

Arun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 302 OF 2011

IN

NOTICE OF MOTION NO. 164 OF 2011

IN

SUIT NO. 36 OF 1969

WITH

CHAMBER SUMMONS NO. 1249 OF 2019

IN

APPEAL NO. 302 OF 2011

IN

NOTICE OF MOTION NO. 164 OF 2011

IN

SUIT NO. 36 OF 1969

WITH

INTERIM APPLICATION (L) NO. 13918 OF 2022

IN

APPEAL NO. 302 OF 2011

IN

NOTICE OF MOTION NO. 164 OF 2011

IN

SUIT NO. 36 OF 1969

WITH

NOTICE OF MOTION NO. 1607 OF 2011

IN

APPEAL NO. 302 OF 2011

IN

NOTICE OF MOTION NO. 164 OF 2011

IN

SUIT NO. 36 OF 1969

WITH

ARUN
RAMCHNDRA
SANKPAL

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NOTICE OF MOTION NO. 260 OF 2014
IN
APPEAL NO. 302 OF 2011
IN
NOTICE OF MOTION NO. 164 OF 2011
IN
SUIT NO. 36 OF 1969
WITH
NOTICE OF MOTION NO. 360 OF 2019
IN
APPEAL NO. 302 OF 2011
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IN
SUIT NO. 36 OF 1969
WITH
CHAMBER SUMMONS NO. 1249 OF 2019
IN
APPEAL NO. 302 OF 2011
IN
NOTICE OF MOTION NO. 164 OF 2011
IN
SUIT NO. 36 OF 1969
WITH
NOTICE OF MOTION NO. 994 OF 2019
IN
CHAMBER SUMMONS NO. 1249 OF 2019
IN
APPEAL NO. 302 OF 2011
IN
NOTICE OF MOTION NO. 164 OF 2011
IN
SUIT NO. 36 OF 1969

WITH
NOTICE OF MOTION NO. 781 OF 2019
IN
CHAMBER SUMMONS NO. 1249 OF 2019
IN
APPEAL NO. 302 OF 2011
IN
NOTICE OF MOTION NO. 164 OF 2011
IN
SUIT NO. 36 OF 1969
WITH
INTERIM APPLICATION NO. 258 OF 2019
IN
CHAMBER SUMMONS NO. 1249 OF 2019
IN
APPEAL NO. 302 OF 2011
IN
NOTICE OF MOTION NO. 164 OF 2011
IN
SUIT NO. 36 OF 1969

THE PROVIDENT INVESTMENT CO LTD,
A Company registered under the Indian
Companies Act, 1913 having Its registered office
at Edward Villa, Cuffe Parade, Colaba,
Mumbai – 400 005.

... APPELLANT

~ VERSUS ~

1. ~~**PREMABAI MATHRADAS**~~
~~**GOCULDAS**~~
2. ~~**PURSHOTTAMDAS MATHRADAS**~~
~~**GOCULDAS**~~

3. ~~LAXMIBAI TULSIDAS~~
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4. ~~MULRAJ DWARKADAS~~
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5. ~~PRATAP DWARKADAS~~
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6. ~~JAISINGH DWARKADAS~~
~~GOCULDAS~~
all of Bombay Indian Inhabitants
residing at 12, French Bridge,
Chowpatty, Bombay 400 007.
7. ~~PUSHPA PRATAPSIKH~~
~~MATHRADAS~~
Of Bombay Indian Inhabitant,
residing at Mathradas Visanji
Bungalow, Mathradas Visanji Road,
Andheri (East), Bombay 58
8. ~~MANJULA MADHAVSIKH~~
~~THAKKAR,~~
Of Bombay Indian Inhabitant,
residing at Jhaveri Building,
Shantaram Narayan Lane,
Bombay 400 006.
9. ~~HEMLATA VIJAYSIKH~~
~~VED(SINCE DECEASED)~~
Of Bombay Indian Inhabitant,
residing at “Shailaja”, Peddar Road,
Bombay 26.
- 9(a) **DEEPAK VED,**
R/a Pashmina, 2nd Floor, Dr
Gopalrao Deshmukh Road, Pedder
Road,
Mumbai 400 026.

10. ~~CHAMPUBAI NAROTTAMDAS-
GOCULDAS~~
11. **HARISINH NAROTTAMDAS
GOCULDAS**
12. **LALIT NAROTTAMDAS
GOCULDAS**
13. **LAXMIKUMAR NAROTTAMDAS
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14. ~~TRIKAMDAS MATHRADAS-
GOCULDAS (SINCE DECEASED)~~
~~Of Bombay Indian Inhabitant residing
at Requia Manzil, Garden Road,
Bombay.~~
- 14(a) **NAINA AJAY GOCULDAS,**
R/a. 9, Rukiya Manzil, 61-A, B Desai
Road, Mumbai 400 026.
- 14(b) **SHYAM AJAY GOCULDAS,**
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15. ~~RANCHODDAS MATHURADAS-
GOCULDAS~~
16. **THE UNION OF INDIA,**
Through Ministry of Law & Justice,
Aaykar Bhavan, Mumbai
17. **THE STATE OF MADHYA
PRADESH,**
Through Chief Secretary,
Mantralaya, Bhopal
18. **DINESH M THACKER**
Zaveri Bungalow,

- Shantaram Lane, Malabar Hill,
Mumbai – 400 006.
19. **VARSHA M THACKER,**
Zaveri Bungalow,
Shantaram Lane, Malabar Hill,
Mumbai – 400 006.
- ... RESPONDENTS

WITH
APPEAL (L) NO. 279 OF 2010
IN
CHAMBER SUMMONS NO. 113 OF 2010
IN
SUIT NO. 36 OF 1969
WITH
NOTICE OF MOTION (L) NO. 1731 OF 2016
IN
APPEAL (L) NO. 279 OF 2010
IN
CHAMBER SUMMONS NO. 113 OF 2010
IN
SUIT NO. 36 OF 1969
WITH
NOTICE OF MOTION NO. 1510 OF 2010
IN
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16. **THE UNION OF INDIA,**
Through the Secretary to the Union of
India, Ministry of Home Affairs,
Parliament Street, New Delhi – 110
001.

17. **THE STATE OF MADHYA**
PRADESH,
Through the Secretary to the State of
Madhya Pradesh, Finance Dept,
Bhopal, Madhya Pradesh.

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Zaveri Bungalow,
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Mumbai – 400 006.

19. **VARSHA M THACKER,**
Zaveri Bungalow,
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WITH
APPEAL (L) NO. 404 OF 2010
IN
CHAMBER SUMMONS NO. 403 OF 2010
IN
SUIT NO. 36 OF 1969
WITH
NOTICE OF MOTION (L) NO. 1743 OF 2016
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APPEAL (L) NO. 404 OF 2010
IN
CHAMBER SUMMONS NO. 403 OF 2010
IN
SUIT NO. 36 OF 1969
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NOTICE OF MOTION NO. 1977 OF 2010
IN
APPEAL (L) NO. 404 OF 2010
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CHAMBER SUMMONS NO. 403 OF 2010
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Sr. Nos. 1 to 6 deleted vide orders
dated 8th January 2010 without
impleading legal heirs.
7. **PUSHPA PRATAPSIKH
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Bombay 400 006.

Deleted by orders dated 8th June
2010 read with and Legal
Representatives brought on record
of Defendants Nos. 4 &
5/Respondents Nos. 18 & 19
payment to order dated 27th
January 2010

9. ~~**HEMLATA VIJAYSINGH
VED(SINCE DECEASED)**~~
~~Of Bombay Indian Inhabitant,
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10. **CHAMPUBAI NAROTTAMDAS
GOCULDAS**

Deleted by orders dated 8th
January 2010 and 4th March 2010

11. **HARISINGH NAROTTAMDAS
GOCULDAS**

12. **LALIT NAROTTAMDAS
GOCULDAS**

13. **LAXMIKUMAR
NAROTTAMDAS GOCULDAS**
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Shantaram Lane, Malabar Hill,
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... RESPONDENTS

APPEARANCES

FOR THE APPELLANT	Mr Pravin Patel , <i>in all three Appeals.</i>
FOR RESPONDENT NO.6- UNION OF INDIA	Mr Yogeshwar Bhate , <i>with AR Varma.</i>
FOR RESPONDENTS NOS. 9A, 13, 14A, 14B	Mr V Dhond , <i>Senior Advocate, with Ankit Lohia, Heena Chheda, Bharat Jain & A Jain, i/b Economic Law Practice.</i>
FOR RESPONDENTS NOS. 18 & 19	Mr Arun Siwach , <i>i/b Cyril Amarchand Mangaldas.</i>

**CORAM : G.S.Patel &
Gauri Godse, JJ.**

DATED : 11th August 2022

ORAL JUDGMENT (Per GS Patel J):-

**CHAMBER SUMMONS NO. 1249 OF 2019 IN APPEAL NO.
302 OF 2011:**

1. The Applicant is one Atul V Borikar. He filed this Chamber Summons seeking that the Appellant, the Provident Investment Company Ltd (“**PICL**”), the original Defendant to the Suit, be directed to implead Borikar as a Respondent to the PICL’s Appeal. The second prayer that Borikar sought in this Chamber Summons was for a stay of the hearing of the Appeal.

2. The Affidavit in Support indicates that Borikar joined the PICL and worked for it for some period of time. There is a bulky Affidavit in Support of the Chamber Summons. We are unable to see how Borikar, an erstwhile manager of the Appellant, has any locus to “intervene” in a civil suit for redemption of a mortgage or an appeal from any interim order in such a suit. Borikar is neither a necessary nor even a proper party. He may or may not be called as a witness at the trial of the Suit.

3. Not only is the Chamber Summons completely misconceived, but Borikar’s conduct today before us needs to be deprecated.

4. The Appeal was before us last week. We passed an order on 4th August 2022 keeping the matter today and saying that there would be no adjournments. All of a sudden, our Court Associate is handed over today a so-called adjournment application on behalf of Borikar. This says:

“the Applicant in person is busy in his personal work wherein the Hon’ble High Court vide the order dated 3rd December 2018 observed in paragraph 7 and under above mentioned Chamber Summons is kept pending and can be looked into when the Appeal is taken up for final hearing.”

5. Therefore Borikar requests us to adjourn the matter for two weeks.

6. Borikar himself is not present in Court. That much is evident. Even his Application says he is “busy in his personal work”. The person present in Court is one Manoj Singh (Mobile No.8422065731; Aadhaar card separately noted), his clerk. To our question as to where Borikar presently is, we are told that he is outside. We are told in fact that Borikar is not engaged in any work but is visiting a relative.

7. We refuse to adjourn the matter like this.

8. The Chamber Summons No.1249 of 2019 is dismissed.

APPEAL NO. 302 OF 2011:

9. The Appeal is directed against an order of 20th April 2011. The Appellant is the 1st Defendant in a mortgage redemption suit that has been pending since 1969. In its Notice of Motion No. 164 of 2011, the 1st Defendant, PICL, an undertaking of the Government of Madhya Pradesh challenged an order of 10th February 2009 passed by the then Master and Assistant Prothonotary, Administration and Public Information Officer, directing reconstruction of the record. The second prayer was for an order that the 1969 mortgage suit was not pending and was disposed of, and the third was to direct the Prothonotary and Senior Master to

furnish a copy of a report of enquiry and the findings as directed by Kathawalla J by his order of 10th February 2010.

10. Paragraph 3 from pages 45 to 50 notes the progress of the suit. To cut a very long story short, matters unravelled sometime on 13th August 2008, almost exactly 14 years ago. On that day, the Plaintiff's Advocate wrote to the Defendants saying that they desired to take search of the papers and proceedings on 14th August 2008 and the Defendants could remain present. The Plaintiffs also filed a search praecipe. The papers were not traceable. On 21st October 2008, the Plaintiff sought an order from the Prothonotary and Senior Master for reconstruction. A clerk of the Record Department inform the Assistant Prothonotary and Senior Master that the papers were not available in the department. Thereafter, a praecipe was submitted on 1st January 2009. Ultimately, on 10th February 2009 after some notices issued on 17th February 2009 to the Defendants, the Master and Assistant Prothonotary passed an order directing the Plaintiffs and Defendants to submit true copies of the record and proceedings in the suit on or before 27th February 2009. Notice of the advanced date of 10th February 2009 was apparently not given to the 1st Defendant which has a grievance about it.

11. To move ahead a little, the specific grievance is that the record was unilaterally constructed by the Plaintiffs and even the Written Statement by the 1st Defendant was not reauthenticated or reverified.

12. The impugned order indicates that before the Trial Court the suit actually progressed after February 2009. Issues were framed and documents were marked. All this was done by December 2009. On the reconstructed record the suit progressed to the stage of cross-examination of PW-2.

13. Then the 1st Defendant filed Chamber Summons No.1999 of 2009 seeking a recasting of issues. An additional issue was permitted and framed on 4th January 2010. At that time the 1st Defendant demanded search of the registers containing orders from 1969 till 2009. The Court rejected the prayer for inspection of the registers and, pending that, for stay of the suit.

14. The 1st Defendant then filed Notice of Motion No. 228 of 2010 which Kathawalla J dismissed on 10th February 2010. In doing so, he commented adversely on the conduct of the 1st Defendant. Among other things, he said that the 1st Defendant was only trying to delay the hearing of the suit. A large part of that order is extracted in the impugned order from page 9 to page 14.

15. The 1st Defendant filed two Appeals. It also filed two Special Leave Petitions against an order of 3rd March 2010 adjourning the hearing of the Appeal. The Appeal Court heard one of the Appeals, Appeal No. 124 of 2010, and disposed of it on 9th April 2010. At this point, what was being sought was an inspection of order sheets and minutes books maintained by the Original Side registry. This was allowed. Then the 1st Defendant filed two Chamber

Summonses seeking an extension of time for inspection. These were allowed.

16. Before the learned Single Judge in the present impugned order, the 1st Defendant was represented by the then learned Advocate General. The contentions were that M/s Udwardia and Udeshi, Advocates & Solicitors, had no authority to represent the Plaintiffs. There was no vakalatnama found in their name authorising them. The suit had been filed through M/s Crawford Bayley. The list of pending suits of 2008, 2010 and 1992 did not indicate that the present suit was pending. Therefore it had to be concluded that the suit had been disposed of though none could say in what manner or by what order. It was then found that some pages of minutes books were torn. A great deal of discussion then followed based on Rules, the requirement for maintaining records, certain circulars and so on. The learned Solicitor General of India was also present before the Court.

17. Ultimately the learned Single Judge was of the view that the question that fell for his consideration was whether the issue of reconstruction was concluded in view of Kathawalla J's order of 10th February 2010 and the Division Bench appellate order of 9th April 2010.

18. In paragraph 18, the learned Single Judge noted that the process of reconstruction had been completed in August 2009 and the suit had in fact progressed further.

19. As to the question of representation, the learned Single Judge noted the rival arguments including the submission made by Senior Counsel for the Plaintiff that the existence or non-existence of a vakalatnama was at best a curable, procedural defect. Even if given later it would undoubtedly relate back to the date of institution of the suit.

20. The rival submissions were considered from paragraph 25 onward at page 79.

21. The Plaintiff's submission was in fact refuted by the learned Single Judge. We note this because in Appeal the 1st Defendant surely cannot be aggrieved by this finding which is in its favour.

22. As to the matter of construction of record, the learned Judge finally concluded that the order dated 10th February 2009 passed by the Master and Assistant Prothonotary need not be set aside but would have to be kept abeyance until such time as the enquiry in respect of the authority of M/s Udwadia and Udeshi to represent the Plaintiff in August 2008 was completed. The learned Single Judge ordered such an enquiry. Again we note this because this also is a finding in favour of the 1st Defendant and it cannot be surely be aggrieved by this portion of it.

23. Then there is a further direction in paragraph 28 to direct the Prothonotary and Senior Master to conduct an enquiry and arrive at a decision. Parties were allowed to make their submissions. Pending this, the learned Single Judge stated the further hearing of the suit

being of the view that the issue goes “to the very root of the matter”. Then in paragraph 29, the learned Single Judge made some general observations regarding the loss of record being undoubtedly a very serious matter. He also observed that reconstruction was governed by circular of 9th August 1995. A reconstruction should ordinarily be by consensus. If there is no consensus an enquiry should be ordered. This was precisely what was done.

24. As regards the enquiry into the vakalatnama, our attention is drawn to an order of 7th June 2011 in the present Appeal. In paragraph 3, on behalf of the Appellant a statement was made that if it failed in the Appeal, it would not insist on an enquiry as ordered by the learned Single Judge of the impugned award (i.e. the order dated 20th April 2011) in relation to the vakalatnama of M/s Udwadia and Udeshi authorising them to appear for the Plaintiff. In view of this the Prothonotary and Senior Master was directed not to proceed with the enquiry until the next date.

25. As regards the question of the records itself there was a CBI enquiry. This ended with a closure report dated 19th December 2016. The CBI report notes that some papers were indeed destroyed and in fact had been cut with knife or a sharp instrument. But the findings were inconclusive and individuals could not identified. They remained at the level of person or persons unknown.

26. For our purposes, the Appeal presents several difficulties. The first is that it is impossible to understand what it is in the impugned order that actually aggrieves the 1st Defendant, PICL.

The only objective seems to have been to further delay the suit and nothing further. The learned Single Judge ordered the enquiry. That was done. The enquiry about the vakalatnama has been separately dealt with by an earlier order as noted above.

27. The question of whether the Plaintiffs were properly represented by M/s Udwadia & Udeshi is now closed in view of the appellate order we have referred to above. But it does seem to us that this entire question was really a non-issue. A litigant may complain that some advocate is unauthorisedly seeking to represent him. We do not see how one litigant can complain about the *other side's* representation by a particular advocate. Here, the Plaintiffs were not complaining about M/s Udwadia & Udeshi. PICL simply had no locus to question that firm's representation of the Plaintiffs. The Plaintiffs were correct in saying this was a curable defect; the proper vakalatnama with an appropriate no objection could have been entered at any time. Even a late entry would not nullify anything that went before, and the fresh vakalatnama would date back — it had to — to the institution of the suit. But, in any case, the issue is moot.

28. As to the alleged destruction of records, it is true that an investigation was needed. But the fact of destruction could hardly result in a stay of the suit or a stoppage of the proceedings. Reconstruction is regularly ordered for one reason or the other. If there is an issue about the process of reconstruction, this can always be addressed at any time.

29. The third aspect is about the ‘non-pendency’ of the suit. Merely showing that some records did not show it as pending is not enough to establish that the suit received a disposal.

30. In all this, we fail to see how the objective of justice delivery was subserved by these directions. There is also the undeniable fact that Kathawalla J found in clear terms that the 1st Defendant was doing everything in its power to delay the suit. If the 1st Defendant, PICL, contends that there was no valid mortgage to redeem, then that is surely a matter of trial. It is not disposed of by trying to show that the suit was ‘not pending’ or that there was ‘destruction of records’ or that a particular firm’s vakalatnama could not be found.

31. In any case, we quite fail to see what possible grievance the 1st Defendant has against the impugned order or why the stay on the proceedings in the 1969 suit should continue. If on the reconstructed records, the 1st Defendant has any grievance regarding the authenticity or correctness of the copy of its Written Statement that has been placed in the reconstructed records, it is always open to the 1st Defendant to point out that the affirmed Written Statement, a copy of which is on record, differs in some material fashion from the one that is in the reconstructed records. In any case, for completeness of the record we direct the 1st Defendant to file a copy of the Written Statement reauthenticated or reaffirmed and in accordance with its own records before the Trial Court so that the suit can proceed and so that there is no further delay.

32. If there is one thing that emerges from this entire rather sordid saga, it is that there is now an undeniable and desperate need for an end-to-end computerisation, scanning and digitization of records, registers, etc so that such instances do not recur. It is unreasonable to accept physical records to be maintained and retained in undamaged and pristine condition for decades and even centuries. We have no proper methods of warehousing and storing these documents in a temperature and humidity controlled environment, safe from flood, fire, pestilence and worse. The only solution appears to us to be to maintain a complete and accurate digital record that can be used to reconstruct record when necessary, with or without the consent of all concerned. This is in fact now the need of the hour and we will suggest to the Registrar General and his officers that urgent steps be taken in this regard with a priority to be given to the oldest pending litigations in this Court. These will need to be first identified, their papers segregated, assembled and then properly scanned and digitized. To avoid any controversy, soft copies must be made available on request to the Advocates of either side free of cost.

33. We see no reason to interfere the impugned order. The Appeal is without merit. It is dismissed. In the facts and circumstances of the case there will be no order as to costs.

34. We clarify that there is no reason now to continue the stay on the suit.

35. As far as the trial is concerned, all contentions are expressly kept open for decision on merits.

36. The suit will be decided uninfluenced by any observations in the impugned order or in this order.

37. All pending Interim Applications are accordingly infructuous and are disposed of as such.

APPEAL (L) NO. 279 OF 2010:

38. The Appeal is against an order of 27th January 2010 condoning a delay in filing a chamber summons to set aside the abatement and allowing Applicants to be joined as party Defendants to the suit. Those Applicants were joined as Defendants Nos. 4 and 5. They were the legal heirs of the 8th Plaintiff.

39. There is absolutely no reason to interfere with this order. The Appeal is without merit and it is dismissed.

40. All pending Interim Applications are accordingly infructuous and are disposed of as such.

APPEAL (L) NO. 404 OF 2010:

41. The Appeal is against an order of 26th April 2010. That was on a chamber summons for seeking a declaration that entire suit abated and in the meantime staying cross-examination of PW-2. By

the impugned order, the learned Single Judge after a detailed consideration dismissed the chamber summons.

42. In view of our judgment and order in Appeal No. 302 of 2011, there is no question of entertaining this Appeal. The entire basis of the ground for abatement is without substance.

43. There is absolutely no merit in the Appeal. It is dismissed. There will be no order as to costs.

44. All pending Interim Applications are accordingly infructuous and are disposed of as such.

45. No costs.

(Gauri Godse, J)

(G. S. Patel, J)