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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 2256 OF 2016
IN
EXECUTION APPLICATION NO. 488 OF 2010
IN
SUMMARY SUIT NO. 2949 OF 2003**

Shabnum Abdul Majid Chaudhary	...Applicant
<i>In the matter between</i>	
Shabnum Abdul Majid Chaudhary	...Plaintiff
<i>Versus</i>	
Abdul Rashid Alias Lalla & Anr	...Defendants

**CHAMBER SUMMONS NO. 658 OF 2011
IN
EXECUTION APPLICATION NO. 488 OF 2010
IN
SUMMARY SUIT NO. 2949 OF 2003**

Shabnum Abdul Majid Chaudhary	...Plaintiff
<i>Versus</i>	
Abdul Rashid Alias Lalla & Anr	...Defendants

Mr Jayesh Bhatt, for the Plaintiff/Applicant.
Ms Shyamli Hajea, i/b H&M Legal Associates, for Defendant No. 1.

CORAM: G.S. PATEL, J
DATED: 6th June 2018

PC:-

1. The Notice of Motion is filed by the Decree Holder seeking that the Execution Application be restored to the file of the Commissioner for Taking Accounts and that an earlier Notice of Motion No. 1894 of 2011 along with the 1st Defendant's Chamber Summons No. 658 of 2011 be transferred to the City Civil Court for hearing and final disposal.

2. A short background is necessary. The Suit was filed in this Court as Summary Suit No. 2949 of 2003. The Suit came to be dismissed as against Defendant No. 1 by an order dated 19th/21st January 2009 (SC Dharmadhikari J). It was decreed against the 2nd Defendant, and the 2nd Defendant alone, in the amount of Rs. 1,97,769/- with interest from the date of decree at 24% per annum. The Decree Holder/Plaintiff then moved in execution, filing Execution Application No. 488 of 2010 and sought *inter alia* sale of the goodwill of a business being carried out in Gala No. 5, Galli No. 4, Mustafa Market, Saki Naka, Mumbai 400 072. This business and the goodwill are not in the name of the Judgment Debtor, Defendant No. 2 at all, but belong to Defendant No. 1, against whom the Suit was dismissed, and against whom there is no decree at all, leave alone an executable decree, and the 1st Defendant's brother Abdul Majid. There are documents annexed to the Affidavit in Support of the Chamber Summons that are sufficient to establish this.

3. The defence seems to be that these documents adduced by the 1st Defendant are forged and fabricated. There is a previous

direction for filing Affidavits of Evidence etc but there is no direction whatsoever, let alone a finding that this is a matter that requires taking of evidence. No issues have been framed. This is clearly not an obstructionist proceeding that would justify taking evidence. As a matter of law when a Decree Holder moves against property, the Decree Holder must be in a position to show that the property is that of the Judgment Debtor and is capable of execution. There is no law that allows a Decree Holder to attach any property that catches his or her fancy and then transfer the burden of proof on to the owner to show that the property is *not* that of the Judgment Debtor. The submission is untenable and cannot be accepted.

4. Merely saying that documents are forged or fabricated does not assist the Decree Holder, because one must look to the nature of the documents. Among these are not only an agreement of transfer of right, title and interest but also statutory certificates and licenses including a registration certificate under the Bombay Shops and Establishments Act 1948 in the name of Royal Steel Corporation, a sole proprietorship of the 1st Defendant, and in the name of AM Steel Corporation, a sole proprietorship of the 1st Defendant's brother. There is *prima facie* nothing whatever to show that these certificates are or can even on a cursory reading be said to be forged. The submission is without substance.

5. The Chamber Summons will have to be allowed in terms of prayer clause (a).

6. Prayer clauses (b) and (c) are misconceived. They demand an injunction against the Plaintiff from “furnishing wrong details”. I can pass no such order. I will only put the Decree Holder to notice that repeated attempts to move against the property of the 1st Defendant will, in future, be met with orders of punitive and even exemplary costs if this continues. This is a final opportunity.

7. However, before making the Chamber Summons absolute, I must deal with the submission advanced by Mr Bhatt that the Execution Application does not lie in this Court at all because of the 2012 amendment to the pecuniary jurisdiction limits of this Court and the Civil Civil Court, under Maharashtra Amendment Act 25 of 2012, as a result of which several Suits in this Court of the pecuniary value of under Rs. 1 Crore came to be transferred to that Court. The submission purports to be based on Sections 3, 4A, 12 and 18 of the Bombay City Civil Courts Act, 1948, as amended in 2012. The submission is misconceived because the Suit was already decreed in this Court in 2009 before that jurisdictional change was brought into effect.

8. The question is no longer *res integra*. An identical submission was raised before RD Dhanuka J in *Anant Narayan Kajrolkar v Neeta Madhukar Kajrolkar & Ors.*¹ It was comprehensibly repelled and rejected. Dhanuka J held:

35. On perusal of the section 12 of the Bombay City Civil Court Act 1948, it is clear that High Court for any special reason and at any stage remove for trial by itself any suit or proceeding from the City Court. Section 18 of the Bombay

1 2014 (1) Mh LJ 329 : 2104 (7) Bom LR 492.

City Civil Court Act 1948 provides that all suits and proceedings cognizable by the City Court and pending in the High Court in which issues have not been settled or evidence has not been recorded on or before the date of the coming into force of this Act, shall be transferred to the City Civil Court and shall be heard and disposed of by the City Civil Court. In this proceedings, decree is already passed. Various steps have been already taken to execute the decree passed by this court. Successful bidder including defendant nos. 1(b) and 1(c) did not pay the bid amount in court and committed default. As a result thereof, such property has not been sold so far.

36. On perusal of section 37 and in particular explanation inserted by Code of Civil Procedure (Amendment) Act, 1976 and in view of section 37(b) it is clear that **court of first instance which passed a decree if ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit would have jurisdiction to execute such decree.** It is not in dispute that when an application for execution of decree was filed by the applicant in the year 2009, this court had jurisdiction to try the subject matter of the execution application or even the subject matter of this suit. It is thus clear that this court continues to have jurisdiction to decide the execution application. On perusal of section 38 of the Code of Civil Procedure, 1908, it is clear that a decree may be executed either by the court which passed it or by the court to which it is sent for execution. **In my view in view of the fact that execution application was pending in this court when the amendment to section 3 was introduced, this court would continue to have jurisdiction to execute a decree irrespective of the fact that the suit claimed valued in**

the plaint was less than Rs. 1 crore. In any event the value of the claim which is subject matter of execution application has to be considered on the date of amendment to section 3 of the Bombay City Civil Court Act and not the valuation of the suit claimed in the plaint which in this case is much more than Rs. one crore.

37. In my view, thus there is no substance in the submission made by Mr Divekar that his Court has no jurisdiction to try and entertain this execution application or the same stood transferred to Bombay City Civil Court in view of the amendment to Section 3 and in view of insertion of Section 4A to the said Act.

(Emphasis added)

A substantially similar view has been taken by SC Gupte J in a decision dated 27th January 2014.²

9. It is neither open to Mr Bhatt to argue that a contrary view ‘should’ be taken, nor to canvass already decided points again and again in the hope that some other bench may be inclined to disagree. There is no scope for disagreement. Judicial discipline and every rule of precedent requires that a binding decision of a Bench of coordinate jurisdiction be followed unless it is shown to be *per incuriam*. In any even rarer situation, a court may request that a point of law on which there are divergent views be placed before the Hon’ble the Chief Justice for considering whether it should be referred to a larger Bench. But the one thing that is simply unthinkable is to ask a bench to take a contrary view just because one

2 Notice of Motion No. 946 of 2011 in Summary Suit No. 2388 of 1997, *Harsukh B Gohel v Vinod Kumar Bindlish & Ors.*

might be possible. Mr Bhatt is not in a position to show that there is any scope for disagreement with the views of the two previous decisions of Dhanuka J and Gupte J. Nor can he show that either is *per incuriam*. Those decisions are binding and must be followed. There is, therefore, no question of transferring this Execution Application to the City Civil Court. That Court has no jurisdiction. As RD Dhanuka J said the only situation in which an Execution Application could be so transferred in respect of a decree passed by one Court, to another Court was if the Court that passed the decree “ceased to exist”. This Court on its Original Side has not, however much some may devoutly so wish, ceased to exist.

10. The Notice of Motion filed by the Plaintiff Decree Holder is dismissed. No costs.

11. The Chamber Summons is made absolute in terms of prayer clause (a). No costs.

12. The property in question described above, Gala No. 5, Galli No. 4, Mustafa Market, Saki Naka, Mumbai 400 072 is to be released forthwith from all attachment.

13. Mr Bhatt’s application for stay is refused.

(G. S. PATEL, J)