

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO.931 OF 2007
WITH
EXECUTION APPLICATION NO.434 OF 2006
IN
SUIT NO.1539 OF 1979**

Kirtikumar Fulchand VoraApplicant/Org. Def. No.1

IN THE MATTER BETWEEN :

Smt. Renuka Anantrai Vora and Ors.Plaintiffs

Vs.

Kirtikumar Fulchand Vora and Anr.Defendants

Mr. K.H. Halai i/b. M/s. Halai and Co. for plaintiff no.1.

Ms. Kavita A. Shah for defendant no.1/applicant.

CORAM : K.R.SHRIRAM, J.

DATE : 26th JULY, 2017

PC.:

1 The chamber summons has been taken out for the following
three reliefs :

“(a) That the Hon'ble Court be pleased to direct the plaintiff no.1 Mrs. Renuka A. Vora to deposit in this Hon'ble Court within two weeks, 6.119 kgs of gold of .995 fineness which she received against seven National Defence Gold Bonds, 1980, from Reserve Bank of India, Mumbai and Rs.2,86,110/- being the price for the deficit quantity of the gold bonds.

(b) If the plaintiff no.1 Mrs. Renuka A. Vora complied with the prayer (a) above, the Hon'ble Court be pleased to direct the registry to hand over the said 6.119 kgs of gold of .995 fineness and Rs.2,86,110/- to the defendant no.1, the decree holder, i.e., Kirtikumar Fulchand Vora.

(c) If the plaintiff no.1 Mrs. Renuka A. Vora fails to comply with the prayer (a) above, this Hon'ble Court may be pleased to fix the amount of compensation with interest at such rate as this Hon'ble Court may deem fit and proper as per provisions of Order XXI Rule 31 of C.P.C., 1908, payable by the plaintiff no.1 to the defendant no.1, the decree holder, pursuant to the decree dated 19.12.1985 and the plaintiff no.1 be directed to pay the same to the defendant no.1, within the period to be filed by the Hon'ble Court.”

2 The original plaintiff one Anantrai Fulchand Vora filed a suit in this Court for a declaration that plaintiff is the owner of 21 National Defence Gold Bonds and for mandatory injunction directing defendant no.1 to hand over to plaintiff the said bonds. The original plaintiff and defendant no.1 were brothers and original defendant no.2 was the mother. The original plaintiff died intestate on 22nd October, 1979 and present plaintiffs are his legal heirs.

3 Defendants filed their written statement wherein it was claimed that the gold bonds though purchased in the name of original plaintiff Anantrai was the absolute property of the deceased Fulchand, i.e., father of original plaintiff and defendant no.1 and husband of original defendant no.2. It was also claimed in the written statement that the gold bonds were purchased in the year 1966 out of the income of Fulchand and at that time original plaintiff had no source of income. Defendants alleged that the father Fulchand transferred 10 gold bonds in the name of defendant no.1 and 11 gold bonds in the name of defendant no.2. According to defendants, the gold bonds were standing benami in the name of original plaintiff though it was the exclusive estate of Fulchand.

4 Suit no.1539 of 1979 was dismissed by a judgment and order dated 5th/6th September, 1985 holding (a) that the suit gold bonds were acquired by Fulchand out of his own income and he purchased them in the

name of Anantrai out of love and affection and therefore, Anantrai was obviously ostensible owner; (b) the evidence on record is more than enough to warrant a conclusion that the purchase of the suit gold bonds was a benami transaction effected by Fulchand in the name of his son Anantrai; (c) Fulchand had an absolute right to transfer the suit gold bonds in favour of defendant nos.1 and 2 and (d) the suit gold bonds were transferred by Fulchand in favour of defendant no.1 and defendant no.2 during his lifetime.

5 Plaintiff preferred an appeal being Appeal No.974 of 1985 and the Appeal Court did not interfere with the findings of the Single Judge and dismissed the appeal by a judgment and order dated 19th December, 1985. At the same time, the Appeal Court granted a stay against defendants from taking back the gold bonds deposited in the safe deposit locker of the Bank of India for a period of six weeks.

6 Against this order of dismissal passed by the Appeal Court, plaintiff preferred a Special Leave Petition before the Hon'ble Supreme Court of India. The Apex Court directed applicant herein, i.e., defendant no.1, to deposit the suit gold bonds that were in the name of applicant in safe custody of Bank of India with a further direction that the gold bonds shall not be encashed or transferred till the disposal of the Special Leave Petition (Appeal). In the Supreme Court, on 29th February, 1996, the parties

filed consent terms dated 23rd February, 1996 and 21 gold bonds were divided between plaintiff, defendant no.1/applicant herein and defendant no.2 the mother.

The order of the Supreme Court dated 29th February, 1996 records as under :

“2. The Reserve Bank of India is directed to transfer six National Defence gold bonds of the value of 1 kg. each and one gold bonds of 119 gms. in the name of appellant no.1.”

The Supreme Court also disposed the Civil Appeal by the said order.

7 In view of the consent terms, original plaintiff no.1 received six gold bonds of 1 kg. each and 1 gold bond of 119 gms. from Bank of India and in addition, was paid a sum of Rs.2,86,110/- by cheque, being the price for the deficit quantity of gold bonds given to her.

8 By an order dated 22nd August, 1997, the Supreme Court recalled the order dated 29th February, 1996 disposing of the appeal in accordance with the consent terms and directed that the said appeal be listed afresh for hearing on merits and the parties were directed to maintain status quo during the pendency of the said appeal and accordingly plaintiff no.1, i.e., Mrs. Renuka Vora, retained the said 6 gold bonds/gold and Rs.2,86,110/- being the price for the deficit quantity of the gold bonds.

As noted later, it is the case of plaintiff no.1 that she sold the gold that she had between February, 1997 and April, 1997 but this was suppressed from the Apex Court when the order dated 22nd August, 1997 was passed directing status quo.

9 By an order dated 19th April, 2000, the Supreme Court referred the Civil Appeal and other disputes to arbitration. The Arbitrator by an Award dated 6th December, 2001 dismissed the arbitration proceedings for non-prosecution. Thereafter, the matter was placed before the Supreme Court and the Supreme Court by an order dated 25th October, 2002 dismissed the Civil Appeal No.1525 of 1986.

10 Therefore, the net effect, upon the dismissal of the Appeal No.1525 of 1986 by the Supreme Court on 25th October, 2002, is the judgment and order dated 19th December, 1985 passed in Appeal No.974 of 1985 by the Division Bench of this Court, has become final and operative and binding on all the parties. Rewinding a bit more, the original suit of the plaintiff for a declaration that plaintiff is the owner of 21 National Defence Gold Bonds and for mandatory injunction for directing defendant no.1 to hand over to plaintiff the said bonds came to be dismissed. The conclusion of the Single Judge of this Court that Fulchand was the actual owner of 21 gold bonds and he had transferred these gold bonds, 10 gold bonds in favour of defendant no.1 and 11 gold bonds in favour of defendant no.2 came to be confirmed in appeal.

11 Plaintiff no.1, therefore, had to hand over to defendant no.1 the six gold bonds of 1 kg. each and 1 gold bond of 119 gms. and Rs.2,86,110/- being the price for the deficit quantity of gold bond that she

got pursuant to the consent terms dated 29th December, 1996. Defendant no.1, therefore, has approached this Court by this chamber summons to direct plaintiff no.1 to deposit in this Court within two weeks 6.119 kg. of gold of .995 fineness that she received against seven National Defence Gold Bonds, 1980 from Reserve Bank of India and Rs.2,86,110/- being the price for the deficit quantity of the gold bond and the registry be directed to hand over the same to defendant no.1/applicant.

12 Mr. Halai, counsel for plaintiff no.1 states that plaintiff no.1 equally distributed the six gold bonds of 1 kg. each between plaintiff no.1, plaintiff no.2 and plaintiff no.3 and plaintiff no.1 had with her only two gold bonds of 1 kg. each and 1 gold bond of 119 gms. Mr. Halai further states that these gold bonds were converted into gold as per the certificate annexed at Exhibit '2' to the affidavit in sur-rejoinder. The certificate covers only 2000 gms., i.e., 2 kilos and there is not mention of 119 gms. Mr. Halai pointed out that as per the Reserve Bank of India directions as mentioned in the certificate, the gold had to be, within a period six months from the date of receipt of the gold, either be sold to a licensed dealer or certified goldsmith or gold should be converted into ornaments through a licensed dealer or a certified goldsmith subject to the statutory limits regarding the possession of such gold by certified goldsmiths under the Gold (Control) Act, 1968 and within three months of the date of such sale or conversion

file a certificate with the Reserve Bank of India. Mr. Halai relies on five invoices, which are annexed to the affidavit in sur-rejoinder and states that the 2 kilos of gold were sold in five equal tranches of 500 gm. on 21st February, 1997, 22nd April, 1997 and 3rd March, 1997. The price varied from Rs.4770/- to Rs.4920/- per gram. Mr. Halai states that since plaintiff no.1 has distributed the gold to plaintiff no.2 and plaintiff no.3, even if the Court is inclined to grant any compensation, it can be only for 2.119 kg. and not 6.119 kg.

13 Ms. Shah, counsel for applicant pointed out and rightly so that as per the consent terms, that were filed in the Supreme Court, the entire gold has been handed over to plaintiff no.1 and plaintiff no.1 should bring the gold back. The position of plaintiff no.1 is that of a judgment debtor and the fact is plaintiff no.1 has to return 6.119 kg. of gold to defendant no.1. Since Mr. Halai has categorically stated and it is also so stated in the affidavit in reply that there is no gold available or gold bond available to be returned to defendant no.1, let us consider the provisions of the Code of Civil Procedure in such a situation. Order XXI Rule 31 reads as under :

“31. Decree for specific movable property.- (1) Where the decree is for any specific movable, or for any share in a specific movable, it may be executed by the seizure, if practicable, of the movable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment debtor, or by the attachment of his property, or by both.

(2) Where any attachment under sub-rule (1) has remained in force for three months, if the judgment debtor has not obeyed the decree and the

decree holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the court may award to the decree holder; in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of movable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment debtor on his application.

(3) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of three months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

Though Order XXI Rule 31 would not in the strict sense be applicable because the demand for the movable is not based on a decree but for return of movable that was handed as interim arrangement on orders of the Apex Court, the underlying principles of Order XXI Rule 31 can certainly be applied to the facts and circumstances of this case.

14 Therefore, if the movable property is not available or cannot be delivered to the party to whom it has to be handed over or gold or the movable property has not been handed over, the Court may award such compensation as it thinks fit. The plaintiff no.1 has categorically stated there is no gold or gold bonds with her.

15 The point that arises for consideration is, what is the compensation to be fixed. Ms. Shah states that either plaintiff no.1 returns

the entire 6.119 kg. gold today or should pay the value of 6.119 kg. gold as prevailing today.

16 In response, Mr. Halai states that the value should be as it was on the date of the decree dismissing the suit, i.e., 5th/6th September, 1985. Mr. Halai relied upon two judgments. One is of the Allahabad High Court in *Gopal vs. Jagdish Singh and Ors.*¹ and the other is of the Rajasthan High Court in *Amarchand and Anr. vs. Gopi Chand*². The Allahabad High Court judgment in *Gopal* (supra) is not relevant in the facts and circumstances of the case. In that case, the point raised was when the decree was passed under Order 20 Rule 10, the Court did not state the amount of money to be paid on the ornaments if delivery cannot be made. The Division Bench sent back to the lower Court for determination of the value of the ornaments and for the passing of a decree in accordance with law.

17 The judgment in *Amarchand* (Supra) is relevant. The Rajasthan High Court after considering the legal position held that the correct principle in determining the compensation under Order XXI, R.31 is that the compensation should be calculated at the rate prevailing on the date of the decree itself if there has been a rise in the value of the specific movable property claimed and decreed. In case, however, there is a fall in price, the plaintiff would be entitled to claim damages at the rate prevailing at the

1. AIR 1951 Allahabad 413

2. 1953 (3) ILR 1009

date of the suit, and possibly at the highest rate which may be prevailing between the date of suit and the date of the decree.

18 The date of decree in this case is 5th/6th September, 1985 but the suit was not decreed in favour of plaintiff no.1. As stated earlier, in view of the directions of the Supreme Court, plaintiff no.1 was handed over 6.119 kg. of gold and Rs.2,86,110/- being the price for the deficit quantity of gold. It is this that defendant no.1 is asking be returned. Therefore, the date of dismissal will not be the relevant date. In my view, it will not be the date of consent terms either. I say this because, as per the consent terms, the gold was handed over to plaintiff no.1 on 29th February, 1996. On 22nd August, 1997 parties were directed to maintain status quo but in the meanwhile, between 21st February, 1997 and 22nd April, 1997, plaintiff no.1 had sold the gold though plaintiff no.1 states that she sold only 2 kg. but suppressed this from the Supreme Court when the status quo order was passed. Even when the arbitration proceedings were going on it was kept suppressed.

19 Ms. Shah, counsel for applicant states that for the first time plaintiff no.1 stated that she has sold the gold only on 15th December, 2006 when the Bailiff went to execute the warrant of seizure.

20 In this background, if we have to fix the compensation, in my view, taking the date of the decree of dismissal of suit being 5th/6th

September, 1985 or the date of the consent terms, will not be correct. Plaintiff no.1 is a wrongdoer as stated above and plaintiff no.1 cannot be allowed to benefit from her own wrong. In my view, the compensation should be determined based on the price that plaintiff no.1 obtained allegedly from selling the gold. The gold was sold on 21st February, 1997 at Rs.477.50/- per gram. On 3rd March, 1997 it was sold at Rs.492/- per gram and on 22nd April, 1997 it was sold at Rs.477/- per gram. It will be in the interest of justice to take the mid figure of 3rd March, 1997, i.e., Rs.492/- per gram for calculating the compensation.

21 Therefore, the compensation that is payable to applicant herein by plaintiff no.1 will be Rs.492/- X 6.119 kg = Rs.30,10,548/-. Plaintiff no.1 has enjoyed this money all these years and therefore, it will be in the fitness of things, if plaintiff no.1 is directed to pay interest on the said amount of Rs.30,10,548/- at 10% p.a. from 1st April, 1997 until payment/realisation. The amount payable as on 31st July, 2017 will be Rs.30,10,548/- plus interest of Rs.61,21,448/- totaling to Rs.91,31,906/-. This increases at Rs.825/- per day. In addition, the amount received by plaintiff no.1 of Rs.2,86,110/-, which is also not disputed, has to be paid back by plaintiff no.1 to defendant no.1 with interest thereon at 10% p.a. with effect from 1st October, 1996 until payment/realisation. I am saying 1st October, 1996 because it appears from the affidavit in rejoinder, where

copy of the cheque is annexed, that the amount of Rs.2,86,110/- was paid to plaintiff no.1 some time in September, 1996. The amount payable under this head as on 31st July, 2017 will be Rs.2,86,110/- plus interest of Rs.5,96,063/- totaling to Rs.8,82,173/-. This increases at Rs.78.40/- per day.

These two amounts of Rs.91,31,906/- increasing at Rs.825/- per day from 1st August, 2017 and Rs.8,82,173/- increasing at Rs.78.40/- per day (Rs.1,00,14,079/- increasing at Rs.903.40/- per day from 1st August, 2017) to be paid within 12 weeks from today.

22 Ms. Shah states that plaintiff no.1 has deposited a sum of Rs.14,28,786/- with the Prothonotary and Senior Master on 5th March, 2011 pursuant to order dated 1st February, 2011.

The Prothonotary and Senior Master to pay over this amount together with accumulated interest to defendant no.1. The amount paid by the Prothonotary and Senior Master will be given credit to plaintiff no.1 and plaintiff no.1 need to pay to defendant no.1 only the difference between the amount mentioned in paragraph 21 above and the amount paid by Prothonotary and Senior Master.

23 Chamber summons accordingly stands disposed.

(K.R. SHRIRAM, J.)