

(2017) 05 BOM CK 0138

In the Bombay High Court

Case No : 2484 of 2016 IN SUIT NO 69 of 2016

JV GOKAL CHARITY TRUST, & ORS.

APPELLANT

Vs

CONTREX PVT LTD, & ORS.

RESPONDENT

Date of Decision : 03-05-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 40 Rule 1](#) -
[Companies Act, 1956](#), [Section 397](#), [Section 398](#) - Application to [ju20\[Tribunal\]](#) for reli

Citation : (2017) 05 BOM CK 0138

Hon'ble Judges : G.S.Patel

Bench : SINGLE BENCH

Advocate : RM KADAM, Aditya Mehta, Kalpesh Doshi, ASPI CHINOY, Aurup Dasgupta, Jhangiani Narula, ZT ANDHYARUJINA, Shruti Sardessai, FE DEVITRE, Cherag Bulsara, Dastur Dadhich, SHYAM KAPADIA

Judgement

A. INTRODUCTION

1. On 19th September 2016, I pronounced judgment on two preliminary issues taken in this Motion - limitation and jurisdiction - and held for the Plaintiffs on both. Defendant No.2 appealed (now numbered as Appeal No. 106 of 2017). Admitting the appeal on 20th October 2016, the Division Bench said:

We make it clear that admission of the appeal will not come in the way of the appellants in the notice of motion pending before Trial Court. In case the order of the learned Single Judge is against the interest of the appellants on the notice of motion to be heard, the said order will be stayed for four weeks so that the appellants can challenge the same and this appeal regarding maintainability and the other appeal to be filed in the above circumstances could be heard together.

Accordingly, I then took up the main Notice of Motion for final hearing.

B. SUMMARY

2. The dispute is about the ownership of and title to 100 shares of the 1st Defendant held by one Ramanlal Gokal, who died on 22nd March 2007. The 2nd and 3rd Defendants are each the second-named holders on two blocks of 50 shares; Ramanlal Gokal's name is first in all the shares. In his Will dated 25th January 2005 and Codicil dated 28th June 2006, Ramanlal made no specific bequest of these shares. The Will contains a residuary clause in favour of Plaintiffs Nos.1 and 2, both registered charitable trusts.

3. The Plaintiffs say the two trusts are the legatees of all 100 shares under the residuary clause. Defendants Nos. 2 and 3 contend that as joint holders of the shares (each a joint holder on 50 shares), the ownership of the shares passes by survivorship. All joint holders hold equally, and all survivors take equally down to the last survivor. Once added as a joint holder to the shares, Defendants Nos. 2 and 3 cannot be ousted from such joint holding - not, at any rate, by a testamentary instrument, and a non-specific residuary legacy at that. It is not correct, these Defendants argue, that being joined as a holder only gives the company a quittance. Mr Kadam for the Plaintiffs and Mr DeVitre for the supporting Defendants say that since in India there is no rule of advancement - which in any case must be proved - the addition of a second name to a shareholding confers no right of coownership. A second-named holder who has paid proven consideration might acquire a divided, partible estate in proportion to the consideration paid; but one who pays nothing and merely has his name added acquires no rights at all of co-ownership, joint ownership or "joint tenancy". Mr Chinoy's case is that if there is a second name, this is joint ownership and therefore the concepts of joint tenancy and survivorship would operate: Defendants Nos. 2 and 3 would succeed to the shares on Ramanlal Gokal's death. This is not, he says, a case of "no consideration" as the Plaintiffs would have it; consideration can be other than money, and in this case, the consideration was the bringing into existence of a Family Arrangement to equalize holdings in the 1st Defendant between different branches of the Gokal family. This, in any case, is a matter that requires evidence. At a prima facie stage, Mr Chinoy says, if the allegation is that the second-named holders paid no consideration, then the question arises of the first-named holder's intentions in order to determine if, on his death, there was or was not advancement.

4. My sole purpose at this interim stage is to find how best to preserve the parties in status quo, that is to say to find a way to balance the competing equities and rights pending the final disposal of the suit. The usual matrix of determinants must be the guide: a prima facie case, balance of convenience and establishing irreparable injury. It seems to me, on a careful consideration of the rival arguments, that the relief the Plaintiffs seek are immodest. Buried in them are results that would effectively decree this suit at the interlocutory stage, without evidence being taken particularly on whether or not there was a Family Arrangement and Settlement. At least one defence canvassed by Mr Chinoy seems to me to require evidence - why these shares were transferred at all, and why they were transferred in the manner and circumstances they were, with

specific no objections from family members who today support the Plaintiffs. In a given case, a suit may indeed be decreed early in its life-cycle, and there is no law that says a defendant may not meet his nemesis sooner rather than later. But for that to happen I must be convinced that one or more of the three factors that guide interlocutory reliefs are so utterly weighted against the contesting Defendants that without interim relief there would be irreparable loss to the Plaintiffs. If Mr Kadam for the Plaintiffs and Mr DeVitre for the supporting Defendants are to succeed in the Motion, they must show an overwhelming case that the law or the facts, or both, demand the grant of relief. An equally important factor is the impact on the contesting Defendants, and where it is shown that the grant of interim relief will result in those Defendants being unseated in parallel litigations in this court and elsewhere, then this, too, must receive consideration. The task is to fashion an order that balances the competing equities. With this approach and these concerns, I have found for the contesting Defendants Nos. 2 and 3 and have dismissed the Motion. C. FACTS

5. Plaintiffs Nos. 1 and 2 (the "Gokal Trust" and the "SK Foundation" respectively; together, "the two Plaintiff Trusts") are both public charitable trusts registered under the Maharashtra Public Trusts Act. The Gokal Trust was set up in 1967 and the SK Foundation in 1982. The original 3rd Plaintiff, Hasmukhlal Parikh, died pending suit. He was a trustee of both Trusts. The Plaintiffs amended the plaint pursuant to my order of 23rd September 2016: the original Defendant No.11 was transposed as Plaintiff No.3; he too is a trustee of both trusts; and one Rajan Mehta, a new trustee of both trusts, was added or substituted as Defendant No. 11. The other Trustees are Defendants Nos. 6 to 10.

6. The 1st Defendant ("Contrex") was incorporated on 15th October 1963 as a private limited company. Defendants Nos. 6 to 9 are its directors. The dispute is about the ownership of and title to 100 shares of Contrex held by one Ramanlal Gokal ("Ramanlal"), who died on 22nd March 2007.

7. Ramanlal had four brothers: Arun, since deceased; Defendant No. 6 ("Ravindra"), Defendant No.8 ("Ashok") and Defendant No.9 ("Kishore"), all sons of one Jagjivan Gokal. Defendant No. 7 and Plaintiff No.3 ("Nakul" and "Nayan") are Arun Gokal's sons. Defendants Nos. 2 and 3 ("Mukesh" and "Bharat" respectively) are Ramanlal's sons.

8. On 26th June 2006, Ashok Gokal and his wife Sudha transferred 50 shares from their holding in Contrex to Ramanlal and Mukesh. Ramanlal's name was first; Mukesh's second. On the same day, Kishore Gokal and his wife Panna transferred another 50 shares from their holding to Ramanlal and Bharat, again so that Ramanlal's was the first name and Bharat's second. Ramanlal paid the entire consideration (Rs.5,000 per transaction).

9. On 16th August 2006, Kishore wrote to Ramanlal and Mukesh saying he had no objection to Nayan (Plaintiff No.3) and Nakul (Defendant No.7) transferring 50 shares from the lot they held in Contrex to Ramanlal's and Mukesh's names.

Notice of Motion paper book, p. 53. Ashok wrote an identical letter. Notice of Motion paper book, p. 54. Kishore and Ashok also wrote identical letters to Ramanlal and Bharat regarding 50 shares being transferred to their names from the holding of Ravindra (Defendant No.6). Notice of Motion paper book, p. 55, 56. These transfers do not seem to have actually been effected; had they been, the stock in Ramanlal's names (jointly with Mukesh and Bharat) would have been 200 shares; 100 in the joint names of Ramanlal and Mukesh, and another 100 in the names of Ramanlal and Bharat. The transfers under these letters are the subject matter of a specific performance suit filed by Mukesh and Bharat.

10. The Plaintiffs say Ramanlal himself paid in March 2007 for the shares he took from Ashok and Kishore with funds from a bank account he held with the deceased 3rd Plaintiff, Ashok, Kishore, and Shishir Diwanji. Mukesh denies this,⁴ but there is nothing to show he or Bharat contributed cash.

11. Ramanlal died on 22nd March 2007. He left a Will dated 25th January 2005 Plaintiff, Ex. "H", pp. 118-143. and a Codicil dated 28th June 2006. Plaintiff, Ex. "I", pp. 144-152. He appointed Defendant Nos. Notice of Motion paper book, p. 32, paragraph 9(e). ("Hemraj Asher"), Defendant No. 5 ("Prashant Asher"; together, "the Ashers"), Ashok (Defendant No.8) and Kishore (Defendant No.9) as his Executors. Ashok sought probate in Testamentary Petition No. 733 of 2007. Mukesh and Bharat consented; they filed consent Affidavits dated 7th September 2007 and 6th September 2007 respectively. Plaintiff, Ex. "J", pp. 153-154, and Ex. "K", pp. 155-156. Probate was granted on 13th December 2007. This included a Schedule of Ramanlal's assets that was annexed to the probate petition. Plaintiff, part of Ex. "I", pp. 147-152. The 100 shares in question were listed at item 26 in this Schedule.

12. Ramanlal made no specific bequest of these 100 Contrex shares in either his Will or his Codicil, though the Codicil is dated just a few days after the transfer of the 100 Contrex shares from Ashok and Kishore to Ramanlal. The Will contains a residuary clause 16 in favour of the two Plaintiff Trusts:

"16. I direct that all of my property of whatsoever kind and wheresoever situate and not disposed of by this my Will or any Codicil thereto otherwise not effectively (including those which cannot take effect because the legatee to whom any property is bequeathed under this Will predeceasing me except as otherwise provided herein) disposed of (hereinafter called "my residuary estate") shall be distributed equally between the J.V. Gokal Charity Trust and Shree Krishna Foundation, which are the two charitable Trusts created as per my direction, absolutely for their respective use and benefit."

13. The immediately next Clause 17 contains a widely worded prohibition against challenging any part of the Will or its dispositions. Any legatee who does so forfeits his bequest. This also extends to anyone who intermeddles with administration or management of the estate. Plaintiff, Ex. "H", pp. 118-141, at p. 139.

14. On 7th May 2008, Ashok and Kishore prepared accounts for Ramanlal for the period 1st April 2006 to 22nd March 2007 (for the last year of his life). The schedule to the Balance Sheet shows these shares as belonging to Ramanlal.

15. On 12th March 2010, the executors of Ramanlal's estate filed in Court an estate administration report dated 8th March 2010 made by Ashok (Defendant No.8). Part of this report included accounts for the estate for the years ending 31st March 2008 and 31st March 2009. Notice of Motion paper book, Defendant No. 6 Affidavit in Reply, Report by Ashok Gokal, Defendant No. 8, pp. 71-98. The report also mentions the 100 Contrex shares.

16. Ashok (Defendant No.8) obtained two orders dated 4th August 2011 and 6th August 2011 from the Additional Prothonotary & Senior Master allowing an amendment to the schedule of assets to the probate to Ramanlal's Will and Codicil. This related to an immovable property at Reay Road. Ashok obtained the orders allowing the amendment to the schedule of assets in relation to this property without the consent of the heirs. Mukesh and Bharat filed Miscellaneous Petition No. 54 of 2012 to recall the orders of the Additional Prothonotary & Senior Master. The Miscellaneous Petition was allowed on 11th October 2013. Ashok filed Appeal (L) No. 410 of 2013. This was dismissed on 23rd October 2013. Separately, Mukesh and Bharat filed Miscellaneous Petition No. 66 of 2013 for removal of Ashok and Kishore (Defendant No.9) as executors. RD Dhanuka J made the Miscellaneous Petition absolute on 11th October 2013. Ashok and Kishore both appealed (Appeal (L) No. 412 of 2013 and Appeal (L) No. 413 of 2013). On 23rd October 2013, the Division Bench in appeal noted the statements by Ashok and Kishore that they did not wish to continue as executors. Both relinquished their appointments. The appeals were disposed of in those terms. Thus, only the two Ashers continued as executors and they are today the only two executors of Ramanlal's estate.

17. Ashok's estate administration report of 8th March 2010 says, in the context of Clause 16 of the Will, that the "residue of the property is being ascertained pending determination of claims made by the claimant." This is a reference to Mukesh and Bharat.

18. On 21st August 2013, M/s Jhangiani, Narula & Associates acting for Mukesh and Bharat wrote to Contrex and its directors (Ravindra, Nakul, Ashok and Kishore; Defendants Nos. 6 to 9) and demanded that they remove Ramanlal's name as the first name on these 100 Contrex shares and to record those shares as being held only by Mukesh and Bharat (50 shares each). Plaint, Ex. "Q", pp. 254-259. On 7th August 2014, Hemraj Asher, for himself and on behalf of his fellow executor, Prashant Asher, wrote to the Gokal Trust forwarding a copy of the Audited Accounts of the estate for the year ending 31st March 2014. The notes to these accounts, in relation to the 100 Contrex shares, say that following the probate issued, the executors attempted to get the share certificates; these were not, however, made available. Plaint, Ex. "V", pp. 279-298 at p. 286.

19. On 9th October 2013, the lawyers for Ravindra and Nakul (Defendants Nos. 6 and 7) wrote to the lawyers for Mukesh and Bharat saying that their (Mukesh's and Bharat's) names were added for convenience, neither of them having contributed to the purchase of these shares. In any event, they were asked to submit an application with supporting documentation for consideration by Contrex's Board. *Plaint, Ex. "R"*, p. 260. On 29th October 2013, the two Plaintiff trusts wrote to Contrex demanding a transmission of the 100 Contrex shares to those trusts. The Ashers were called on to ensure this. *Plaint, Ex. "S"*, p. 272; *Ex. "T"*, p. 274. On 11th December 2103, the two Plaintiff trusts wrote to Contrex and the Ashers repeating their demand for an immediate transmission to the names of the two Plaintiff trusts of the 100 Contrex shares. *Plaint, Ex. "U"*, p. 276.

20. On 7th August 2014, Hemraj Asher sent the two Plaintiff trusts copies of the audited accounts of Ramanlal's estate. These account show the 100 Contrex shares as part of Ramanlal's investments. They are shown in the estate's Balance Sheet. These accounts do not refer to Mukesh and Bharat at all. They do note that without the physical share certificates, the auditors could not proceed. *Plaint, Ex. "V"*, p. 279, at p. 286.

21. On 13th March 2015, Mukesh and Bharat filed Company Petition No. 20 of 2015 before the Company Law Board (now National Company Law Tribunal) seeking reliefs under Sections 397 and 398 of the Companies Act, 1956 inter alia alleging oppression and mismanagement of Contrex.

22. The Plaintiffs brought suit on 11th April 2015. They seek a declaration that the two lots of 50 Contrex shares vest, respectively, in the Gokal Trust and the SK Foundation; for orders directing Contrex and the Ashers to delete the names of Ramanlal on all 100 shares and also the names of Mukesh and Bharat on the two lots of 50 shares, and to insert the names of the Gokal Trust and the SK Foundation instead; and for consequential directions for rectification of Contrex's register of members. In the alternative, the Plaintiffs seek declarations that the two lots of 50 Contrex shares vest in, respectively, the Gokal Trust and the SK Foundation, and then there follow prayers for transmission of those shares to the two Plaintiff Trusts, rectification of the register and so on.

23. The Motion seeks these interim reliefs:

(a) For a restraint against Contrex, Ravindra, Nakul, Ashok Gokal and Kishore from transmitting the 100 Contrex shares to Mukesh or Bharat, or both;

(b) For a restraint against Mukesh and Bharat from exercising any membership rights, including voting rights, over these 100 Contrex shares, and from selling, alienating, encumbering or creating any third party rights over them;

(c) For the appointment of a Court Receiver of the 100 Contrex shares under Order XL Rule 1 of the Code of Civil Procedure, 1908;

(d) For a direction to Mukesh and Bharat to deposit the certificates in respect of

these 100 shares with the Court Receiver and for a direction to the Court Receiver to exercise all rights in respect of these shares (including voting rights) in accordance with the directions of the trustees of the two Plaintiff trusts.

24. In response, Mukesh filed four affidavits dated 16th April 2015 Notice of Motion, 2nd Defendant Affidavit in Reply, pp. 12-22., 23rd April 2015 Notice of Motion, 2nd Defendant Additional Affidavit, pp. 23-56., 20th July 2015 Notice of Motion, 2nd Defendant second Additional Affidavit, pp. 112-114. and 24th November 2016. Notice of Motion, 2nd Defendant third Additional Affidavit, pp. 134-135. I am not, in this judgment, concerned with the pleas of limitation, maintainability and jurisdiction taken in these affidavits: Notice of Motion, 2nd Defendant's Affidavit in Reply, paragraph 4, pp. 13- 14; Additional Affidavit, paragraph 3, p. 24; second Additional Affidavit, paragraph 3, p. 113. I decided those issues, as I said at the beginning, in my judgment of 19th September 2016. I am to consider now the defence on merits.

25. Mukesh then says the Contrex shares never formed part of Ramanlal's estate. He says the suit is a collusive action between the two Plaintiff trusts, their trustees and Ravindra, Nakul, Ashok, Kishore and Nayan (now Plaintiff No.3). The attempt, Mukesh says, is to wrest control of Contrex. Mukesh and Bharat have already filed an oppression and mismanagement petition before the Company Law Board (now the National Company Law Tribunal), the one I referred to earlier. This is pending. The suit attempts to stall the hearing of that oppression and mismanagement petition and to effectively unseat Mukesh and Bharat by denying that they have any rights as shareholders at all. Between them, Ravindra, Nakul, Ashok, Kishore and Nayan are also trustees of the two Plaintiff trusts. As to the consent to the Probate, Mukesh says this was a general consent and not specific to the shares in question - the consent was to the Will and Codicil being probated, not to the probate petition's contents.

26. In paragraph 5 of his Additional Affidavit, Mukesh then raises a contention that, far from being included in the residuary clause, the 100 Contrex shares were transferred as part of, and pursuant to, a Family Arrangement and Settlement ("FAS") of 2006. In paragraphs 9(d) and 9(e), he amplifies this somewhat, suggesting that each branch was to take an equal shareholding in Contrex, by transferring to Ramanlal holdings in Contrex in excess of 200 shares, so that each of the five branch had an equal holding of 200 shares. He also says in paragraph 6 that under Regulation 25 of Table A to Schedule I of the Companies Act, 1956, which Contrex adopted and incorporated as Article 65 of its Articles of Association, Mukesh and Bharat are the only ones entitled to these shares. Contrex can, he says, only recognize the surviving joint holder as having any title to these shares. Ramanlal made his Codicil on 28th June 2006, just a few days after the transfer of the 100 Contrex shares from Ashok and Kishore to his and Mukesh's and Bharat's joint names, and, therefore, Mukesh says, explains why they find no mention in either the Will or the Codicil. It was never Ramanlal's intention, Mukesh insists, to have these shares included in his estate,

and most certainly not to pass by a residuary clause; they were always intended to be part of the composite FAS of 2006. He relies on the letters of 16th August 2006 from Ashok and Kishore as evidence of the FAS: another lot of 100 shares was also agreed to be so transferred. In paragraph 9(n) of the Additional Affidavit, Mukesh says the FAS was conceived so that each of the five branches of the Gokal family - five brothers and their families - would hold 20% each of Contrex's equity. He also points out that the joint shareholding is shown as such in the item 27 of the Schedule of Assets to the probate petition.

27. Ravindra, Defendant No. 6, filed an Affidavit in Reply dated 7th May 2015 in this Notice of Motion. Notice of Motion paper book, pp. 57-98. This was for himself and on behalf of Nakul and Nayan (at a time when Nayan, now Plaintiff No.3, was Defendant No.11). Ravindra reaffirms what is said in the Plaint, viz., that the shares are part of Ramanlal's estate, and are covered by the residuary clause of his Will. He says that till 2013, when Mukesh and Bharat first asserted rights to the shares, all proceeded on the basis that the shares were Ramanlal's alone. Article 65 of the Articles of Association (and Regulation 25) are for the convenience of the company, he says. He denies there was ever any family arrangement or settlement at all. He says the audited accounts also show these shares as part of Ramanlal's estate.

28. These assertions are broadly the ones the original 3rd Plaintiff, Hasmukh Parekh (since deceased) took in his Affidavit in Rejoinder dated 22nd May 2015. Notice of Motion paper book, pp. 99-111. Hasmukh Parekh also filed a further Affidavit in Rejoinder dated 23rd July 2015 (pp. 115-116) dealing with Mukesh's second Additional Affidavit dated 20th July 2015 in which Mukesh took the plea of a jurisdictional bar (pp. 112-114).

29. On 5th August 2015, Mukesh and Bharat filed Suit No. 671 of 2105 for specific performance of the 2006 FAS. That suit is pending. The averment about the filing of this suit is in Mukesh's third Additional Affidavit dated 24th November 2016, pp. 134-135 of the Notice of Motion. Specific performance is sought inter alia by a transfer from Ravindra and his family of 50 shares in Contrex, and from Nakul and Nayan of another 50 shares in Contrex. If decreed, this would result in Mukesh and Bharat each holding 100 Contrex shares, representing 200 shares held by Ramanlal's branch.

30. Nayan, the substituted 3rd Plaintiff, filed an Additional Affidavit dated 9th October 2016. Notice of Motion paper book, pp. 117-133. In this, he set out details of Ramanlal's bank account with the Union Bank of India, Bombay Samachar Marg branch, from which payment was made for the 100 shares, and details of these payments. He also annexed copies of the bank statements, and the financial statement for Ramanlal for the period ending 22nd March 2007. Mukesh and Bharat were not joint holders or signatories on Ramanlal's Union Bank of India account, and there is also no doubt that Ramanlal paid for the 100 Contrex shares by cheques drawn on that account. Notice of Motion paper book, p. 123. Kishore was paid Rs.5,000 on 5th March 2007 and Ashok the same

amount on 6th March 2007.

31. Finally, to complete the factual narrative: on 16th April 2015, Mr Andhyarujina then appearing for Mukesh and Bharat, said on instructions from the former, then present in Court, that until 7th May 2015 they would not sell, alienate, encumber or create any third party rights over these 100 shares. That statement was continued periodically, and continues even now. D. JOINT OWNERSHIP; ARTICLES; THE PRINCIPLE OF ADVANCEMENT

32. I must accept that neither Mukesh nor Bharat paid any rupee consideration for the acquisition of the Contrex shares, and that the entirety of the purchase price was paid by Ramanlal alone. As we shall see, this is not the "consideration" of which Mr Chinoy speaks. He says the FAS itself formed part of the consideration. Deciding the preliminary issues, I proceeded on the basis, as I believed I then had to, that Mukesh and Bharat had accepted these shares formed part of Ramanlal's estate. Today, I must consider their case that the shares did not, and were not intended to, form part of Ramanlal's estate, and that they passed to the two Plaintiff trusts under the residuary clause in Ramanlal's Will, notwithstanding that Mukesh and Bharat are admittedly shown as joint holders of these shares.

33. Mr Chinoy's case is that Mukesh and Bharat, as joint holders, have an undivided right, title and interest in the shares. There is no division in specie or by metes and bounds. The shares pass by survivorship, and all survivors take equally down to the last remaining survivor. There is no question of anything Mukesh or Bharat said or did affecting this, for this is the position in law. Once Mukesh and Bharat are name joint holders, they cannot be ousted from that holding and ownership. (I) ARTICLE 65 OF THE COMPANY'S ARTICLES OF ASSOCIATION

34. Mr Kadam's submission is that the invocation of Article 65 of the company's Articles of Association and Regulation 25 of Table A to Schedule I of the Companies Act, 1956 is a red herring. It is not a stand-alone provision to be read in isolation and, in any case, it cannot defeat the operation of succession or testamentary law.

35. Article 65 of Contrex's Articles of Association reads: *Plaint, Ex. "X", pp. 299-343, at pp. 312-313.*

65. Death of one or more joint-holders of shares.-In the case of the death of any one or more of the persons named in the Register of Members as the joint-holders of any share, the survivor or survivors shall be the only persons recognized by the Company as having any title to or interest in such share, but nothing herein contained shall be taken to release the estate of a deceased joint-holder from any liability on shares held by him jointly with any other person.

(Emphasis added)

36. Mr Chinoy emphasizes the first emphasized portion, in bold; Mr Kadam the

second, in italics, saying the provision only gives the company a quitance. If the estate continues to be liable for any call on a share held jointly then, Mr Kadam says, other than giving the company a release, there is no question of passing any title by survivorship. He also points to Articles 66 and 68, but I think the submission on those Articles will not much carry us further: Article 66 speaks of executors, administrators, holders of a Succession Certificate or legal representatives "not being one of two or more joint-holders". Article 66 therefore operates where there are no joint holders. In that case, the company will recognize a person with a probate, succession certificate etc., or may, in its discretion, waive their production. Article 68 operates differently. It is subject to Articles 65 and 66 and allows the company discretion to recognize any person entitled to shares in consequence of the death, lunacy, bankruptcy or insolvency of any member. The applicant must prove that he sustains the character in respect of which he proposes to act, or must prove title. The company is not bound to accept this application. I understood Mr Kadam to suggest not that Article 65 was otiose but that all these Articles speak of the company recognizing a person or class of persons and that, therefore, the scope of these Articles is to give the company a quitance, not to prevail over succession law. A joint holding, in other words, cannot operate to divest a person of the right to make a testamentary bequest; and Mr Chinoy's submission, says Mr Kadam, leads to just that untenable conclusion.

37. Article 65 says that on the death of "one or more of the persons named in the Register of Members as the joint-holders of any share, the survivor or survivors shall be the only persons recognized by the Company as having any title to or interest in such share." This only affords the company protection against a claim by another. It ensures that the company is not put to the trouble of having to investigate itself who has that entitlement. In Mr Kadam's words, it affords the company a quitance as to title. To "be recognized by the company" is not the same thing as to "be recognized by the law". Indeed, any other view raises another insuperable difficulty: at what point in time would the joint-holder acquire such a fullness of title? Only on the death of the first-named holder, or at the time when the second-named holder is added? If it is the latter case, then the second-named holder could never be substituted or changed and that, as we know, is neither law nor practice.

38. If it is the former, i.e., that the second-named holder "acquires" title on the death of the first-named holder, then this raises the same difficulty that used to be canvassed in regard to nominations etc., a matter concluded for the present by the decision of the Division Bench in *Shakti Yezdani & Anr v Jayanand Jayant Salgaonkar & Ors.*, 2017 (1) Bom CR 319 : [2017] 200 Comp Cas 143 (Bom). This has now been taken to the Supreme Court in Special Leave Petition (C) No 3982 of 2017 and placed with Civil Appeals Nos. 1862-63 of 2009. That was in the context of 109A of the Companies Act (and provisions of the Depositories Act). That section of the Companies Act speaks of a "vesting" in the nominee at the time of the shareholders' death, and the Division Bench said this did not

create a third mode of succession or over-ride testamentary law. Article 65 is of a species with Section 109A and it cannot possibly exclude the operation of succession law, at least not when stated in such general terms. That proposition would be over-broad and to accept it would mean that no person could make a Will bequeathing his shares though he may have added a second name to his shareholding for convenience; and in estate planning would have to be careful at every step of the way. A person may often add his or her spouse as the second name on shareholdings and stock, but in a Will leave parts of these holdings to their children. That bequest would be impossible if a joint holder could never be removed inter vivos once added; the joint holder (in our example, the spouse) alone would get all the shares. I do not believe this to be the mandate of the law at all. Article 65 does not and cannot, therefore, operate to benefit the surviving holder. Indeed, and in fairness, I understood Mr Chinoy to say that Article 65 operates outside succession law, not in defeasance of it.

39. A quite different consideration may arise when the joint-holder contributes to the consideration. In that situation, the joint-holder might have title to the shares at the time of acquisition as a tenant in common if there is a distribution in specie, or on the rule of advancement. (II) Advancement

40. The principle of advancement, which applies in England, raises a presumption of a gift to the second-named surviving person. There is, as Mr Kadam says, no such presumption in India.

41. In *Guran Ditta v T Ram Ditta*, [1928] 30 Bom LR 1384 (PC) : AIR 1928 PC 172 : 55 Ind App 235. An earlier decision in *Sura Lakshmiah Chetti v Kothandrama Pillai* (AIR 1925 PC 181 : 52 Ind App 286) said in India the English rule of advancement (regarding property purchased or a deposit made in the name of a wife by a husband) does not hold good. This was also the decision of Lord Atkinson in *Kerwick v Kerwick*, [1920] 23 Bom LR 730 : 47 Ind App 275, cited in *Guran Ditta*. Both *Lakshmiah Chetti* and *Kerwick* were cited and followed by the Supreme Court in *Bibi Sadiqa Fatima v Saiyed Mohammad Mahmood Hasan*, (1978) 3 SCC 299. on appeal from the court of the Judicial Commissioner of the North West Frontier Provinces, the Privy Council had before it a question of whether a gift to wife was to be presumed. There was a fixed deposit in a bank. It was in the name of husband and wife. It was payable to "either or survivor". The question was whether the fixed deposit was payable to the survivor or belonged to the estate of the person "who originally supplied the money". The Privy Council said:

"The general principle of equity, applicable both in this country and in India, is that in the case of a voluntary conveyance of property by a grantor, without any declaration of trust, there is a resulting trust in favour of the grantor, unless it can be proved that an actual gift was intended. An exception has, however, been made in English law, and a gift to a wife is presumed where money belonging to the husband is deposited at a bank in the name of a wife, or where a deposit is made in the joint names of both husband and wife.

This exception has not been admitted in Indian law under the different conditions which attach to family life, and where the social relationships are of an essential different character. "

(Emphasis added)

42. The rule of advancement was again squarely before the Privy Council in *Pandit Shambu Nath Shivpuri v Pandit Pushkar Nath.*, [1944] 47 Bom LR 595 : AIR 1945 PC 10 : 71 Ind App 197. The Privy Council followed its decision in *Guran Ditta*. It said again there is no principle of advancement in India. It also said this rule is not confined to assets in the joint names of a deceased husband and his wife but is of general application, whatever the property and whatever the relationship. If the surviving joint holder alleges there was a gift in his favour, he must establish it. Where the first-named deceased holder makes frequent changes in the name(s) of the joint holder(s), and causes interest to be paid to himself, his intention is that there is no immediate gift of the corpus to the joint holder. The case involved, apart from fixed deposits, 100 shares in Central Bank of India Ltd in the joint names of the deceased and the 1st defendant. It was common ground before the Privy Council that it fell to the 1st respondent (the surviving joint holder) to establish a contrary intention, i.e., to prove the gift. If not, the assets fell into the partible estate. The deceased was seen to have made periodic changes in the joint names. Interest and earnings on the assets were paid to the deceased. There was, therefore, no evidence of an immediate gift. In other words, even making a provision for an asset to be held for "either or survivor" would not result in the making of a gift *eo instante* by the first named holder to the second.

43. Importantly, it follows from *Shambu Nath* that there is no warrant at all for the proposition that once a joint holder is named as a second holder he or she cannot be removed.

44. The Supreme Court followed both Privy Council decisions in *Indranarayan v Roop Narayan & Anr.*, AIR 1971 SC 1962. The transfer in question was held not to be a gift because the first-named deceased holder continued to be the owner of the amounts in question till his death. The Supreme Court said there is no presumption of advancement in this country, but yet if there had been satisfactory evidence to show the transfers were genuine, and, further, to show that the deceased intended the amounts to go to the 1st defendant exclusively, the advancement propounded might have been held to be satisfactorily proved.

45. In *Krushandas Nagindas Bhate v Bhagwandas Ranchhoddas & Ors*, AIR 1976 Bom 153. Vaidya and Lentin JJ of this Court were considering a case involving a bank deposit in joint names held "either or survivor". It seems to have been argued that *Shambhu Nath* was decided on a concession inconsistent with the law. The Division Bench negatived this (paragraph 33 of the AIR report):

33. In view of his position in law, it cannot be said that what was conceded before the privy Council was inconsistent with law. We are of the opinion that it

will ordinarily depend on the facts and circumstances of the case relating to the opening of the account showing the intention of the parties. If from the facts and circumstances of the case it could be held that the intention was to make the survivor the owner of the amount lying in the account, then he, and not the heirs, would be entitled to recover the amount. If the facts and circumstances of the case do not establish any such intention, although the holder of the joint account may be authorised to withdraw the amount, he would be bound to restore that amount to the heirs and legal representatives of the deceased joint holder. The bank may be discharged by payment to the survivor. But the survivor may, in the absence of an intention to make him the owner, be accountable to the heirs of the deceased joint holder.

(Emphasis added)

46. This is the clearest possible enunciation of the principles involved: (a) discharge to the company (or bank) by looking to the survivor; (b) no presumption of ownership passing to the second named holder; (c) the liability of the survivor to heirs absent proof of the intention to pass title by survivorship; and (d) the exclusion of heirs in succession on proof of intention to pass title by survivorship.

47. Mr DeVitre, supporting Mr Kadam, suggests another perspective to assessing Mr Chinoy's submission that on addition of a his name, the second named holder becomes a co-owner and a joint tenant with a right of survivorship to the whole of the property. There are three aspects that fall for consideration:

(a) The rights of the shareholders vis-a-vis the company;

(b) The rights of shareholders and joint holders against the general law and law of succession

(c) The inter se relationship between joint holders.

48. For the purposes of the company, the holder of the share is the owner. The company will only "recognize" the holder. Entries in the register of members are like entries in land records: they do not confer title. For instance, a trustee under a Will holding for a minor is not, on account of his name being in the register of members, a person with absolute title to the shares. A joint holder does not acquire ownership and title in general law contrary to succession law. The Articles of the company regulate its management, not the legal rights of members. The "owner" of a share for the purposes of succession law and general law may be quite different from a "holder" under company law and the company's Articles.

49. Outside the rule of advancement, Mr DeVitre says, Mukesh and Bharat have no case at all. There is no source in law that gives them, as joint holders, a right of ownership by survivorship. The concept of a joint tenancy is unknown to Hindu law; it only recognizes a tenancy in common. Under Ramanlal's Will, there were specific bequests to Mukesh and Bharat, and these were paid and accepted. If

they have accepted these bequests, they cannot impeach Ramanlal's title to these shares.

50. Mr DeVitre cites the decision of Chagla J (as he then was) in *Mahomed Jusab Abdulla v Fatmabai Jusab Abdulla*, [1946] 49 Bom LR 505. for the proposition that Indian courts strongly lean against any bequest or grant being a joint bequest or joint grant. The presumption in India is always in favour of a tenancy in common rather than a joint tenancy. That presumption may be displaced, but to do so requires clear and cogent evidence to the contrary.

51. Mr Kadam and Mr DeVitre urge me to accept that the no objections of 16th August 2006 were because the Articles of Contrex contain a pre-emption clause in Article 52. They also say that other than this proposed transfer of additional shares (from Ravindra, Nakul and Nayan) there is no evidence at all of the alleged FAS. All concerned except Mukesh and Bharat accept that the shares are part of Ramanlal's estate; the challenge from Mukesh and Bharat is late, and rendered worthless by their own no objection to the grant of probate and their acceptance of the accounts, all of which show these shares as part of Ramanlal's estate.

52. Mr Chinoy's response is not to dispute the state of the law on advancement but to point out, correctly I think, that whether at an interim or final stage, this dispute turns on a factual context. As to the law, he poses the issues thus: (1) does a joint holder, on the death of the first named holder, become a joint owner? and (2) if a person is a joint holder, joint tenancy or co-ownership, and therefore survivorship would operate absent an express common law agreement outside a company's articles.

53. Now the Plaintiffs in this case say the names of Mukesh and Bharat were added "for convenience". But what that "convenience" might be is unclear. The Plaintiffs' claim is through a bequest in a residuary clause. As Mr Chinoy says, a specific bequest would be a strong indicator of the lack of an intention to create a joint holding or joint ownership. According to him, Ramanlal was to take 200 shares under the FAS; he was to take them for his branch, one of five in the Gokal family; Mukesh and Bharat were to succeed him in representing that branch. As a first step in the implementation of the FAS, Ramanlal took 100 share from Ashok and Kishore (50 shares each). The second step was to take 50 shares from Ravindra and another 50 shares from Nakul and Nayan. All branches were to divest holdings in excess of 200 shares so that all five branches held 200 shares, or 20% of the equity, in Contrex. The second step, and therefore the FAS itself, is established, Mr Chinoy says from the four letters from Ashok and Kishore of 16th August 2006 granting no objections to the transfers from Ravindra and Nakul/Nayan. There is no explanation at all for these four no objections of 16th August 2006. The only explanation is that these four letters were in ostensible compliance with Articles 52 to 57 of Contrex's Articles of Association, which provide for a right of pre-emption: before Ravindra and Nakul/Nayan could transfer 50 shares each to Ramanlal's branch they would have had

to offer them to Ashok and Kishore; hence the no objections. Ashok and Kishore are part of the Plaintiffs' group, and to revert these 100 Contrex shares to them through the two Plaintiff trusts would be disrupt and unbalance the potential equalisation sought by the FAS.

54. The other telling factor is that Ramanlal did not include these shares in his Codicil. This, Mr Chinoy says, indicates that he did not intend them to pass otherwise than by survivorship, that is to say, he did not leave a document evidencing an intention they should go to the Plaintiffs.

55. All of this in any case requires evidence, Mr Chinoy submits, adding that the "consideration" - the apparent lack of which the Plaintiffs make so much - may not be cash consideration; no one suggests that it must be cash; but is, in fact, the FAS itself. Mukesh and Bharat stand to be knocked out of their oppression and mismanagement petition and specific performance suit if this residuary clause is allowed to operate over shares held jointly.

56. A joint shareholder is a joint owner of shares, and this is settled law, submits Mr Chinoy citing *Shree Sakti Mills Ltd v CIT*, AIR 1948 Bom 394 : (1948) 50 Bom LR 309. Followed by the Punjab & Haryana High Court in *Jarnail Singh & Anr v Bakshi Singh & Anr*, [1959] XIII ILR Punjab 969. He also points out that in *Narandas Manmohandas Ramji & Ors v The Indian Manufacturing Co Ltd*, [1953] ILR Bom 877. a Division Bench of this Court (Chagla CJ & Shah J) for the proposition that for a public company, every joint holder is a member. This is not true for a private company because of a legal fiction in a specific proviso enacted to ensure that the cap on membership of a private company is not exceeded by virtue of joint holding.

57. Mr Chinoy submits that the question of advancement would arise on the death of the first named holder if the allegation is that the joint holder paid no consideration. Then the question of proof of intendment would arise. When there is an admission that there was no consideration, as in *Shambu Nath*, then the burden shifts. To dislodge the rule against advancement, the burden to be discharged is very slight. *Mohammad Sadiq Ali Khan v Fakr Jahan Begam Nawab*, 1931 Oudh Weekly Notes 1378 (PC). In this case, the transfers were not to Ramanlal alone, or that he later added Mukesh and Bharat. They were to Ramanlal and Mukesh, and Ramanlal and Bharat jointly. They were also the first of a two-step transfer. Thus, the real consideration had to have been the FAS.

58. No one explains, Mr Chinoy says, and I think this is pivotal, why these 100 shares were transferred at all. At least at the interim stage, this is determinative. The shares were not distributed between Ramanlal and Mukesh or Ramanlal and Bharat; they were acquired as joint holdings, and remained that way until Ramanlal died. No one explains either why the four no objection letters were thought necessary.

59. Another factor to be considered is that in the Schedule of Assets to the probate petition, these 100 Contrex shares are valued at Rs.20 lakhs. The

accounts show their value at Rs.10,000. Their purchase price was only Rs.5,000 for each lot of 50 shares. Therefore, Mr Chinoy says, there is prima facie evidence of the shares being bought for an equalisation in furtherance of a common understanding, viz., the FAS. E. FINDINGS & CONCLUSIONS

60. I will accept for now that Article 65 does not operate to defeat succession law but operates outside it. On its own, an invocation of Article 65 will not fully serve Mr Chinoy's purpose except perhaps to this extent: Article 65's provisions may be dislodged by a specific bequest made in a testamentary instrument, but it cannot be dislodged by an inferential reading of a residuary clause. The 100 Contrex shares are not the subject of any specific bequest, though they could have been included in the Codicil if it was Ramanlal's intention they pass to the two Plaintiff trusts. That, had it existed, would have been a strong indicator of Ramanlal's intention against advancement, and the burden on Mukesh and Bharat would have been that much heavier.

61. There is no rule of advancement in Indian law; that is clear. There is, therefore, no presumption that Mukesh and Bharat would succeed to 100 Contrex shares. Some proof is required of advancement. That proof might be slight. It might possibly lie in the manner and circumstances of the acquisition of those shares. The four letters of 16th August 2006 are not, I think, to be discarded so lightly by alleging that they "may have been intended to pre-empt a preemption clause". That submission raises more questions than it answers: pre-emption by whom in respect of a transfer by whom to whom and for what purpose? The argument posits that someone knew why Ramanlal was to have these shares, and just this quantity of these shares, and in these precise combinations, drawn from precisely these four sources (Ashok, Kishore, Ravindra and Nakul/Nayan, four of the five branches of the Gokal family). Of these four letters, there is no explanation other than the one Mr Chinoy offers. This also addresses the question of the so-called "lack of consideration". I think there is some substance to Mr Chinoy's case that the real consideration was the proposed equalisation of holdings between the five branches in Contrex, and that the effected transfer of 100 shares was perhaps a first step in that direction. This is only, of course, a tentative prima facie view. If that is so, then it is difficult to say with absolute certainty (a) that Ramanlal did not intend Mukesh and Bharat to succeed to his holding of these 100 shares; or (b) there was absolutely no consideration for joining Mukesh and Bharat as the second-named holders to these shares. On Ramanlal's passing, Mukesh and Bharat would stand on the same footing vis-a-vis Contrex holdings as Nakul and Nayan - representing their respective deceased father's branches.

62. But there is a more fundamental aspect that concerns me and that is the consequence of so fully accepting the Plaintiffs' case at this stage. I return to the prayers in the Motion and, at the cost of repetition, I set them out again:

(a) For a restraint against Contrex, Ravindra, Nakul, Ashok Gokal and Kishore from transmitting the 100 Contrex shares to Mukesh or Bharat, or both;

(b) For a restraint against Mukesh and Bharat from exercising any membership rights, including voting rights, over these 100 Contrex shares, and from selling, alienating, encumbering or creating any third party rights over them;

(c) For the appointment of a Court Receiver of the 100 Contrex shares under Order XL Rule 1 of the Code of Civil Procedure, 1908;

(d) For a direction to Mukesh and Bharat to deposit the certificates in respect of these 100 shares with the Court Receiver and for a direction to the Court Receiver to exercise all rights in respect of these shares (including voting rights) in accordance with the directions of the trustees of the two Plaintiff trusts.

63. Prayers (b) and (d) are telling. They seek to restrain Mukesh and Bharat from exercising any rights over these shares, and to direct the Court Receiver to exercise those rights as directed by the Plaintiffs. For one thing, granting these reliefs effectively decrees this suit. Nothing of consequence survives. Second, these two prayers, and prayer (d) most especially, seem to me to indicate that there is an attempt to upset an equalization of holdings. Third, and perhaps most importantly, these reliefs would effectively put paid to Mukesh and Bharat's entire proceeding for oppression and mismanagement and would also adversely effect their specific performance suit.

64. My task at this stage is to preserve, as far as possible, the parties in status quo. Certainly Mukesh and Bharat cannot be shut out from leading evidence of the FAS. They will need to do this in their specific performance suit and they must do so here - and this is another conflict; for if they succeed in doing so in that suit, and these shares have, in the meantime, by an interim order in this suit, not been preserved pendente lite, the result might be foregone conclusion.

65. It is difficult to say that the defence raised by Mukesh and Bharat is entirely worthless (and my observation to that effect in the earlier judgment of 19th September 2016 is almost certainly incorrect, even though I may have had to proceed on that basis). As I have noted earlier in this judgment, there is no explanation at all for these transfers in the first place, or why they were effected in this manner with transfers from Ashok and Kishore, and proposed transfers from Ravindra and Nakul/Nayan (with no objections of 16th August 2006 from Ashok and Kishore), and all in lots of exactly 50 shares. We do not know why, if Ramanlal wanted them to go to the two Plaintiff trusts, he did not say so in the Codicil he made after the shares were acquired. The only claim the Plaintiffs make is through a residuary, non-specific clause. It is certainly not without significance that Mukesh and Bharat are opposed not only by the two Plaintiff trusts and their trustees, but that Contrex and the Plaintiff trusts are all controlled by Ashok, Kishore, Ravindra and Nakul/Nayan, the other four branches, all opposed to Mukesh and Bharat.

66. To be granted prayers like these, or even some re-fashioning of them in the guise of "moulding relief", the Plaintiffs must make out a far more compelling case. To appoint the Court Receiver or to deny voting rights would be to ignore

the joint holding altogether. That I cannot do.

67. Finally, in a matter like this it would, I think, be unwise to proceed entirely on the basis of Mukesh's and Bharat's no objection to the probate or their so-called "acceptance" of accounts and financial statements. That would amount to proceeding on an admission without testing the explanation offered. It would amount to overlooking the admissions of joint holding by the Plaintiffs and those who support them. All this must await trial and I think Mr Chinoy is completely correct in saying that at the interim stage the lack of any explanation from the Plaintiffs about why the transfers were made in the first place (and why Ashok and Kishore gave their no objections to a second tranche of transfers) is determinative.

68. As it happens, Contrex's Articles do contain detailed preemption provisions from Article 52 to Article 57. The explanation that the Plaintiffs offers for the no objection letters, based on these Articles, works against them now, for those very Articles are surely enough protection to the Plaintiffs and the other four branches - Mukesh and Bharat cannot sell these shares to any third parties in breach of those provisions. Mukesh and Bharat will continue to have, for now, a less-than-equal holding in Contrex; exactly half of the shareholding to which they claim to be entitled (100 shares instead of 200).

69. I also see no reason to continue until the final disposal of the suit the statement earlier made on 16th April 2015 on behalf of Mukesh and Bharat. It may be argued that since it has continued this long, it should do so until the suit is decided; but it is I think more correct to say that it has continued for far too long. If the Plaintiffs succeed in the suit, the shares will go to them and they may also be entitled to an order of all benefits in the interim that may have been taken by Mukesh and Bharat. As to the voting rights, not to allow Mukesh and Bharat to exercise them pending the suit would amount to denying the existence of their names as joint holders. As against the so-called admissions by them, there is equally the admission by the executors that these shares were jointly held. A denial of voting rights in respect of these shares also upsets the balance in Contrex: Mukesh and Bharat cannot then do what Ramanlal, had he been alive, might have done.

70. The consequence of all this would be, at the interim stage, to permit a complete rollback or reversal of Ramanlal's purchase of the shares in joint names. On a consideration of the balance of convenience and the question of irreparable injury, I cannot find for the Plaintiffs.

71. In the result, the Motion fails, and is dismissed.

72. The 20th October 2016 order said that if I should hold against Mukesh and Bharat, my order (this one) would be stayed for four weeks. It did not contemplate an order in favour of Mukesh and Bharat. But I do think the principle should apply at least as regards the statement made on their behalf on 16th April 2015 for a reasonable time (though not pending the final disposal of the

suit). That statement will, therefore, have to be continued for a limited time, and it is, until 23rd June 2017.

73. No costs.