

(2002) 01 BOM CK 0097

In the Bombay High Court

Case No : Chamber Summons No. 1533 of 2001 in Suit No. 1065 of 1981

Jagdish Ramdhan Singh

APPELLANT

Vs

Keki Rattansha Kalapesi and Others

RESPONDENT

Date of Decision : 22-01-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 1

Citation : (2002) 3 ALLMR 122 : (2002) 3 BomCR 579

Hon'ble Judges : Pratibha Upasani, J

Bench : Single Bench

Advocate : P. Gunwani, instructed by B. Amin and Co, for the Appellant; Zubin Kamdin, instructed by Bilawala and Co. for Defendant No. 2, H.N. Vakil, instructed by Mulla and Mulla and Craigie Blunt and Caroe, for the Respondent

Judgement

Dr. Pratibha Upasani, J.—This chamber summons is taken out by the plaintiff praying that he be permitted to carry out amendment to the plaint pursuant to the consent order dated 11th March, 1982 passed by the Prothonotary and Senior Master, High Court, Bombay, in this suit, and that, this Court be pleased to condone the delay of 19 years in carrying out the said amendment.

2. The prayers made in the chamber summons and the facts which led to these prayers are not only peculiar, but are shocking.

Briefly stated, the plaintiff Jagdish Ramdhan Singh filed a suit against defendant No. 1 Keki Rattansha Kalapesi, since deceased in the year 1981 for specific performance of sale of the Immovable property described in para 1 of the plaint. Admittedly, original defendant No. 1 Keki Rattansha Kalapesi was the owner of a plot of land bearing Survey Nos. 37 and 42, admeasuring about 2,79,994 square yards equivalent to 2,34,102.97 square meters or thereabout situated at village Charkop in Borivli, Taluka Bombay. The plaintiff's case is that there was agreement for sale dated 28th January, 1997 made between the plaintiff and the original defendant No. 1 to see this property to the plaintiff for a price of Rs. 9,00,000/- on the terms and conditions mentioned in the said agreement. Copy

of the said agreement is annexed as Exhibit B to the plaint. Thereafter, as per the plaintiff's case, there was a renewal of the agreement on 29th May, 1980, and the original agreement dated 28th July, 1997 was renewed on the same terms and conditions. Plaintiff, at the request to defendant No. 1 paid to him a total sum of about Rs. 1,50,000/- and the balance sum of Rs. 7,50,000/- remained payable by the plaintiff to defendant No. 1. Thereafter, plaintiff learnt that the original defendant was unwell and was admitted in Parsi General Hospital. He also learnt from daughter of the original defendant No. 1, one Mrs. Perviz F. Dotivala that about a month earlier, defendant No. 1 had executed an agreement for sale in favour of defendant No. 2 namely one Resham Singh Pyars Singh with respect to the same piece of land. Plaintiff gave a notice to defendant no. 2's Advocate, stating that the agreement between plaintiff and defendant No. 1 was prior in point of time and that, defendant No. 2 was not entitled to purchase and defendant No. 1 was not entitled to sell the said land to anybody else, except the plaintiff. Thereafter, the present suit came to be filed by the plaintiff against both the defendants, praying for declaration that the agreement entered into between the plaintiff and defendant No. 2 was valid, subsisting and binding on defendant No. 1, further calling upon defendant No. 1 to specifically perform the said agreement. Though defendant No. 2 was made a party to this suit, no relief whatsoever was claimed against defendant No. 2.

3. Thereafter, it appears that defendant No. 1 Keki Rattansha Kalapesi who had entered into agreement for sale with the plaintiff, expired on 3rd December, 1981. The plaintiff therefore was required to bring the legal heirs and representatives on record in place of original defendant No. 1. On 11th March, 1982, consent order was passed to bring on record the legal heirs and representatives of defendant No. 1 within two weeks by the Prothonotary and Senior Master, Bombay. However, the plaintiff did not carry out this amendment at all, though period of more than 19 years have passed. Thereafter, on 7th December, 2001, the present chamber summons is taken out by the plaintiff praying that the delay of 19 years in carrying out the amendment be condoned and the amendment of the plaint be permitted.

4. The reliefs in the chamber summons are vehemently opposed by defendant No. 2 as well as respondents. The affidavit is filed by respondent No. 1(c) Mrs. Perviz F. Dotivala.

5. I have heard all the Advocates at length. I have also gone through the averments made in the affidavit-in-support of the chamber summons, so also, the replies and the rejoinder filed by the parties and in my opinion, the chamber summons has to be dismissed for reasons given below:---

Admittedly, original defendant No. 1 expired on 3rd December, 1981. Thereafter, it appears from the proceedings that consent order was obtained by the parties for bringing the heirs of original defendant No. 1 on record on 11th March, 1982. As per the order, the amendment was to be carried out within a period of two weeks. However, this was simply not done for a period of 19 years. Suddenly, the

plaintiff woke up after long deep slumber of 19 years and took out the present chamber summons. Since the legal representatives of defendant No. 1 were not brought on record, the suit automatically abated in view of Order XXII of the Code of Civil Procedure, 1908. Once the suit abated, there has to be a specific order of the Court setting-aside the said abatement. Such an order is not there. Even in the present chamber summons, there is no prayer seeking setting-aside of the abatement. Simpliciter there is a prayer for condonation of delay of 19 years to bring the heirs on record. This is not permissible.

6. Moreover, the lethargy, inaction and negligence on the part of the plaintiff is so great that even though copy of the written statement filed by defendant No. 2 dated 17th December, 1987 was served upon the plaintiff referring to defendant No. 1 as, "original defendant No. 1", plaintiff did not realise as to why defendant No. 1 was being so referred. There were also parallel proceedings between the parties which were going on before the revenue authorities and plaintiff very well knew that defendant No. 1 had expired, but he did nothing to bring the heirs and legal representatives of defendant No. 1 on record.

7. Roznama also reveals that the matter appeared on Board on various occasions before Mr. J.A. Patil, J. and Mr. D.B. Bhosale, J. It was also kept for dismissal, but nothing happened. Neither any application for setting-aside the abatement was made, nor any application for bringing the legal representatives on record was made, and no explanation whatsoever has been given by the plaintiff for this serious lapse. In para 8 of the rejoinder, some attempt is made to give explanation, but that is a dishonest explanation. Vague averments are made in this para that the wife of his previous Advocate (Mr. Nanavati), who was also an Advocate, was ill, and ultimately expired, and thereafter, he was informed by his previous Advocate (Mr. Nanavati) that he had reduced his practice and was not able to continue his appearance on plaintiff's behalf in this suit. Actually, in the averments made in the said para, name of Mr. Nanavati is not mentioned, but the records mention that it was Mr. Nanavati who was appearing for the plaintiff and who was on record, when the consent order was passed, after the demise of defendant No. 1. Dishonesty lies in this that it is informed across the bar that Advocate Mrs. Nanavati expired only in 2001, but capital is made out of this fact, probably to invoke sympathy from the Court. The fact remains that there is no explanation as to why the amendment remained to be carried out though there was a consent order dated 11th March, 1982 to bring the legal representative of defendant No. 1 on record. The suit naturally has abated as against defendant No. 1, whose heirs were not brought on record, within the prescribed time limit. As already observed, the suit has automatically abated and there is no order setting-aside the said abatement. Even in today's chamber summons, there is no prayer for setting aside the abatement. Hence, the following order:

Chamber summons dismissed. No order as to costs.

Suit against defendant No. 1 abates.

Suit as against defendant No. 2 kept for directions on 4th February, 2002.