

MANU/MH/1012/2014

IN THE HIGH COURT OF BOMBAY

Chamber Summons Nos. 524 and 525 of 2013 in Execution Application (L) No. 370 of 2012 in Suit No. 2471 of 1984

Decided On: 16.07.2014

Appellants: **Nipun Thakkar**
Vs.

Respondent: **Ramesh Nanalal Shah**

Hon'ble Judges/Coram:

R.D. Dhanuka, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Birendra Saraf, Dushyant Purekar, Vishal Thakker, Vinod Thaker, and Anjali Trivedi

For Respondents/Defendant: Drupad Patil, Kalpesh Mehta, Pravin Mehta, Mithi, S.C. Naidu, Sanjay Jain and Hemang Raythatta, i/b. RMG Law Associates

JUDGMENT

R.D. Dhanuka, J.

1. By this chamber summons applicant seeks permission for impleadment as a party and seeks deletion of defendant nos. 2(a) to 2(c), 3(a) to 3(e) and 7 and seeks permission to carry out amendment to the execution application, Judges Order No. 58 of 2012, Judges Order No. 59 of 2012 as per schedule annexed to the chamber summons.

2. Application for amendment is filed on the basis of the deed of assignment in favour of the applicant entered into between defendant nos. 2(a) to 2(c) vide deed of assignment, dated 5th July, 2012, between defendant no. 7 and applicant vide deed of assignment dated 5th July, 2012, by defendant nos. 3(a) to 3(e) vide deed of assignment dated 16th July, 2012 and by defendant no. 10 vide deed of assignment dated 21st March, 2014. All these assignors under the said four deeds of assignment are parties to the suit or are brought on record in view of the demise of the original defendants.

3. In response to this chamber summons, learned counsel appearing for all these assignors have made a statement that in view of the deed of assignment executed by them in favour of the applicant, none of the assignors claim any right, title or interest in the property and they abide by the deed of assignment entered into between the parties. Statement is accepted.

4. Chamber summons is however opposed by defendant no. 5 and the plaintiff on various grounds.

5. Mr. Naidu, learned counsel appearing on behalf of defendant no. 5 invited my attention to various provisions of the consent terms and would submit that it is provided under the consent terms that share of the property in favour of each of the party to the consent terms if sold at any stage, there is right of pre-emption under

the consent terms granted to the other party for purchase of their share in the suit property. It is submitted that since the assignors did not offer their share to the defendant no. 5, no such deed of assignment at all could have entered into between the assignors in favour of the applicant. Learned counsel submits that the assignors accordingly cannot be deleted from the execution application or other proceedings.

6. The next submission of the learned counsel is that by an order passed by this court on 8th May, 2013, the applicant was appointed as a contractor for construction of a compound wall and no other right has been created in favour of the applicant. It is submitted that though some of the deed of assignments are prior in point of time when the said order dated 8th May, 2013 came to be passed appointing the applicant as a contractor, no such alleged rights under the deed of assignment were brought to the notice of the court. It is submitted that the deed of assignment itself is thus illegal.

7. Learned counsel appearing for the plaintiff submits that though in the affidavit in support of the chamber summons there is an averment that the defendant nos. 2A to 2C are the only legal heirs of the original defendant no. 2 and though the said deceased died also leaving behind him his daughter Mrs. Smita Mukesh Modi, the said party is not impleaded as a party to the alleged deed of assignment or to this proceedings. It is submitted that since there is incorrect statement made in affidavit in support of the chamber summons, defendant nos. 2A to 2C shall be directed to deal with such statement by filing affidavit. It is submitted that since the assignment itself is executed without impleading the daughter of the said deceased i.e. the original defendant no. 2, no effect to such deed of assignment can be given by this court even while hearing this application for impleadment of the alleged assignment.

8. The next submission of the learned counsel is that under Order 21 Rule 16 of the Code of Civil Procedure, 1908 even if there is any assignment of a decree, such assignee has to file a separate application for execution of the decree and cannot seek impleadment in the execution application already filed by the assignor.

9. In so far as objection of the learned counsel appearing for the defendant no. 5 is concerned that there was a right of pre-emption provided under the consent terms and deed of assignment alleged to have been executed without offering the property to defendant no. 5 is illegal is concerned, in my view the legality and validity of the deed of assignment cannot be gone into this proceedings and the said issue is kept open. The assignor who are parties to the deed of assignment have made statement before this court that they have assigned their right, title and interest in the decree in favour of the assignee and have no objection if their names are deleted from the cause title of the execution application and the other proceedings. In my view there is thus no merit in this submission of the learned counsel appearing for the defendant no. 5. Defendant no. 5 if so desires may exercise the remedies available in law to challenge the deed of assignment. If such deed of assignment is set aside by the court, consequence will follow.

10. In so far as second submission of the learned counsel that the applicant did not disclose their alleged rights under the deed of assignment when the order passed by this court on 8th May, 2013 appointing the applicant as contractor is concerned, it is the case of the applicant that all the parties were aware of the deed of assignment. In my view even this issue if defendant no. 5 wants to raise while challenging the deed of assignment, he is at liberty to do so.

11. In so far as submission of the learned counsel appearing for the plaintiff that there is no denial and/or confirmation in the averments made in affidavit in support of the chamber summons that the original defendant no. 2 died leaving behind him his daughter viz. Ms. Smita Modi also and she is also one of the legal heir of the said deceased is concerned, since no affidavit in reply is filed by defendant nos. 2 A to 2C, averments made in the affidavit in support of the chamber summons are deemed to have been accepted.

12. In so far as submission of the learned counsel that the applicant who claims to be an assignee has to file a separate execution application and cannot seek impleadment in the execution application filed by the assignor is concerned, a perusal of the Order 21 Rule 16 in my view indicates that the said provision is applicable when there is no existing application made by the assignor for execution and a fresh application has to be made for the first time by the assignee. Since one of the assignor has already made an application for execution of the decree and during the pendency of such execution application if such assignor has assigned his rights in favour of the assignee, in my view the assignee is entitled to seek impleadment in the pending execution application and is not required to file any fresh execution application. All the right, title and interest of the assignor stands assigned in favour of the assignee including the right to prosecute the pending proceedings.

13. Chamber summons is accordingly made absolute in terms of prayer (a). Amendment to be carried out within two weeks from today. Amended copy of the proceedings shall be served upon the defendants within one week from the date of carrying out amendment. No order as to costs.

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