

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.975 OF 2010
IN
EXECUTION APPLICATION NO.86 OF 1990
IN
CO-OPERATIVE CASE NO.ABN/65/658 OF 1971
IN
AWARD DATED 27th APRIL, 1978

Mr. Chandru Fatnani	...	Applicant
Vs.		
Sagar Sangeet & Conversion Scheme		
Co-Op Hsg. Soc. Ltd. & Ors.	...	Respondents

Mr. Karl Tamboly, Adv. i/b. Deepak Luhim, Adv. for applicant.
Mr. Vishal Kanade, Adv. a/w. Ms. Jaini Shah, Adv. & Ms. Bharavi Pathak, Adv. for Opponent No.1.

CORAM : MRS. ROSHAN DALVI, J.
DATE : 3rd March, 2015.

P.C. :

1. The applicant / decree holder has got notice issued under Order 21 Rule 22 of the CPC to execute the consent decree dated 27th April, 1978. He has also taken out the above Chamber Summons for appointment of receiver in respect of the suit property being flat No.2 / C, Sagar Sangeet, Shahid Bhagat Singh Road, Opp. Colaba Post Office, Colaba, Mumbai – 5 and injunction against the society, who was the original respondent, in which the suit flat is situate.

2. The two members of the society in respect of the suit flat filed a dispute in the cooperative Court with regard to certain arrears payable by them. They have since resigned. Their flat was vacated.

The society was the respondent in their dispute. It used the said flat for itself. The flat was not released by the BMC on account of a certain shed in the premises of the society which had to be removed. The flat was not allotted to any other member pending the release.

3. In such a scenario the applicant sought to be a member in the place of the original member and sought to settle the dispute with the society by consent terms in terms of which the decree of the cooperative Court has been passed and which is sought to be executed.

4. The society was represented by its advocate Mr. Bhawalkar in the above dispute between the society and the original member. The said advocate did not represent the society at the time of the settlement of the dispute by the execution of the consent terms. Another advocate is shown to have appeared for the society. He has signed the consent terms as the advocate of the society. He has also signed the consent terms as the opponent No.1 itself being the society. It is such consent terms which are sought to be executed.

5. The consent terms show that the applicant be accepted and added as opponent No.2 in the above dispute. The original disputants gave up their right, title, interest and claim and resigned from the society which designation was accepted by the society. The applicant herein paid the original disputants Rs.65,000/- in consideration of their resignation. The opponent No.1 allotted the flat to the applicant and who was to pay Rs.70,000/- to the society as his contribution towards the price of the flat within one month of the consent terms.

He has also agreed to get the suit flat released from the BMC at his own cost after which the society was to handover possession of the flat to him.

6. Such consent terms would bring to an end the dispute of the disputants, the society as also applicant.

7. The society against whom the consent terms are sought to enforced contends that the consent terms is a fraud as the society has never signed the consent terms, the society has never accepted the terms of the consent terms, the society has never passed any resolution to settle the dispute, the society has not passed any resolution authorising the new advocate to appear, the advocate has not obtained the NOC of the previous advocate who was not discharged, the new advocate has signed not only as the advocate of the society but as the society itself, the society had no knowledge of the consent terms and none of all the parties acted upon the consent terms.

8. It is upon this fraud that the society contends that the consent terms are not enforceable and the society has challenged the executability of the consent decree itself.

9. The applicant would contend that considering the fraud claimed by the society would be going behind the decree which the executing Court cannot do and the society must challenge the consent terms in a separate civil action. It is contended that the society's contention is that the decree is not validly passed on the ground of

fraud and hence the society has objected to the validity of the decree which ground cannot be the ground to challenge the execution of the decree. The applicant has relied upon the judgment of Division Bench of this Court in the case of ***Laxman Bala Surve & Ors. Vs. M/s. Pesh Builders, 1997(1) Bom C R 115*** to show that only the objection as to executability of the decree and not as to the validity of the decree can be considered. However, that was in a suit to set aside the consent decree which was alleged to have been obtained by fraud and misrepresentation. It was contended that because such suit was filed the decree could not be executed and hence Court opined that the decree would be required to be executed despite the suit being filed. As the suit was filed on the ground that the consent terms was not valid it having been obtained by fraud and misrepresentation which made it voidable and it was avoided by that party by filing the suit. Consequently the filing of the suit could not stay the execution.

The facts and circumstances of that case were diametrically different; it was a suit filed to stay execution which was not challenged. This is a challenge to the execution on the ground of fraud. That fraud is intrinsic to the suit. It is alleged on the ground of new facts, unknown to the party in the lis.

10. Counsel on behalf of the applicant has relied upon the case of ***Lalitabai W/o. Ishwarprasad Chopra Vs. Pundlik Dayaram Rangari (deceased) thru. Legal heirs, 2007(3) ALL M R 690***, in which a decree was alleged to have obtained by fraud. It was held that the objection as to executability could be raised in a separate suit. In that case the Regular Civil Suit was actually filed. The maintainability of the suit was challenged. Hence even in that case

the circumstances were wholly different.

11. In an execution application the Court would not go behind the decree. The Court would execute the decree including a consent decree. It would be upon whatever terms the parties agreed. However, no decree can be obtained by fraud. No consent decree can be passed by fraud. Such a decree would be nullity. Consequently no decree obtained by fraud can be executed.

12. It would, therefore, have to be seen whether the allegations of fraud can be prima facie shown without the Court having to go into the niceties of any fraud which could be done only in civil suit.

13. The various aspects relating to the agreement between the parties would, therefore, have to be seen :

(a) The consent decree in this case is obtained not by the original parties to the lis alone. It is obtained essentially by another party who is sought to join in the consent terms.

(b) The consent terms is not executed by the original advocate of the original opponent No.1 also. That advocate is not shown to be discharged. The NOC of the advocate is not on the vakalatnama of the new advocate. The applicant has obtained a certified copy of the consent terms and the vakalatnama. The vakalatnama shows no NOC. The new advocate has accepted the vakalatnama about three months before the consent terms is

executed. The new advocate has signed not only as the advocate of the society but as the society itself.

Counsel on behalf of the applicant contended that an advocate can sign as a party required to sign the consent terms under Order 23 Rule 3 of the CPC. (See *Byram Pestonji Gariwala Vs. Union Bank of India & Ors.*, AIR 1991 Supreme Court 2234 and *Union Bank of India Vs. Byram Pestonji Gariwala & Ors.*, AIR 1991 Bombay 185.)

Indeed the advocate can sign on behalf of the party but if the advocate signed on behalf of the party he would not sign as a party also.

It is interesting to note that the copy of the consent terms relied upon by the applicant is typewritten copy which shows Sd/-- against various names including the opponent No.1 society as also its advocate. A reading of the typewritten copy of the consent terms would show that the society as also advocate of the society have separately signed the consent terms. But that is not so.

The applicant has obtained the certified copy of the consent terms which show the same signature which is in the vakalatnama as the signature of the advocate for opponent No.1 to be in place of the signature for advocate of opponent No.1 as also opponent No.1.

(c) The chronology of events would be material to consider. The original advocate of the society appeared on behalf of the society in the co-operative Court at least till 15th December, 1977. It was for the disputants to prosecute their dispute which remained on the record of the cooperative Court.

The vakalatnama of the new advocate came to be signed on 1st February, 1978.

The consent terms itself came to be signed on 27th April, 1978.

Rs.70,000/- was to be paid by the applicant to the society by 26th May, 1978 since it was payable within one month.

The applicant never made payment to the society and he has stated to have deposited the said amount in this Court in this execution application.

From 1978 to 1989 the applicant did not claim his rights under the consent terms. He did not apply for possession of the suit flat and he did not get the suit flat released from the BMC. The applicant never applied for membership of the society. In fact the applicant has not shown anything done by him for the release of the flat from the BMC. Hence the applicant did not either make payment or get flat released and hence did not do anything to obtain the possession of the flat which he got and for which he signed the consent terms to be a member of the society.

(d) At the fag end of the limitation period (and it is justifiably contended on behalf of the society that after the society's records may have even be destroyed) the applicant filed the above execution application in June, 1989 and got it numbered in 1990.

(e) The applicant took out the above notice under Order 21 Rule 22 of the CPC on 28th April, 1990.

(f) The opponent society filed its reply on 11th June, 1990.

(g) The applicant applied for certified copy of the vakalatnama and the consent terms on 22nd June, 1990.

(h) The opponent society demanded inspection of the consent terms and the authority of the society given to the advocate who signed the consent terms by its first letter dated 9th July, 1990 before which the applicant had applied for certified copies of these documents.

The vakalatnama does not show the NOC of the previous advocate. The consent terms do not show the resolution of the society or any authority given to the advocate to appear.

(i) The vakalatnama is shown to be signed by R W Chande, Joint Secretary of the society but the consent terms is not signed by the said Secretary on behalf of the opponent No.1. It is, as aforesaid, signed by the said advocate as opponent No.1 itself.

(j) That advocate has since not been seen; he has not appeared for the society in execution.

14. The circumstantial evidence of what transpired between the parties who entered into consent terms and had to act upon the consent terms or who did not enter into consent terms and hence acted otherwise would, therefore, very material to see. It is shown by the conspicuous absence of any act on behalf of the applicant upon the consent terms. It is seen by the presence of specific letters of the society instead. This dual circumstantial evidence rings true the case of fraud. It would be seen thus :

i) The applicant never paid Rs.70,000/- to the society within one month or soon thereafter.

ii) The applicant never applied for release of the flat from

the BMC.

iii) The applicant never applied to be a member of the society.

iv) The applicant never acted to obtain possession of the flat agreed to be given to him.

v) The applicant is stated to have sent a notice by RPAD to the opponent society to accept Rs.70,000/- and to handover possession of the suit flat. The notice is stated to be sent by RPAD. The photocopy of the notice is not produced. The registered acknowledgment is not produced. The notice is not shown to be received by the opponent society. The opponent society has denied that the notice was sent.

vi) The applicant never sought to execute the consent decree until the fag end of the limitation period.

15. As against this, the opponent society has done acts in the ordinary course which would not have been by it had the consent terms been signed :

(A) The opponent society has itself applied to the BMC for release of the suit flat. Under its letter dated 3rd November, 1979 to the BMC setting out the facts requesting a visit and stating that the completion certificate could be granted and the flat could be released.

B) The opponent society has thereafter again written to the BMC on 23rd April, 1981 for release of the suit flat on the ground of the encroachment having been removed.

16. It is not known how, the applicant came to annex these

letters to his affidavit in support though they make no mention of the applicant, but the applicant also claims to have written to the BMC. That is shown to be written 8 years after the letters written by the society to the BMC. The applicant has annexed typewritten copies of letters dated 20th April, 1989 and 26th June, 1989 addressed to the BMC. The letters are wondrous. The applicant has not written any letter to the BMC to get flat released. After the flat was got released by the opponent society the applicant has written the aforesaid letters putting on record that the society had written to the BMC on 3rd November, 1979, 23rd April, 1981 and 28th April, 1981 and had complied with all the conditions of the BMC including condition No.5 so that the flat was got released by the society under the order passed by the Municipal Commissioner. He stated that the flat was used by the society but under the award he was entitled to the flat and called upon the BMC to confirm that it had handed over possession of flat No.2/C to the opponent society that he would take steps against opponent society.

Hence the applicant did not sow the seeds for the release of the flat as per the consent terms but wanted to reap the harvest of the society's endeavour to get the flat released.

17. The aforesaid facts show enough evidence that the consent terms is obtained by the applicant by practicing fraud not only upon the opponent society but in fact upon the Court itself. The consent terms is obtained by extrinsic fraud upon new material unknown to the opponent society which was a part to the dispute. Consent terms obtained by such fraud cannot allowed to be executed. (See *Sankaran Govindan Vs. Lakshmi Bharathi*, AIR 1970 SC 1764

paras 24 to 30) The objection to the consent terms is to the executability of the consent terms itself. The Court has to see the fraud, if any, on the face of the record. Once seen, the decree passed in terms of the consent terms becomes nullity. A decree which is nullity cannot be enforced or executed. Hence the objection to the executability made by the opponent society must be sustained. The case of the opponent society that it did not give any authority to that advocate or even to the party who has signed the vakalatnama as the Joint Secretary under any resolution of the society has to be accepted. There being no such resolution passed by the society and none which has been shown by the applicant even by the copy of the resolution served upon by the applicant, the entire exercise has been done by way of fraud by obtaining the signatures of an advocate as stated above as also of one R W Chande as the Joint Secretary of the society. Consequently the objection to the notice taken out by the claimant to the enforceability and executability of the consent decree / award must be upheld.

18. Hence notice is dismissed. Consequently there is no question of appointment of a receiver or grant of injunction as prayed for by the applicant. Hence the Chamber Summons is also dismissed. In view of the dismissal of the notice the execution application itself is dismissed.

19. The certified copy of the vakalatnama and the consent terms produced by the applicant shall be kept in sealed cover with the Prothonotary and Senior Master of this Court.

20. The vakalatnama of the present advocate who has obtained NOC from the previous advocate who filed above execution application is accepted on record.

(ROSHAN DALVI, J.)