Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO. 3117 OF 2016
IN
SUIT NO. (L) 1000 OF 2016

HEENA NIKHIL DHARIA ... Plaintiff

~ VERSUS ~

KOKILABEN KIRTIKUMAR NAYAK & ORS ... Defendants

CORAM: G.S. PATEL, J
DATED: 13th December 2016

P.C.:

1. Taken up *suo motu* for speaking to the minutes of the order dated 9th December 2016. The following typographical errors and omissions are to be corrected in that order.

2. In the title, Satyen Kirtikumar Nayak and Ms. Diya are to be shown as Defendants Nos. 4 and 5 respectively.

3. The following line is to be added as the last line of paragraph 11:

11. ... ... Thus the preliminary issue is: *whether the suit as filed is barred by limitation?*

4. Order dated 9th December 2016 be read accordingly.

(G. S. PATEL, J.)

Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO. 3117 OF 2016
IN
SUIT (L) NO. 1000 OF 2016

Heena Nikhil Dharia
Age 49 years, Occupation: Housewife, of Mumbai, Indian Inhabitant, residing at 22, Las Palmas Building, 20, Little Gibbs Road, Mumbai 400 006 … **Plaintiff**

~ versus ~

1. **Kokilaben Kirtikumar Nayak,**
   Age 70 years, occupation Housewife, of Mumbai, Indian Inhabitant, residing at 901, 9th Floor, Shanta Shivam Building, Babulnath Road, Mumbai 400 007

2. **Hiren Kirtikumar Nayak**
   Age 47 years, occupation Business, of Mumbai, Indian Inhabitant, residing at 901, 9th Floor, Shanta Shivam Building, Babulnath Road, Mumbai 400 007

3. **Kiren Kirtikumar Nayak,**
   Age 45 years, occupation Professional, having his Indian address at 901, 9th Floor, Shanta Shivam Building,

Babulnath Road, Mumbai 400 007

AND

address in United States of America at 35, Oak Mount Terrace, East Windsor, New Jersey 08520

3. **Satyen Kirtikumar Nayak**, Age 41 years, Occupation Business, Indian Inhabitant, residing at "Natraj Bungalow", Near Havmor Restaurant, Navrangpura, Ahmedabad 380 009.

3. **Ms. Diya,** daughter of Jagruti Nayak, Age 13 years, 16, Paritosh Society, Opposite Kamnat Mahadev, Near St. Xaviers High School, Mem Nagar Road, Ahmedabad – 380 013. … **Defendants**

Appearances

FOR THE PLAINTIFF	**Mr. Sanjay Jain**, *with Mr. Roham Cama, Ms. Trupti Shetty, Ms. Aditi & Ms. Anchal Singhania, i/b Dhruve Liladhar & Co.*
FOR THE DEFENDANTS	**Mr. Rishabh Shah**, *i/b Tejpal & Co.*

CORAM: G.S. PATEL, J

RESERVED ON: 2nd December 2016

PRONOUNCED ON: 9th December 2016

JUDGEMENT:

1. This is an application for ad-interim reliefs. I have heard Mr. Sanjay Jain for the Plaintiff and Mr. Rishabh Shah for Defendants Nos. 1 to 3 at some length.

2. Mr. Shah takes a preliminary objection to the jurisdiction on the basis of limitation. I have framed this issue below. While both sides agree before me to proceed with the hearing of the preliminary issue without leading evidence, I have since found that it would neither be possible nor even appropriate to do so. The reason is because a substantially similar issue is even now pending final disposal before a Full Bench of this Court.

3. Both Mr. Jain and Mr. Shah placed before me certain authorities. I will proceed to set out their respective contentions and to trace, to the extent that I am able, the judicial history of the matter. I do so only for completeness. I have expressed no view on this.

4. In order to appreciate how the preliminary issue arises and why it is framed as it is, a few background facts are necessary. The parties are all of one family, and the dispute is about the estate of one Kiritkumar Shambhulal Nayak ("**Kiritkumar**"). There is a family tree annexed at Exhibit "B" to the plaint. Defendant No. 1 is Kiritkumar's widow. The Plaintiff is one of the two daughters of Kiritkumar and Defendant No. 1. Defendants Nos. 2, 3 and 4 are the three sons of Kiritkumar and Defendant No. 1. Kiritkumar and

Defendant No.1 had another daughter named Jagruti, who died on 10th August 2013. Defendant No. 5 is Jagruti's daughter.

5. The suit is firstly for a declaration that the Plaintiff and Defendants Nos. 1 to 5 are each entitled to a one-sixth undivided share right, title and interest in the estate of Kiritkumar. The second prayer in the Suit is for an order of administration of Kiritkumar's estate, including of the properties mentioned at Exhibit "C" to the plaint.[1] Prominent amongst these properties is a penthouse apartment of about 1,200 sq. ft with an adjacent terrace of 640 sq. ft. in a building known as "Shivam" at Walkeshwar, Malabar Hill. The third prayer is for partition of the estate by metes and bounds. The fourth prayer is in the alternative to the prayer for partition by metes and bounds. Then there are usual prayers for disclosure etc.

6. Kiritkumar died on 4th August 2005. The Plaintiff claims he died intestate and was survived by the Plaintiff, Defendants Nos. 1 to 4 and Jagruti (Defendant No.5's mother, and who died on 10th August 2013).

7. The plaint sets out that on 21st September 2002 Kiritkumar entered into a development agreement in respect of the Malabar Hill property, now known as "Shivam". As part of that development agreement, the developer provided Kiritkumar with a penthouse in question. In paragraph 6, it is said that Kiritkumar was the absolute owner of the penthouse. Then there is a mention that the estate also includes other immovable properties elsewhere and movable

1 Plaint, *p.* 22.

properties including some lying in a locker with the Indian Overseas Bank, Stadium Road, Ahmedabad.

8. The plaint was filed on the basis that Defendant No. 3 who is usually a resident abroad was proposing to visit India for the purposes of opening the locker and for distribution of the estate. The matter was moved before me on 21st October 2016. I granted a time-limited ad-interim injunction till 25th October 2016. I directed an Affidavit in Reply to be filed. On 25th October 2016, I granted time till 25th November 2016 to file Reply but directed that no Rejoinder should then be filed without leave of the Court.

9. Mr. Jain has had produced before me papers in Testamentary Petition No. 884 of 2006. This was a Petition filed by the 1st Defendant seeking a Succession Certificate to part of Kiritkumar's estate. This Petition is produced *inter alia* on account of its averments. In this Petition, which was granted, the averment is that Kiritkumar was survived only by the 1st Defendant and Defendants Nos. 2, 3 and 4. In paragraph 4 of this Petition, there is a specific assertion that he left no daughters, *i.e.*, denying the existence of both the Plaintiff and Jagruti, the mother of the 5th Defendant minor. This Petition for a Succession Certificate also says that Kiritkumar died intestate. This is a circumstance on which Mr. Jain relies heavily in support of this application. He does so because it is now the contention in the 2nd Defendant's Affidavit in Reply,[2] that Kiritkumar left a Will dated 22nd March 2005. The 2nd Defendant annexes as Exhibit "2" to this Affidavit an Affidavit said to have

---

2 Specifically taken in paragraphs 8 and 9 at pages 10 and 11 of the Notice of Motion paper-book

been made by the 1st Defendant, the 2nd Defendant, the 4th Defendant, Jagruti and the Plaintiff allegedly confirming that they and the 3rd Defendant are the only heirs of Kiritkumar, and acknowledging Kiritkumar's alleged Will. This Affidavit is supposedly dated 16th November 2005, *i.e.*, well before filing of the Petition for Succession Certificate on 20th July 2006. This Affidavit is denied by the Plaintiff. According to her, she never signed it. The Petition for a Succession Certificate was amended on 19th December 2006 and a Succession Certificate was issued on 11th May 2007.

10. In view of the preliminary issue, I propose to pass a restricted ad-interim order, the frame of which I have indicated to both sides. I do so because the preliminary issue seems to me to fall significantly or at least substantially within the ambit of the reference to the Full Bench that is pending final determination.

11. The preliminary issue is framed on this basis: that a Suit such as this one which seeks, first, a declaration coupled with a relief in both administration and partition, and, second a prayer for partition of both movable and immovable properties must be brought within three years of the date of death of the deceased. Mr. Shah says that the governing Article would be Article 113 of the Schedule to the Limitation Act, 1963. This is a residuary provision and it provides for a period of three years from the date when "the right to sue accrues". Mr. Shah would have it that a suit of this nature does not fall within either Article 65 (for possession of immovable property or any interest thereon based on title) or Section 110 (a suit by a person excluded from joint family property to enforce to a right or

share therein), both of which stipulate a twelve-year period limitation with different starting points. I have understood him to say that given the frame of prayer clause (a), mentioned above, since there is a declaration, the only other applicable Article would be Article 58 which applies to suits to obtain "any other declaration" and provides a three-year time limit from the time when "the right to sue first accrues". Kiritkumar having died on 4th August 2005, this Suit, according to Mr. Shah, is out of time.

12. Mr. Shah's contention that this right to sue must be pegged to and only to the date of death of the deceased is based on a series of judgments, which I will now set out.

13. The first decision in point of time placed by Mr. Shah is that of a learned single Judge of this Court in *Kobad Rustomji Noble v Nelly Rustomji Noble*.[3] This was decided on 2nd June 2008. Here, the Court *inter alia* held that Article 113 would apply to an administration Suit. In paragraph 35, the Court held that in such a case the right to sue accrues upon the death of the person in question, and the Suit must be brought within three years of that date. Mr. Shah cited this decision as good law. What he did not point out, and which I found myself on checking the High Court website, was that this decision was set aside in Appeal No. 322 of 2008 on 18th September 2008.[4] Minutes were filed. I called for the record, since the minutes are not uploaded, and found that Clause (2) of the minutes specifically provided that the impugned order dated 2nd

3 2008 (5) Mh LJ 289.

4 Appeal No. 322 of 2008; per Swatanter Kumar CJ, as he then was, and AP Deshpande J.

June 2008 in *Kobad Noble v Nelly Noble* was set aside and the Appeal, by consent, stood allowed. I am unable to understand how this decision could ever have been cited at the Bar today.

14. Then Mr. Shah refers to the decision in *Antony Eugene Pinto & Ors v Eugene Cajetan Pinto & Anr*,[5] of the same learned single Judge who decided *Kobad Rustomji Noble*. Here, too, the Court held that where a Suit is for administration of both movable and immovable properties of a deceased, it must be filed within three years from the accrual of the right to sue, and the right to sue accrues on the date of death of the deceased. That Suit, the learned Single Judge held, was barred by limitation. This decision was rendered on 15th September 2009. What Mr. Shah did not place before me was the order dated 21st September 2011[6] in appeal from *Antony Eugene Pinto* in which the judgement of the learned single Judge was set aside by consent.

15. Mr. Shah also did not point out that just under two months later, the decision of the single judge in *Antony Eugene Pinto* was placed before another learned single Judge of this Court, DG Karnik J, on 8th November 2011 in *Sajanbir Singh Anand & Ors v Raminder Kaur Anand & Ors*[7] as a binding precedent on the same issue of limitation. Another decision of the same learned single Judge to the same effect was cited: *Shehnaz Aftab Kapadia v Dr Niranjan Umeshchandra M. Joshi*.[8] Karnik J found himself unable to agree

---

5 2009 (1) Bom.C.R. 828.

6 Appeal No. 41 of 2009, per D.K. Deshmukh & Anoop V. Mohta JJ.

7 Notice of Motion No. 2955 of 2011 in Suit No. 1869 of 2011

8 Suit No. 137 of 2009, decided on 21st October 20109.

with the view expressed by the learned single Judge in *Shehnaz Aftab Kapadia* and *Antony Eugene Pinto*. He framed a point for consideration by a larger Bench:

> What is the period of limitation for filing a Suit for possession of movable as well as immovable property by one of heirs against another heir in partition and separate possession of inherited property?

16. Karnik J does not appear to have been shown the Appeal Court order of 21st September 2011 by which the order in *Antony Eugene Pinto* was set aside by consent. The decision in *Shehnaz Aftab Kapadia* had also been carried in appeal, and that appeal had been disposed of by consent on 16th November 2010.[9] This, too, was not shown to Karnik J. Thus, on 8th November 2011, Karnik J was confronted with two decisions and was told these were binding, but was not told that by then both had been set aside in appeal.

17. I have noted the single Judge decisions in *Kobad Rustomji Noble* and *Antony Eugene Pinto* first because both referred to the decision of another learned Single Judge of this Court (AM Khanwilkar J, as he then was) in *Parmeshwari Devi Ruia v Krishnakumar Nathmal Murarka & Ors*,[10] a decision that pre-dated both *Antony Eugene Pinto* and *Kobad Rustomji Noble*. In paragraph 42 of *Parmeshwari Devi Ruia*, Khanwilkar J held that the cause of action in such a suit has no relevance to the date of death of the deceased,

---

9 Appeal No. 1132 of 2010, per Mohit Shah CJ (as he then was) and Kathawalla J.

10 (2007) 6 Bom CR 180.

and that the date of death cannot be the starting point of limitation for a suit for a partition. He held that the law does *not* make it imperative to ask for partition or for a declaration on a particular share within a specified period of time. This is squarely in issue before me, and was in issue in *Antony Eugene Pinto* and *Kobad Rustomji Noble*, in both of which it was sought to be distinguished. The judgment in *Parmeshwari Devi Ruia* was carried in appeal. This was disposed of on 26th March 2008.[11] A Consent Decree was taken in Appeal, and the Appeal was dismissed. Thus, the decision in *Parmeshwari Devi Ruia*, unlike the decisions in *Antony Eugene Pinto* and *Kobad Rustomji Noble*, was affirmed in appeal. Mr. Shah does not place *Parmeshwari Devi Ruia* before me. Indeed, when Mr. Jain referred to it, I understood Mr. Shah to say that it was for Mr. Jain to place the judgement if he wished, giving a copy to Mr. Shah in advance, and that Mr. Shah was not obliged to do so. Mr. Shah is, as we shall see, utterly wrong in this.

18. Mr. Shah then cites another decision of the same Judge who decided *Kobad Rustomji Noble* and *Antony Eugene Pinto*. This is the decision of 1st April 2009 in *Mubarakunnis Mohammed Naseem & Ors v Moinuddin Mohd. Usman Khan & Ors*.[12] In this, once again, the suit was held to be barred since it was brought beyond three years from the date of death of the deceased. No reference seems to have been made in this decision to *Parmeshwari Devi Ruia* or to the fact that by this time, *Kobad Rustomji Noble* and *Antony Eugene Pinto* had been set aside and, in any case, that Karnik J had disagreed at least

---

11 Appeal No. 240 of 2008: Appeal (L) No. 750 of 2008, per Swatanter Kumar CJ (as he then was) & JP Devadhar J.

12 2009 (2) Bom CR 2

with the latter in Sajanbir Singh Anand. Appeal No. 268 of 2009 preferred against the decision in *Mubarakunnis* was admitted on 13th July 2009.[13] That Appeal appears to be pending.

19. In the meantime, on 27th September 2012, a Division Bench of this court (SA Bobde J (as he then was) and RG Ketkar J) heard the reference to the Division Bench in *Sajanbir Singh Anand*. By consent, the question referred for decision was recast. Before this Division Bench the judgment of a previous Division Bench of this Court in *Sadbudhhi Bramhesh Wagh & Ors v Sheela Mahabaleshwar Wagh*[14] was cited. That decision in *Sadbuddhi Wagh* held that an administration suit would be governed by Article 110 of the Limitation Act and the period of limitation would be twelve years from the time when the exclusion from share became known to the plaintiff. Bobade and Ketkar JJ hearing *Sajanbir Singh Anand* were unable to agree with the decision in *Sadbuddhi Wagh*. They, therefore, referred the question to a larger Bench and framed the following questions that are now before the Full Bench:

> "1. Whether Article 110 of the Limitation Act, 1963 has any application to a suit for administration of the estate of a deceased?
>
> 2. What is the period of limitation for filing a suit for administration and partition of properties, both movable and immovable, left by a deceased and whether there will be different periods for such a

13 Per BH Marlapalle J & SJ Vazifdar J (as he then was).

14 2003 (6) BCR 787.

suit for immovable property and such a suit for movable property?"

20. Again, this forms no part of Mr. Shah's exposition. I have been left to trace all this for myself.

21. Now Mr. Shah cites a fourth order of the learned Single Judge who decided *Antony Eugene Pinto*, *Kobad Rustomji Noble* and *Mubarakunnis*. This is the decision in *Paresh Damodardas Mahant v Arun Damodardas Mahant* decided on 13th October 2014.[15] This decision does not seem to refer to the previous judicial history as noted above except for the decisions in *Mubarakunnis* (from which, as I have noticed, an Appeal was already admitted but to which there is no reference) and *Antony Eugene Pinto* (which, as I have also noted, had long since been set aside by consent in Appeal). In paragraph 31 of the *Paresh Mahant*, the learned Single Judge held yet again that the right to sue would accrue on the date of death of the father in a suit for administration. An Appeal against this order was admitted on 17th November 2014.[16] Interim relief has been continued. This order *is* placed by Mr. Shah.

22. To complete the narrative: The Full Bench reference was last placed on 14th October 2016 and has since been stood over.

23. The result of all this is that of the four decisions cited by Mr. Shah, two have been set aside in Appeal – *Antony Eugene Pinto* and *Kobad Rustomji Noble* and *Antony Eugene Pinto*. Appeals in the other

15 AIR 2015 Bombay 24.

16 Appeal (L) No. 674 of 2014:Appeal No. 662 of 2015.

two (*Mubarakunnis* and *Paresh Damodardas Mahant*) are admitted and pending. That *Antony Eugene Pinto* had been set aside by consent in appeal was not brought to the notice of Karnik J in *Sajanbir Singh Anand*; and it was his inability to agree with *Antony Eugene Pinto* that led to the reference to a larger Bench in the first place and, later, to the reference to the Full Bench.[17] As against this, the decision of Khanwilkar J in *Parmeshwari Devi Ruia* has been confirmed in Appeal.

24. There is another dimension to this. *Kobad Rustomji Noble* and *Antony Eugene Pinto* both sought to distinguish the decision of Khanwilkar J in *Parmeshwari Devi Ruia*. However, *Kobad Rustomji Noble* and *Antony Eugene Pinto* were both set aside in appeal. *Parmeshwari Devi Ruia* was *confirmed* in appeal. *Antony Eugene Pinto* and *Shehnaz Aftab Kapadia* were placed before Karnik J in *Sajanbir Singh Anand*, without it being pointed out that these were reversed in appeal, and without *Parmeshwari Devi Ruia* being noticed. Then, in *Mubarakunnis* and *Paresh Mahant*, the orders in *Sajanbir Singh Anand* do not seem to have been brought to the notice of the court – the learned single Judge was not told that another learned single Judge had disagreed and referred the very question for determination by a larger bench. Instead, both *Mubarkunnis* and *Paresh Mahant* proceeded as if *Noble* and *Antony Eugene Pinto* were settled law.

---

17 *Kobad Rustomji Noble* also considered *Sadbuddhi Bramhesh Wagh*, a judgment with which the Division Bench of Bobade & Ketkar JJ in *Sajanbir Singh Anand* disagreed, and which required the reference to the Full Bench.

25. Leaving aside all questions on merits as to limitation, it will be at once obvious from this narrative that the preliminary issue before me today seems to be directly covered by the issues pending before the Full Bench. It is for this reason that I will not decide the preliminary issue in this matter today, but will defer that consideration till after the decision of the Full Bench is rendered.

26. I will note, for completeness, the other authorities placed by Mr. Jain on the question of right to sue in relation to estates. Again I only note these but express no view. The first is the decision of the Privy Council in *Bolo v Koklan*,[18] in which the Privy Council held that there can be no right to sue until there is an accrual of right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendants against whom the suit is instituted. Then there is the decision of the Division Bench of the Madras High Court in *Kondcsami Pillai & Others v Munisami Mudaliar & Ors*[19] following the Privy Council. To the same effect is the decision of a learned Single Judge of this Court in *National Sports Club of India & Others v Nandlal Dwarkadas Chhabria & Others*.[20] In paragraph 18, the learned Single Judge arrived at the same conclusion that was enunciated by the Privy Council in *Bolo v Koklan*.

27. Mr. Jain then relies on the decision of the Supreme Court in *State of Punjab & Others v Gurdev Singh*,[21] where the Supreme Court

18 LVII Indian Appeals 325.

19 AIR 1932 Madras 589.

20 1997 (3) Bom.C.R. 565.

21 (1991) 4 SCC 1.

affirmed the principle set out in *Bolo v Koklan*, saying that generally the right to sue accrues only when the case of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is brought. There is the decision of the Supreme Court in *Daya Singh & Another v Gurdev Singh (Dead) by L.Rs. & Others*.[22] Here again the Privy Council was cited and followed.

28. This, in its entirety, is the judicial history and background relating to the preliminary issue of jurisdiction taken before me. As I have said, I will express no view on the issue of law and await the decision of the Full Bench, noting only, as I have at the beginning, that the applicable Articles of the Limitation Act that Mr. Shah invokes may be different from the ones enumerated in *Sajanbir Singh Anand*. Nonetheless the question of the applicable Article, the period of limitation and starting point of that limitation are all matters that appear to lie before the Full Bench for consideration.

29. I will instead make the following ad-interim order to preserve the *status quo*, the rights of the parties till the preliminary issue can be finally determined:

(a) Given the admitted position that the 2nd Defendant occupies the Shivam flat, and that the 1st Defendant visits occasionally from Gujarat, Defendants Nos. 1 to 4

22 (2010) 2 SCC 194.

are directed not to alienate, transfer, alienate or part with possession or create third party rights (including by way of leave and license) without prior leave of the Court obtained at least after two weeks' prior written notice to the Advocates for the Plaintiff;

(b) The Court Receiver is appointed for the limited purpose of making an inventory of the locker in Indian Overseas Bank, Stadium Road, Ahmedabad. The 1st Defendant is required to provide the keys to the locker. If she does not have these, the Branch Manager will allow that locker to be broken open at the cost of the Plaintiff. The contents of the locker will be inventoried and replaced either in the repaired locker or in any new locker that is assigned in substitution.

(c) Should the Court Receiver's inventory disclose the existence of any currency in demonetized denominations, the parties will be at liberty to apply for suitable orders, including that this currency be deposited by the Court Receiver in a separate account with the Bank of India or State Bank of India, Mumbai.

(d) All contentions as to whether the 2nd Defendant should be appointed as an Agent of the Court Receiver and on what terms are expressly left open to the final hearing of the Notice of Motion.

(e) There will also be an order in terms of prayer clause (a) against Defendants Nos. 1 to 4 requiring them to disclose on Affidavit all their dealings with the estate from the date of Kiritkumar's death with full particulars.

30. Affidavits in Reply have been filed. Since Mr. Jain has relied on further documents, further Affidavits in Reply may be filed. This is to be done by 9th January 2017. Affidavit in Rejoinder by 16th January 2017. Motion to be listed for directions on 23rd January 2017.

31. Liberty to the parties to apply, including for further ad-interim reliefs. Liberty also to apply to the Full Bench for being heard on the issue before that bench.

32. Since I have been able to obtain the citations and references of the judgments and orders mentioned above, and since this might conceivably be of aid to the Full Bench, the Registry is requested to place a copy of this order before the Full Bench for its convenience and reference.

33. I end this in profound sadness. I heard Mr. Jain and Mr. Shah at length on 2nd December 2016. I placed the matter today for pronouncement. Before I pronounced judgement in open Court today, I specifically asked Mr. Shah if he still maintained that *Kobad Rustomji Noble* and *Antony Eugene Pinto* were good law. He confirmed that he did and that both were binding precedents. It was

clear that Mr. Shah was completely unaware of the appeal court orders, and, too, the subsequent orders in *Sajanbir Singh Anand*.

34. Leaving aside the question of the applicable provisions of the Limitation Act, the one recurring theme in this judicial history is the failure to place the law accurately before court after court. Karnik J in *Sajanbir Singh Anand* was not shown that the decisions of the learned single Judge in both *Shehnaz Aftab Kapadia* and *Antony Eugene Pinto* had been reversed in appeal. Unable to agree with those decisions, Karnik J was left with no choice but to refer the matter for a decision by a larger bench; had he been apprised of the appellate orders, conceivably matters might have stood very differently today, especially since the 2007 decision in *Parmeshwari Devi Ruia* was not cited before Karnik J either. Before me now, this very pattern is repeated: *Kobad Rustomji Noble* and *Antony Eugene Pinto* are still cited as authoritative, though both have been set aside in appeal. *Parmeshwari Devi Ruia* is not shown because it is *contra*: it is said to be the responsibility of the other side to place. Karnik J's order in *Sajanbir Singh Anand* is not shown. The developments in the *Sajanbir Singh Anand* reference are not traced. All this I am left to discern on my own.

35. Wholly unrelated to any preliminary issue or the question of limitation, or to any estate, partition or administration action, is the decision of AM Khanwilkar J (as he then was) in *Chandrakant Govind Sutar v MK Associates & Anr*.[23] Counsel for the petitioner raised certain contentions on the maintainability of a civil revision

23 2003 (4) Bom CR 169 : 2003 (1) Mh LJ 1011.

application. Khanwilkar J pronounced his judgement in open Court, finding for the petitioner. Immediately thereafter, counsel for the petitioner brought to the court's notice that certain relevant decisions on maintainability had not been placed. He requested that the judgement be not signed and instead kept for re-hearing on the question of maintainability. At that fresh hearing, petitioner's counsel placed decisions that clinched the issue – against the petitioner. The civil revision application was dismissed. The counsel in question was A. S. Oka, now Mr. Justice Oka, and this is what Khanwilkar J was moved to observe in the concluding paragraph of his judgement:

> 9. While parting I would like to make a special mention regarding the fairness of Mr. Oka, Advocate. He conducted the matter with a sense of detachment. In his own inimitable style **he did the wonderful act of balancing of his duty to his client and as an officer of the Court concerned in the administration of justice. He has fully discharged his overriding duty to the Court to the standards of his profession, and to the public, by not withholding authorities which go against his client.** As Lord Denning MR in *Randel v W.* (1996) 3 All E. R. 657 observed:
>
> > "Counsel has time and again to choose between his duty to his client and his duty to the Court. This is a conflict often difficult to resolve; and he should not be under pressure to decide it wrongly. Whereas when the Advocate

> puts his first duty to the Court, he has nothing to fear. But it is a mistake to suppose that he (the Advocate) is the mouthpiece of his client to say what he wants. **The Code which obligates the Advocate to disregard the instructions of his client, if they conflict with his duty to the Court, is not a code of law — it is a code of honour.** If he breaks it, he is offending against the rules of the profession and is subject to its discipline."

This view is quoted with approval by the Apex Court in *Re. T. V. Choudhary*, [1987] 3 SCR 146 (*E. S. Reddi v Chief Secretary, Government of AP & Anr.*).

The cause before Khanwilkar J may have been lost, but the law gained, and justice was served.

36. Thirteen years ago, Khanwilkar J wrote of a code of honour. That was a time when we did not have the range, width and speed of resources we do today. With the proliferation of online databases and access to past orders on the High Court website, there is no excuse at all for not cross-checking the status of a judgement. I have had no other or greater access in conducting this research; all of it was easily available to counsel at my Bar. Merely because a judgement is found in an online database does not make it a binding precedent without checking whether it has been confirmed or set aside in appeal. Frequently, appellate orders reversing reported decisions of the lower court are not themselves reported. The task

of an advocate is perhaps more onerous as a result; but his duty to the court, that duty of *fidelity to the law*, is not in any lessened. If anything, it is higher now.

37. Judges need the Bar and look to it for a dispassionate guidance through the law's thickets. When we are encouraged instead to lose our way, that need is fatally imperilled.

(G. S. PATEL, J.)