

Dik / sat

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

**CHAMBER SUMMONS NO. 395 OF 2004
IN
EXECUTION APPLICATION NO.267 OF 2003
IN
SUMMONS FOR JUDGMENT NO. 1266 OF 2001
IN
SUMMARY SUIT NO. 1089 OF 1999**

Mrs.Ila Rohit Sanghvi & Ors.	...Plaintiffs / Applicants
Vs	
Dr. Pankaj Champaklal Gandhi & Anr.	...Defendants
And	
Mrs Jyoti Pankaj Gandhi	...Obstructionist.

WITH

**CHAMBER SUMMONS NO. 1195 OF 2004
IN
EXECUTION APPLICATION NO.267 OF 2003
IN
SUMMONS FOR JUDGMENT NO. 1266 OF 2001
IN
SUMMARY SUIT NO. 1089 OF 1999**

Mrs Jyoti P. Gandhi	...Applicant.
VS	
Smt. Bharti R. Khokhani & Ors.	...Respondents
And	
Dr. P.C.Gandhi	...Respondent No.2.

.....
Mr Shyam Mehta a/w Bhavik Manek & Udayan Shah for Dr. P.C.Gandhi.
Mr Y.V.Divekar i/b M/s Divekar & Co. for creditors.
Mr M.D.Narvekar, O.A. Present,
Ms Jyoti P. Gandhi, Applicant in person.
Mr.P.C. Gandhi, Insolvent present.
.....

**CORAM : S.C. GUPTE, J.
Reserved on : 20 October 2015
Pronounced on : 24 February 2016**

ORDER. :

These two Chamber Summonses concern the right of an obstructionist to a property attached in execution. Chamber Summons No.395 of

2004 is taken out by the decree-holder for removal of obstruction to the execution of a money decree passed in a Summary Suit and for delivery of possession of the flat purportedly owned by the judgment debtor to the receiver in execution, whilst the other chamber summons, namely, chamber summons No.1195 of 2004, is taken out by the obstructionist for removal of attachment in respect of the suit flat. The obstructionist is the wife of the original Defendant and judgment debtor. The two chamber summonses involve essentially the right of the obstructionist to raise an obstruction to the attachment.

2 The case of the obstructionist may be briefly narrated as follows (The reference to 'Plaintiff' includes his predecessor in title) :

- (i) Prior to 1984, that is, prior to the Defendant's marriage to the obstructionist, the former was part of an HUF comprising of his father, mother, himself and his three brothers. On 4 May 1984, the Defendant was married to the obstructionist. In the following two years two sons were born to them.
- (ii) On 16 April 1991, the Defendant purchased the suit flat under an agreement for sale. On 13 November 1991, the share certificate in respect of the flat was transferred in the name of the Defendant.
- (iii) On 30 January 1995, a wealth tax return was filed by the Defendant in respect of assessment year 1992-93 (corresponding to previous year 1991-92) showing the suit flat as HUF property. Filing of the return was followed by notices from the Wealth Tax Department raising certain requisitions, which were responded to by the Defendant through his Chartered Accountant. On 31 March 1995, an assessment order for the assessment year 1992-93 was passed in respect of the Defendant's HUF. Pursuant to a notice under Section 143(1)(a) of the Income Tax Act, tax was duly paid by the HUF for the assessment year. This was followed by further returns, assessments, intimations and payments of tax for the following

assessment years.

- (iv) In the meantime, on 9 February 1995 a loan of Rs.5 Lac appears to have been advanced by the Plaintiff to the Defendant. By May 1996, the loan was outstanding.
- (v) It is the case of the obstructionist that on 13 May 1996, the Plaintiff illegally entered into the suit flat and committed criminal trespass, forcibly dispossessing the Defendant's wife from the suit flat and occupied the suit flat along with his family. Simultaneously, the Plaintiff instituted a suit against the Defendant and the obstructionist in the City Civil Court, Mumbai (S.C.Suit No.2974 of 1996) seeking an injunction restraining the Defendant and the obstructionist from disturbing the Plaintiff's possession of the suit flat. On 11 October 1996, the Plaintiff also filed another suit against the Defendant and the obstructionist in this Court (Suit No. 167 of 1997) seeking declaration of the former's ownership in respect of the suit flat.
- (vi) Whilst these suits were pending, on 3 November 1996, an FIR was filed by the obstructionist against the Plaintiff and his son for the offence of criminal trespass, forcible break in, theft etc. Subsequent to the filing of this FIR, on 8 November 1996, the obstructionist filed a suit against the Plaintiff and his family members (Suit No.4606 of 1996) under Section 6 of the Specific Relief Act for recovery of possession of the suit flat.
- (vii) By an order dated 12 March 1997, the City Civil Court appointed Court Receiver in respect of the flat with directions to remove the Plaintiff and put the obstructionist in possession of the suit flat. Though an AO filed by the Plaintiff against that order was admitted by this Court, the direction to the Court Receiver to put the obstructionist in possession of the suit flat was not disturbed by this

Court, though the order was said to be subject to the decision in AO. Special Leave Petition filed by the Plaintiff against the order of this Court was dismissed by the Supreme Court on 29 May 1997. The Plaintiff thereupon vacated the suit flat. Subsequently, the AO filed by the Plaintiff against the order of the City Civil Court was dismissed by this Court for want of prosecution. On 10 December 1999, the suit filed by the Plaintiff for declaration of his title to the suit flat (Suit No. 167 of 1997) was withdrawn by the Plaintiff.

- (viii) Around this time, the present summary suit (Summary Suit No.1089 of 1999) was filed by the Plaintiff against the Defendant. On 10 December 2002, the suit was decreed for an amount of Rs.5 Lacs with interest at the rate of 6 % per annum from the date of the institution of suit till the date of payment or realization. In the execution application filed by the decree holder, the Court Receiver attached to this Court sought to take possession of the suit flat.
- (ix) On 2 May 2003, the obstructionist obstructed the execution of the decree, following which Chamber Summons No. 647 of 2003 was filed by the obstructionist for protection against her dispossession. The Chamber Summons was partially allowed by a learned Single Judge of this Court, imposing costs on the Plaintiff. Though the possession of the obstructionist was protected, the Plaintiff was permitted to execute the decree and apply for taking over possession of the suit flat in execution. Both the Plaintiff and the obstructionist challenged this order. The appeal filed by the Plaintiff was dismissed by a Division Bench of this Court. The obstructionist's challenge to the order of the learned Single Judge was disposed of by the Division Bench observing that in view of the obstruction of the Appellant, the decree holder would have to file an appropriate application under Order XXI Rule 97 of the Code of Civil Procedure, 1908 ("CPC") for execution of the decree.

- (x) In the premises, on 5 March 2004, Chamber Summons No.395 of 2004 was filed by the Plaintiff. Under an order passed by a learned Single Judge of this Court on 29 July 2004, the suit flat was attached in execution of the decree. The Plaintiff was, however, not permitted to dispossess the obstructionist pending hearing of the Chamber Summons.
- (xi) On 18 August 2004, Chamber Summons No.1195 of 2004 was taken out by the obstructionist for raising of the attachment.
- (xii) On 18 February 2008, whilst these two Chamber Summonses were pending, an Insolvency Petition was filed by the Defendant. On 11 May 2009, the Defendant was declared as insolvent.
- (xiii) On 17 August 2009, a Notice of Motion was taken out by the Plaintiff (Notice of Motion No.57 of 2009) seeking annulment of the order of adjudication.
- (xiv) On 21 August 2009, a Deed of Rectification was executed by the Defendant for rectification of the name of the transferee as the HUF of the Defendant. A deed of confirmation-cum-declaration was thereafter executed, which has since been duly registered. The share certificate of the society was subsequently transferred to the name of the Defendant's HUF.
- (xv) That is where the matter stands today. The Defendant -judgment debtor is adjudged as insolvent. The flat stands in the name of the HUF of the Defendant. The obstructionist, who claims to be a member of the HUF, has been residing in the flat. The Plaintiff refutes the title of the HUF and wants the flat to be sold in execution of the decree against the Defendant – judgment debtor.

whether the suit flat belongs to the Defendant in his personal capacity or is it an HUF property. Though, by virtue of a deed of confirmation-cum-declaration and deed of rectification read with the agreement for sale, the HUF is the transferee of the suit flat and also a share holder of the society in respect of the same, the deed of rectification as well as the deed of confirmation-cum-declaration and the share certificate have been issued after 2009 by which date the Defendant was already declared as insolvent. Learned counsel for the Plaintiff submits that these documents have been executed and transfer of the suit flat in the name of HUF has been obtained only with a view to defeat the rights of the Defendant's creditors including the Plaintiff. It is submitted that the Summary Suit was already decreed and the order of this Court permitting execution of the decree before sealing of the same was already in place before these documents were executed and share certificate was transferred in the name of the Defendant's HUF. In response, it is submitted by learned counsel for the obstructionist that the flat was declared to be an HUF property much before the decree was passed in the Summary Suit and execution of that decree was ordered by this Court. It is submitted that in the first wealth tax return in respect of the suit flat for the assessment year 1992-93 corresponding to the financial year in which the same was purchased by the Defendant, the flat was declared as an HUF property. It is submitted that the notices of the wealth tax and income tax department, the Defendant's response to the notices, the assessment orders passed for the assessment year 1992-93 as well as the following years, the notices of demand and intimations received in respect of such assessments and the payments made by the HUF in response thereto, which are all evidenced by chalans issued by the tax authorities, make it clear that the flat was at all material times declared and continued to be an HUF property.

4 Based on these facts and the submissions advanced at the bar, the following two questions need to be determined:

- (i) Whether the suit flat, which was originally purchased in the name of the Defendant presumably as his separate property, ceased to be such separate property and acquired the characteristic of a joint

family property by his own volition ?

- (ii) If yes, whether the property has acquired such characteristic of joint family property before the relevant date so as to defeat the Decree - Holder's right to proceed against it in execution or insolvency ?

5 The Supreme Court in the case of **Goli Eswariah Vs Commissioner of Gift Tax, Andhra Pradesh**¹ examined the true scope of the doctrine of throwing a property into the common stock or common hotchpot of a Hindu Joint Family. In the first place, the court noted that a Hindu joint family was not a creature of contract. A joint Hindu family was rather a natural state of a Hindu family. It exists as an ordinary incident of Hindu Law. Secondly, a separate property by a member of a joint Hindu family gets impressed with the character of a joint family property if it is voluntarily thrown by him into the common stock with the intention of abandoning his separate claim therein. The act by which the coparcenar thus throws his separate property into the common stock is a unilateral act. It is by his individual volition that he renounces his individual right in that property and treats it as a property of the family. No sooner than he declares his intention to treat his individual property as a joint family property, the property assumes the character of a joint family property. There is no question of acceptance by the family of the property thrown into the common stock. So also, this transaction does not of itself amount to a transfer; no transfer deed is needed for such change and no transfer ensues either.

6 The next question which arises is whether, though the existence of a coparcenery may be necessary before a coparcener can throw his self-acquired property into the common stock, it is necessary that any joint family property should be in existence so as to form as an ancestral nucleus or other joint family property with which the self-acquired property would get mixed. Even here, as clarified by the Supreme Court in the case of **Goli Eswariah** (supra), a separate property of a Hindu ceases to be a separate property and assumes the

1 1970(2) Supreme Court Cases 390.

characteristic of a joint family or ancestral property not by any physical mixing with some joint family or ancestral property, but by his own volition and intention of waiving and surrendering his separate rights in it. The High Court of Madras in the case of **R. Subramania Iyer Vs. The Commissioner of Income Tax, Madras**² held that under the Hindu Law there was no necessity of existence of any joint family property in order that there may be a joint family and that the joint family might well start with no ancestral nucleus or other joint family property and even in the absence of such nucleus or joint family property, it was perfectly open for an individual to impress upon a self-acquired property belonging to him the characteristic of joint family property. No formalities were necessary in order to bring this about and the only question was one of intention on the part of the owner of the separate property to abandon his separate rights and invest it with the character of a joint family property. This view of Madras High Court was accepted by a Division Bench of our Court in the case of **Damodar Krishnaji Nirgude Vs Commissioner of Income Tax, Bombay South**³. Our Court in that case held as follows:

“8. Now, in our view, possession of ancestral or joint family property under the Hindu law is not a condition precedent for enabling a coparcener to impress his self-acquired property with the character of a coparcenary property. What constitutes impressing self-acquired property with the character of coparcenary property is the unequivocal act on the part of the coparcener to abandon his individual exclusive right in the property in favour of the coparcenary. It is a well-known principle of Hindu law that a coparcenary can exist even though it may own no coparcenary property. When a coparcenary can exist without possessing or owning coparcenary property, there is no reason why a coparcener could not be in a position to abandon his rights in his self-acquired property in favour of the coparcenary. It is his right under the Hindu Law on the exercise of which the property assumes the character of the coparcenary property. Sir Dinshah Mulla in his Treatise on Hindu Law, 12th edition, at page 332, in paragraph 227, has stated the position thus:

2 AIR 1955 Madras 623

3 [1962] 461 ITR 1252(Bom)

“Property which was originally the separate or self-acquired property of a member of a joint family may become joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established... Separate property thrown into the common stock is subject to all the incidents of joint family property.”

9. Mayne has also stated the position in identical terms (Mayne's Treatise on Hindu Law and Usage, 11th edition, page 348, paragraph 282).

10. From the aforesaid observations of the learned authors, it is clear that the only thing that is required to impress the self-acquired property with the character of a coparcenary property is a clear intention on the part of the coparcener owning that property of abandoning all separate claims upon it and throwing it into the joint stock of the coparcenary. A similar view has been taken by the Madras High Court in R. Subramania Iyer Vs. Commissioner of Income Tax, where it has been held:

“Under the Hindu law in order that a joint family may exist it is not necessary that there should be joint family property. A father and his son constitute members of a joint Hindu family and even if there was no ancestral nucleus or other joint family property there is nothing to prevent the father from impressing upon any self-acquired property belonging to him the character of joint family property. No formalities are necessary in order to bring this about and the only question is one of intention on the part of the father to abandon his separate rights and invest it with the character of joint family property.”

7 Applying this law to the facts of our case, it is clear that the declaration of the suit flat as HUF property and its assessment through all these years as such has impressed on it the characteristic of a joint family property. It is not necessary for the obstructionist to show that there was any ancestral nucleus or other joint family property owned by the joint family either for establishing the existence of an HUF or for impressing the suit flat thrown in the common hotchpot of the family with the characteristic of a joint family property. The declaration made to the wealth tax department and assessment sought on

the basis thereof are sufficient to effectuate the transaction of throwing the property into common hotchpot.

8 The relevant date for impressing the property with the character of a joint family property is the date of declaration. As we have seen above, no formality is necessary to effectuate this and as soon as the act of throwing the property into a common hotchpot is accomplished by expressing volition and intention to do so, in this case by a declaration of the property as HUF property before the wealth tax department, the property gets impressed with the character of a joint family property. In the present case, this has happened on 30 January 1995 when the wealth tax return was first filed by the Defendant in respect of the assessment year 1992-93 (corresponding to previous year 1991-92) showing the suit flat as an HUF property. In the first place, the acknowledgment issued by the Income tax Department, Exh O-19, does disclose that the return filed by the Defendant was in the capacity of an HUF. There is sufficient connection between the wealth tax return filed by the Defendant on 30 January 1995 and the assessment order passed by the wealth tax officer on 31 March 1995. The name of the assessee shown in the order is of the Defendant as an HUF. The status of the assessee disclosed is that of an HUF. The net wealth disclosed in the assessment order, namely, Rs.2,36,450/-, is the same as what is mentioned in the return. The assessment order refers to the details of the immovable property furnished by the assessee through his Chartered Accountant. The computation of wealth for the assessment year 1992-93 on which the assessment order is based works out the net value of the wealth at Rs.2,36,450/- after taking into account the immovable property located in India, namely, the suit flat. The self assessment tax paid on the assessment of HUF for the year 1992-93, which is evidenced by the original wealth tax receipt produced in evidence (Exh O-24) corresponds with computation of wealth and the amount of tax worked out therein. The notice of demand raised on the Defendant's HUF under Section 30 of the Wealth Tax Act, 1957, based on the return filed for the year 1992-93 and preceded by notices under Section 16(2) and 17 of the Wealth Tax Act, 1957 (all of which are reproduced as secondary evidence in the form of photo copies, for the production of which a case is made out in the evidence) shows the tax

demand of Rs.534/- for the assessment year 1992-93. This demand has been duly paid. A receipt of the wealth tax so paid is also produced in evidence, marked as Exh O-33. Further assessment record is produced which reiterates the position that the Defendant's HUF continued to be assessed as such and tax liability was worked out and paid accordingly, such payments being evidenced by acknowledgments of returns, balance sheets, computation of income, intimations under Section 143(1) of the Income Tax Act and challans of income tax, all of which are duly produced as Exh O-25, Exh O-44, O-45, Exh O-26, O-27, O-28 to Exh O-29 r/w Exh O-46, O-47, Exh O-31 and O-30, Exh-0-32 read with Exh O-48 and O-49 with Exh O-33 and O-34. All this documentary evidence establishes that throughout the relevant period, the suit flat was shown as an asset of the Defendant's HUF and on that basis assessments were made for wealth tax as well as income tax.

9 In the premises, it is clear that the suit flat acquired the characteristic of joint family property on 30 January 1995. The execution was ordered by this Court on 23 April 2003. Insofar as insolvency of the Defendant is concerned, the adjudgement occurred on 11 May 2007. The suit flat, having ceased to be an individual property of the Defendant insolvent more than two years prior to that date, does not fall within the avoidance provision of Section 55 of the Presidency – Towns Insolvency Act.

10 The question now is whether the attachment should be raised altogether or should it be restricted to the share of Respondent No.2 to Chamber Summons No.1195 of 2004, i.e. the original Defendant. It is submitted by learned Counsel for the decree holder that, if at all, raising of attachment should only be considered with respect to the share of the Applicant, who has come before the court with the plea of joint family property. It is submitted that the record bears that the HUF consists of 4 members, namely, the Defendant, the Applicant and two of their sons, namely, Jay and Yash. It is submitted that on a finding that the Applicant has a share in the property, the attachment could only be raised to the extent of her share. It is also submitted that in any event, the other two coparceners, namely, the sons of the Defendant, are liable for the debts

contracted by the father under the principles of Hindu law.

11 Since I have come to the conclusion that the property is a joint family property and since according to the judgment debtor himself, coparcenery consists of four individuals the share of the Defendant / judgment debtor in the property is merely 25%, though undivided, I am not inclined to grant any relief insofar as the shares of sons are concerned to the decree holder. In any event, there is no pleading to the effect that the sons are liable for the debts contracted by their father whether as their pious obligation or otherwise. If the Plaintiff / decree holder has any case for attaching their shares on any footing, he may adopt such proceedings as he may deem fit. Surely, in this chamber summons he is not entitled to such relief.

12 The Applicant appeared in person and made submissions on the question as to whether the attachment could be continued at all even insofar as the undivided share of the defendant / judgment debtor in the HUF property is concerned. It is submitted that there is no prayer in the Plaintiff's chamber summons, namely, Chamber Summons No.395 of 2004, seeking attachment of the Defendant's undivided share in the HUF property. She relies on a judgment of the Supreme Court in the case of **Vinay Krishna vs. Keshav Chandra**⁴ in support of her contention that without a specific plea, no such relief could be granted to the Plaintiff. I am afraid what the court seeks to do whilst continuing with the attachment of the defendant / judgment debtor's share in the HUF property is merely to restrict the attachment ordered earlier in respect of the entire property to the share of the defendant as a coparcener to which alone it can legitimately relate. This is like reading down the attachment and there is no need for specific prayer to restrict it to the Defendant's share. So also, the fact that the share of the Defendant as a coparcener is an undivided share does not come in the way of attaching it in execution of a decree.

13 In the premises, it is ordered as follows:

4 AIR 1993 SC 957

- (a) The attachment of the suit flat, namely, flat No.21, 5th Floor, Gautam View Co-operative Housing Society, Seven Bungalows, Andheri (West), Mumbai 400 03 is raised;
- (b) The share of Dr. P.C.Gandhi, Respondent No.2 to Chamber Summons No.1195 of 2004, in the suit flat to the extent of 25 per cent undivided share shall stand attached in execution of the decree dated 10 December 2002 passed in Summary Suit No.1089 of 1999;
- (c) It is ordered that the possession of the Applicant in Chamber Summons No.1195 of 2004 cannot be disturbed by the Plaintiff / decree holder without specific orders in that behalf in execution or otherwise;
- (d) The Plaintiff decree holder shall be entitled to adopt such proceedings as he may choose in respect of the shares of the Defendant's two sons in the HUF property;
- (e) All rights and contentions of the parties in that behalf are kept open;
- (f) There shall be no order as to costs;
- (g) The Chamber Summonses are disposed of accordingly;

14 Learned Counsel for the Plaintiff seeks continuation of the order of attachment in respect of the entire suit flat for a limited period. I do not propose to continue the attachment, since the matter has been heard in extensio, after which I have raised the attachment, giving liberty to the Plaintiff to take appropriate steps for proceeding against the shares of the other coparceners. I, however, would order the shares of the other coparceners in the suit property to be protected for a limited period. Accordingly, the other coparceners are directed not to dispose of their respective shares or create any third party interest in respect thereof for a period of four weeks from today.

15 The other matters including the chamber summons and the notices of motion may now be placed before the regular court hearing insolvency matters.

(S.C.GUPTE J.)