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

CHAMBER SUMMONS NO.1167/2011
IN
EXECUTION APPLICATION NO.02/2011

VNS Commodities Pvt. Ltd. … Applicant

V/s.

Jayshankar P. Chanda … Respondent

Mr. S. H. Bohra for the applicant third party.
Mr. Vivek Khemkar i/b. A. R. Bamne for decree holder.

CORAM: K.K. TATED, J.
DATED : OCTOBER 9, 2017

P.C. :

1. Heard the learned counsel for the parties. The Chamber Summons is filed by third party for raising an attachment dated 26.04.2011 from her Flat No.202/A Wing admeasuring 450 sq.ft. (built up), 2nd Floor, Priyank Apartments, Kondvita Road, Andheri (East) Mumbai – 400059.

2. The learned counsel for the applicant filed affidavit dated 31.08.2017 duly affirmed by one Mr. Edward Rodrigues, Secretary of the society Priyank Premises CHS along with a list of documents. Same are taken on record.

3. The learned counsel for the applicant submits that the applicant

is owner of the suit flat i.e. Flat No.202, A Wingh. He submits that the applicant has purchased the suit flat by registered agreement for sale dated 09.12.1985 from M/s. Paras Builders. He submits that the said agreement was duly registered with the Registrar (Exhibit-A to the affidavit in support of the Chamber Summons.)

4. The learned counsel for the applicant submits that thereafter the society issued 5 share certificate from Sr.No.16 to 20 Rs.250/- dated 25.03.1997. He submits that since then the applicant is owner of the suit flat.

5. The learned counsel for the applicant submits that in the present proceedings the claimant had entered into some transactions with the respondent Jaishankar. P. Cheda, husband of the applicant. Because of that, there were some disputes between both of them. Hence, the claimant filed arbitration proceedings wherein the decree was passed on 06.08.2008 directing the respondent to pay sum of Rs.2,99,338/- with 12% p.a. interest from 06.08.2008 till payment and/or realization. He submits that as the respondent has failed and neglected to clear the said liability, the claimant made execution application no.2/2011 in this court. He submits that the claimant on solemn affirmation made an incorrect statement in execution application that the suit flat belongs to the respondent. On the basis of the said execution application , the claimant moved this court for warrant of attachment. Same was allowed by this court.

6. The learned counsel for the applicant submits that the applicant

was neither party before the Arbitrator nor liable to pay any money to the claimant. The applicant is owner of the suit property as per the registered agreement dated 09.12.1985 and share certificate issued by the society. He further submits that even the Secretary of the society has filed affidavit dated 31.08.2017 stating that the suit property stands in the name of the applicant. He submits that in view of the above mentioned facts this Hon'ble Court be pleased to set aside the warrant of attachment dated 07.01.2011. He submits that if the Chamber Summons is not allowed, irreparable loss will be caused to the applicant.

7. On the other hand, the learned counsel for the claimant vehemently opposed the Chamber Summons. He submits that the Chamber Summons as it is filed by the applicant itself is not maintainable. He submits that there is collusion between the applicant and the respondent to avoid the payment of Rs.299338 with 12% p.a. interest as per the award dated 06.08.2008. He submits that though the applicant in her affidavit-in-support of the Chamber Summons relied on the agreement dated 09.12.1985 and share certificate issued by the society to show that she is owner of the suit property, in fact the source of income was from respondent only. Hence, as per Benami Transaction Act, the said flat was rightly attached by the applicant in the present proceedings for recovery of his dues. He submits that if the property is purchased in the name of some one else, then that is to be treated as a Benami Transaction. In support of this contention, he relies on a judgment of the Apex Court in the matter of ***Jaydayal Poddar (deceased) Vs. Mst. Bibi Hazra & Ors. AIR 1974 SC 171***. In

this matter, Apex Court held how to determine whether sale transaction is benami or not on the basis of the source of income. He relies on para 6 of the said judgment which reads thus:

> *"6. It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or cid test, uniformally applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances; (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour ; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.*
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> *The above indicia are not exhaustive and their efficacy varies according tot he facts of each case. Nevertheless No.1, viz the source whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another."*

8. The learned counsel for the claimant submits that bare reading of income tax returns and the documents placed on record by the applicant clearly shows that the suit property was purchased by the applicant from the source of income of her husband i.e. the respondent. Hence, the said transaction is hit by the principles of Benami Transactions. Therefore, the claimant has right to recover his dues by selling the suit property by auction as per the procedure prescribed by law. He submits that if the Chamber Summons is allowed, it will be very difficult for the applicant / claimant to recover their dues which is as on today more than Rs.4 lacs. Hence, there is no substance in the Chamber Summons. Same is liable to be dismissed with costs.

9. In the present proceedings by the warrant of attachment dated 07.01.2011, the applicant's flat No.202 stood attached. In fact the said flat was purchased by the applicant by registered sale deed dated 09.12.1985. On the basis of the said registered sale deed, the society issued share certificate in the name of the applicant herself. This itself shows that the applicant is absolute owner of the suit property. In the present proceedings because of some disputes between the claimant and the respondent which arose out of commercial transaction of 2006, the claimant filed claim before the arbitrator against the respondents wherein the decree was passed. It is crystal clear that the suit flat was purchased by the applicant in the year 1985 whereas the transaction took place between the claimant and the applicant in their business in the year 2006. Not only that applicant was neither party before the Arbitral Tribunal nor award is against her. Therefore, she is not liable

to pay any amount to the applicant.

10. The authority relied on by the claimant in the matter of Jayadayal Poddar (Supra) is not applicable in the facts and circumstances of the present case. In the present matter, the applicant purchased the suit property in the year 1985 whereas after more than 20 years, there was commercial transaction between the claimant and the respondent. Applicant failed to bring on record any document to show that said flat was purchased by respondent in the name of applicant with his own money. Considering these facts, I am of the opinion that the applicant has made out a case for allowing the Chamber Summons.

11. Hence, following order is passed:

a. The Chamber Summons is allowed in terms of prayer clause (b), which reads thus:

> *"(b) That execution proceedings and attachment warrant against the respondent but levied upon immovable property of applicant third party viz. Flat No.202/A Wing admeasuring 450 sq.ft. (built up), 2nd Floor, Priyank Apartments, Kondvita Road, Andheri (East) Mumbai – 400059 under warrant of attchment in execution application No.02/2011 pursuant to award dated 06.08.208 in arbitration matter No.MCX/Legal/131A/2008 on 26.04.2011 under order XXI Rule 43 of CPC and further attachment levied on movables lying at the suit flat as per list of moveable items which are the property of third party, attached wrongly and all further action in said execution be set aside and quashed.*

b. The claimant to bear all the expenses of the Sheriff's Office, if any.

c. The parties to act on an authenticated copy of this order.

d. The Chamber Summons stands allowed accordingly.

(K.K. TATED, J.)