

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

**CHAMBER SUMMONS NO.420 OF 2011
IN
EXECUTION APPLICATION NO.250 OF 2008
IN
ARBITRATION CASE NO.1210 OF 2005**

M/s.Sree Gokulam Chit & Finance Co. (P) Ltd. .. Disputants

vs.

Devinder K. Bhatia, S/o. Sri Khemchand Bathia .. Respondents

And

Gaurav Mehta .. Applicant

Mr.Dharam Jumanani a/w Mrs.Aarathi Thampy and Mr.Kiran S. Mohite
i/b Mr.Kiran Mohite for the applicant

Mr.S.B.Rao i/b M/s.India Law for the decree holder / respondent

**CORAM : K. K. TATED, J.
DATE : AUGUST 8, 2017**

PC.:

1. Heard the learned counsel for the applicant.
2. The learned counsel for the applicant submits that they are not claiming any relief against the respondent Devinder K. Bhatia in the present proceedings, and hence, it is not necessary to serve him. Statement is accepted at the cost and consequences of the applicant.

3. By this Chamber Summons, the applicant third party is seeking the order of setting the warrant of attachment dated 27.9.2010 issued under Order XXI Rule 54 of the Code of Civil Procedure, 1908 in respect of the property belonging to him Flat No.801 8th floor, Akshardham Co-operative Housing Society Ltd., Near Link Road, Malad (W), Mumbai 400 064.

4. The learned counsel for the applicant submits that in the present proceedings, the disputant decree holder initially filed Arbitration Proceeding before the Arbitrator at Chennai against the respondent. As no one appeared before the Arbitrator on behalf of respondent, the Arbitrator passed award on 30.11.2005 holding that the respondent is liable to pay sum of Rs.1,82,000/- together with interest on the principle amount and further interest of Rs.12% p.a. from the date of filing of dispute, till the entire amount is paid with cost of Rs.3,885/-.

5. The learned Counsel for the applicant submits that the applicant purchased the suit property from the respondent by agreement for sale dated 13.5.2006 for a total consideration of Rs.18,00,000/-. He submits that before executing the said transaction the applicant made enquiry with Akshardham Co-op. Housing Society Ltd., where the suit flat is situated, about encumbrance, charge or liability, if any. He submits that the Society by its letter dated 11.06.2006 informed IDBI Bank Ltd. that the said flat as well as the building and the land appurtenant thereof are not subject to any encumbrance, charge or liability of any kind whatsoever and that the entire property is free and marketable. He submits that on the basis of said letter from Akshardham Co-op.Housing Society Ltd. they registered the agreement for sale on 13.5.2006 by paying stamp duty. He submits that as per the

agreement between the applicant and the owner of the said flat, the applicant undertook to clear the loan to the extent of Rs.7,66,573/- to the Bank of India. He submits that as per terms and conditions between the applicant and the owner of the said flat, the applicant paid sum of Rs.50,000/- as Earnest money to the respondent, Rs.7,66,573/- to the State Bank of India towards their loan and Rs.9,83,427/- to the respondent. He submits that entire payment was made by the applicant by cheque. In support of this contention, the learned counsel for the applicant relies on Exhibit-B and Exhibit-C to the present Chamber Summons. He submits that thereafter the Society also transferred share certificate bearing no.149 in favour of applicant on 25.11.2007. Photocopy of the said share certificate is at Exhibit-D on page 37 to the Chamber Summons.

6. The learned counsel for the applicant submits that as per the terms and conditions of sale deed, the respondent handed over vacant and peaceful possession of the suit premises to the applicant on 31.5.2006. Since then, the applicant is in possession and enjoying the same. The learned counsel for the applicant submits that before purchasing the said flat, he made enquiry from the Society and was satisfied that respondent was holding marketable title. He submits that though the disputant decree holder obtained award dated 30.11.2005 from the sole arbitrator, they filed Execution Application bearing 250 of 2008 before this court on 6.5.2008 and thereof, moved for warrant of attachment. Same was issued on 27.9.2010 and received by them in December, 2010. He submits that as per section 64(2) of the Code of Civil Procedure, 1908, applicant is a bonafide purchaser of the suit property. Same was purchased by him before issuing any attachment by this court. He further submits that even the decree holder never

informed the Society about the award passed by Arbitrator. He submits that the applicant being a bonafide purchaser, this Hon'ble Court be pleased to lift the attachment order dated 27.09.2010 issued by this court in respect of the suit property. He submits that if the said attachment is not lifted, irreparable loss will be caused to the applicant. He submits that in any case, as on today, applicant is bonafide purchaser of the suit property. Same stands in the name of the applicant in the record of the Society and at present, he is paying maintenance charges to that effect. Therefore Chamber Summons be made absolute in terms of prayer clause (a) and (b) with costs.

7. On the other hand, the learned Counsel for the decree holder vehemently opposed the present Chamber Summons. He submits that in the present proceeding, after following due process of law, sole arbitrator passed award on 30.11.2005 for sum of Rs.1,82,000/- against the respondent. He submits that the respondent with malafide intention to avoid his liability sold the suit property to the applicant. He submits that as on today, the decree holder have to recover sum of Rs.1,82,000/- with interest. Therefore, there is no question of lifting the attachment order passed by this court. He submits that the decree holder is entitled to recover their dues by following due process of law i.e. sale of the suit property. He submits that the transaction between respondent and applicant is just to avoid their liability for payment of awarded amount by the sole Arbitrator. Hence, there is no substance in the present Chamber Summons and same is required to be disposed with costs.

8. I have heard both the sides. In the present proceeding, though the sole arbitrator passed award on 31.11.2005, decree holder failed

and neglected to take steps to execute the same according to law immediately. First time, they filed application for Execution Application No.250 of 2008 before this court on 6.5.2008. Thereafter after more than two years, they moved for warrant of attachment. Same was issued on 27.9.2010 in respect of the suit flat. It is to be noted that though award was passed on 30.11.2005, decree holder failed and neglected to inform their claim to the Akshardham Co-op.Housing Society Ltd. where the suit flat is situated. For want of knowledge about the award dated 30.11.2005, the said Society issued letter dated 11.6.2006 in favour of IDBI Bank Ltd. where it is specifically stated that the flat was not subject to any encumbrance. The portion of the letter reads thus:

“We hereby assure you that the said flat, as well as building and the land appurtenant thereto are not subject to any encumbrance, charge or liability of any kind whatsoever and that the entire property is free and marketable.”

“We further confirm that we have clear, legal and marketable title to the said property and every part thereof, and that all taxes and dues in respect thereof have been paid upto date.”

9. Apart from that, the Society already transferred share certificates in favour of the applicant. In any case, applicant has purchased the suit property before the date of attachment order. As per section 64(2) of the Code of Civil Procedure, 1908, applicant is a bonafide purchaser of the suit property. The Sub-section (2) is in the nature of an exception to Sub-section (1) and provides that nothing in Section 64 shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment. It is stated

in Sub-section (2) where the property sought to be attached is transferred and registered after attachment, the Order of attachment prevails over the transfer. The difficulty arises where the property sought to be attached is contracted for such transfer or delivery but is entered into before an Order of attachment is executed, and the registration of the transfer takes place after Order of attachment is executed. The Supreme Court in ***Vannarakkal Kallathil Sreedharan v. Chandramaath Balakrishnan (1990) 3 SSC 291*** has made the following observations:

“Under a contract of sale entered into before attachment the conveyance after attachment in pursuance of the contract passes on good title in spite of the attachment. The agreement for sale indeed creates an obligation attached to the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the Judgment-debtor, the attachment cannot be free from the obligations incurred under the contract for sale. Though Section 64 Code of Civil Procedure was intended to protect the attaching creditor, but if the subsequent conveyance is in pursuance of an agreement for sale which was before the attachment, the contractual obligation arising therefrom must be allowed to prevail over the rights of the attaching creditor. The rights of the attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property. The attaching creditor cannot ignore the obligation and proceed to bring the property to sale as if it remained the absolute property of the Judgment-debtor.”

10. Further, the Supreme Court ***Hamda Ammal v. Avadiappa Pathar (1991) 1 SSC 715*** has observed:

“When the property belonged to the Defendant Judgment-debtors (vendors) and the sale deed had already been

executed by them prior to the attachment before Judgment and only its registration remains, then neither the attachment before Judgment nor a subsequent attachment or court sale of the property would confer any title by preventing the relation back. The fact that the document of sale had not been registered until after the attachment makes no difference. Even an unregistered document can be received as evidence for purposes mentioned in the proviso to Section 49 of the Registration Act. The contention that till registration, the execution, the execution of the sale deed does not confer any rights whatsoever on the vendee cannot be accepted.

The legislature by the insertion of Sub-section (2) desired to limit the benefits of the above mentioned Judgments to bona fide transfers. In any transaction for transfer or delivery of the property attached, where the contract is executed and registered before attachment, the mischief of Sub-section (1) shall not apply. It shall, however, apply to following situation.

(i) Where the property is transferred and registered after attachment.

(ii) Where the property is transferred before attachment but registration takes place after attachment.”

11. The Hon'ble Supreme Court has observed that Section 64(1), inter alia, provides that where an attachment has been made, any private transfer or delivery of property attached or of any interest therein contrary to such attachment shall be void as against all claims enforceable under the attachment. Sub-section (2) protects the aforesaid acts if made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment. The concept of registration has been introduced to prevent false and frivolous cases of contracts being set up with a view to defeat the attachments. Reference can be made of Apex Court judgment in the matter of ***Salem Advocate Bar Association, Tamil Nadu v. Union of***

India (UOI) AIR 2005 SC 3353

12. Hence, I am of the opinion that the applicant has made out a case for allowing the Chamber Summons. Following order is passed:

A) Chamber Summons is allowed in terms of prayer clause (a) and (b) which reads thus:

“(a) That this Hon'ble Court be pleased to quash and/or set aside the Warrant of Attachment dated 27th September, 2010 issued under Order XXI, Rule 54 of the Civil Procedure Code, 1908 in respect of the property belonging to the applicant herein viz. Flat No.801 8th floor, Akshardham Co-operative Housing Society Ltd., Near Link Road, Malad (W), Mumbai 400 064.

(b) That this Hon'ble Court be pleased to vacate and/or raise the attachment levied pursuant to the aforesaid Warrant of Attachment dated 27th September, 2010 in respect of the property belonging to the Applicant herein viz. Flat No.801 8th floor, Akshardham Co-operative Housing Society Ltd., Near Link Road, Malad (W), Mumbai 400 064.”

B) Office of the Sheriff, Mumbai is directed to take appropriate steps for raising the attachment and issuing appropriate certificate to the applicant.

C) Chamber Summons stands disposed of accordingly.

D) No order as to costs.

(K.K.TATED, J.)