

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

APPEAL NO. 313 OF 2018
IN
CHAMBER SUMMONS NO. 1867 OF 2010
IN
EXECUTION APPLICATION NO. 441 OF 2006
IN
SECUNDERABAD O.S. NO. 313 OF 1997

Kuber Housing Investment and Finance
Pvt.Ltd. ... Appellant.
V/s.
TCI Finance Limited and others. ... Respondents.

Mr.A.J.Uniyal with Ms.S.S.Karkada for the appellant.
Ms.Shilpa Kapil with Ms.Disha Vaghasiya for respondent No.1.

CORAM : A.S.OKA AND M.S.SONAK, JJ.

DATE : 28th September 2018.

ORAL JUDGMENT : (Per A.S. Oka, J.)

On 26th September 2018, the parties were put to notice that an endeavor will be made to decide this appeal finally at the admission stage. We have heard the learned counsel appearing for the appellant and the learned counsel appearing for the first respondent. The first respondent is the original plaintiff- decree holder. The suit filed by the first respondent was decreed and in Execution Application No.441/2006 filed by the first respondent, a warrant of attachment of an immovable

property was issued. Chamber Summons No.1867/2010 was taken out by the present appellant in which there is a prayer made for releasing the immovable property from the attachment. In the affidavit-in-support, the appellant claimed ownership in respect of the attached property. By an order dated 18th June 2012, the chamber summons was dismissed. Being aggrieved by the said order, an appeal was preferred being Appeal No.128/2013. The said appeal was allowed by a Division Bench of this Court on 13th June 2013. The Division Bench referred to a decision of the Apex Court in the case of Ashan Devi and another v. Phulwasi Devi and others¹. Ultimately, while allowing the appeal, in paragraph- 9, the Division Bench observed thus:

“9. Having regard to the well settled position of law, we are of the view that the summary manner in which the learned Single Judge has dealt with the Chamber Summons is untenable. The Chamber Summons required the Executing Court to adjudicate upon the title claimed by the Appellant on the basis of a registered agreement dated 29 January 2005. We clarify that whether the Appellant has established such a title is a matter which would not stand adjudicated by this judgment. Since the learned Single Judge has not dealt with the issue in the manner as required by the judgment of the Supreme Court noted earlier, we allow the appeal and while setting aside the order of learned Single Judge, restore the Chamber Summons for a disposal afresh.”

(underline supplied)

2. Thereafter, the chamber summons was placed before the learned single Judge on 27th September 2013 wherein two issues were framed. The first issue was regarding the title claimed by the appellant. Vide order dated 29th January 2014, the learned single Judge adjourned

1 (2003) 12 SCC 219

the chamber summons to 26th February 2014 for deciding the issue of admissibility of documents. The order dated 29th January 2014 records that a Court Commissioner was appointed to record the evidence. An affidavit in lieu of examination-in-chief was filed by the Director of the appellant in January 2014.

3. By the impugned order dated 21st June 2018, Chamber Summons No.1867/2010 and Chamber Summons No.1603/2016 were disposed of. Chamber Summons No.1867/2010 was dismissed by holding that the appellant has failed to establish the title pleaded in the chamber summons. Chamber Summons No.1603/2016 was disposed of as infructuous.

4. The learned counsel appearing for the appellant stated that he is not making any grievance about disposal of Chamber Summons No.1603/2016. However, he submits that as per the mandate of sub-rules (2) and (3) of Rule 58 of order XXI of Code of Civil Procedure, 1908 (for short “the said Code”), an adjudication on the rights of ownership claimed by the appellant in respect of attached property ought to have been made. He submitted that under sub-rule (2) of Rule 58 of order XXI read with sub-rule (4) of Rule 58, the proceeding of adjudication partake a character of a suit as the order passed on adjudication has force of a decree. He submitted that issues were framed in the Chamber Summons and an affidavit in lieu of examination-in-chief was already filed by the appellant. He submitted that without recording evidence, the Chamber Summons has been dismissed. He submitted that the date on which the

impugned order was passed, the Chamber Summons was not listed for hearing and it was listed under the caption of “direction”.

5. The learned counsel appearing for the first respondent submitted that an adjudication on the title claimed by the appellant has been made by the impugned order and after considering the documents produced by the appellant, the learned single Judge has come to a conclusion that the appellant has failed to prove the title. She submitted that as per the order dated 13th June 2013 passed in Appeal No.128/2013, adjudication as required by Rule 97 of order XXI was directed to be made and that adjudication has been made. She, therefore, submits that as the appellant has failed to prove the title, there is no merit in this appeal.

6. We have carefully considered the submissions. Rule 58 of order XXI of the said Code reads thus:

“58. Adjudication of claims to, or objections to attachment of, property— (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:

Provided that no such claim or objection shall be entertained—

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right,

title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub- rule (2), the Court shall, in accordance with such determination,—

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claims or objection shall be conclusive.”

In the present case, the appellant claimed release of the attached property in execution on the basis of right of ownership claimed by it. All questions regarding title claimed by the appellant were required to be decided while deciding the Chamber Summons in view of the mandate of

sub-rule (2) of Rule 58. Sub-rule (2) imposes a bar on filing of a suit on title by the person who wants to object to an attachment. Sub-rule (4) of Rule 58 makes it very clear that the adjudication made in accordance with sub-rule (2) has a force of decree.

7. In the facts of the case, earlier, the same Chamber Summons was summarily dismissed by the learned single Judge. The said order was set aside by the Division Bench in Appeal No.128/2013. Though the Division Bench may have referred to the decision of the Apex Court dealing with an adjudication contemplated by Rule 97 or Rule 101 of order XXI of the said Code, ultimately, the Division Bench has observed in paragraph-9 of its decision that the adjudication of title claimed by the appellant will have to be made. Looking to the provisions of Rule 97 read with Rule 101 of order XXI and Rule 58 of order XXI, the adjudication contemplated is the same, in the sense that when a party claims title in respect of a property subject matter of attachment, adjudication of the said claim of title is required to be made in the execution and not by way of a separate suit.

8. In the facts of the case, as narrated earlier, on 27th September 2013, issues were framed on the Chamber Summons. An affidavit in lieu of examination-in-chief was filed by the appellant in January 2014 and, in fact, by the order dated 29th January 2014, the learned single Judge had kept the matter on board for deciding the issue of admissibility of documents. Exhibit-M is a printout of the cause list of the learned single Judge of 21st June 2018 which shows that on the said date, the Chamber

Summons was listed under the caption of “direction”. A remark on the cause list shows that an affidavit in lieu of examination-in-chief dated 13th January 2014 was filed by the appellant. Admittedly, oral evidence of the witness of the appellant on the basis of the affidavit was not recorded.

9. Without allowing the parties to adduce oral evidence, the Chamber Summons could not have been decided, especially, when not only the parties were permitted to lead evidence but even an affidavit in lieu of examination-in-chief was already filed. None of the documents were marked as exhibits. Thus, in our considered view, it cannot be said that by the impugned order, an adjudication as contemplated by sub-rule (2) of Rule 58 of order XXI of the said Code has been made. That is the reason why interference is called for with the impugned order.

10. Hence, we pass the following order:

- (i) The impugned judgment and order dated 21st June 2018 as far as Chamber Summons No.1867/2010 is concerned, stands modified and in the light of the reasons recorded by us, Chamber Summons No.1867/2010 is restored to the file of the learned single Judge;
- (ii) The learned single Judge will have to give an opportunity to the parties to lead oral evidence and the adjudication shall be commenced from the stage on which the Chamber Summons was pending as on 21st

June 2018. An opportunity will have to be given to the appellant to examine its witness whose affidavit in lieu of examination-in-chief was filed;

- (iii) We make it clear that all contentions on merits of the objections raised by the appellant are expressly kept open;
- (iv) We also make it clear that the impugned order as regards Chamber Summons No.1603/2016 is not interfered with;
- (v) Appeal is partly allowed on the above terms.
- (vi) Pending notices of motion, if any, do not survive and stand disposed of accordingly.

(M.S.SONAK, J.)

(A.S.OKA, J.)