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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 1000 OF 2018
IN
EXECUTION APPLICATION NO. 676 OF 2015**

Kukreja Construction Co	...Petitioner
<i>Versus</i>	
DM Builders & Developers	...Respondent
<i>And</i>	
Shree Navbharat Apartment Coop Hsg Soc Ltd	...Applicant

Mr Mahesh Menon, *with Mani Thevar, i/b Mahesh Menon & Co., for the Petitioner.*

Mr Sharan Jagtiani, *with Nishant Sashidharan & Suraj Iyer, Rickin Dang, i/b Ganesh & Co., for the Applicant.*

CORAM: G.S. PATEL, J
DATED: 5th September 2018

PC:-

1. The Chamber Summons will have to be allowed for the asking. It is filed by Shree Navbharat Cooperative Housing Society Limited (“**the Society**”) to set aside the warrant of attachment dated 29th July 2015 levied by the Decree Holder, Kukreja Construction Company (“**Kukreja**”) against the arbitral Respondents, DM Builders & Developers (“**the Developer**”). The attachment levied is apparently in respect of 8,700 sq mtrs of land at

Village Wadhawali, Chembur, Taluka Kurla, Mumbai Suburban District, Mumba bearing CTS Nos. 318, 318D, 321 (part), 322, 322/1-10 out of a larger tract of land of 10,531.30 sq mtrs. The attachment also said to be in respect of Plot No. 75. There is no dispute that whatever be the area of Plot No. 75, that plot is the property of the Society.

2. The Award arises out of a Memorandum of Understanding (“MoU”) dated 25th August 2005 between the partners of the Developer and Kukreja. This, in its second recital, describes Survey No. 65 and other lands as aggregating to 10,541.30 sq mtrs. The third recital makes it clear that of this land, even according to the parties to that document, an area of 4,790.40 sq mtrs was expressly accepted and admitted to be the property of this very Society. The parties claimed that other portions of this 10,541,30 sq mtrs belonged to others. There is a controversy in regard to that as well.

3. The matter was taken to arbitration by an order of this Court of 16th September 2010. The learned Sole Arbitrator made an *ex parte* Award on 19th July 2012. It seems that although the Respondent-Developer filed a response to the claim and even a counter-claim, after the Claimant Kukreja filed Evidence Affidavit nothing further was done. On 19th July 2012, the Advocate for Kukreja said he was not pressing for specific performance and instead sought damages. I am told that a challenge to this Award has failed, but that is not presently my concern. For myself, and though this is not relevant, I confess I am unable to understand how, if specific reliefs were not pressed for, damages could have been awarded like this. In my understanding of it, damages in such a case

are awarded in *lieu* of specific performance, ie when it is found that the Claimant is entitled to specific performance but for some reason that decree for specific performance cannot be granted. If specific performance itself was not prayed or sought at all, it seems to me unclear how damages could have been granted and that too without any further discussion as to the figure of damages. But that, as I said, is irrelevant, and not my concern as a court in execution. I must take that decree as I find it. I cannot go behind it.

4. It is clear, though, that this is a matter between Kukreja and the Developer. The Society is also not concerned with this. It seems that Kukreja then moved in execution of this award in damages. He filed an execution application and obtained a warrant of attachment dated 29th July 2015. The schedule to this warrant of attachment is obviously based on portions of the execution application and it is this that is materially misleading. It speaks of attachment of CTS Nos. 318, 318D, 321 (part), 322, 322/1-10 admeasuring 8,700 sq mtrs out of the larger land of 10,531.30 sq mtrs and then at item 4 speaks of “Plot No. 75, Shree Navbharat CHSL, Mahul Road, Chembur, Mumbai 400 071 [owned by Mr Mohan Chug]”. Mr Mohan Chug could never have owned the Society’s plot. The description at Serial No. 4 is, therefore, totally incorrect and it is and was incorrect to the knowledge of the Decree Holder. The description in item 2 is also incorrect because, as we have seen, both parties to the initial MoU, the very one that was not pressed to a decree, accepted that an area of 4,790.40 sq mtrs belongs to the Society itself.

5. It does not end at that. Mr Jagtiani points out that the Society's registered title documents (and this in contrast of the MoU which is insufficiently stamped and not registered) mentions that the property conveyed to the Society admeasures about 14,000 sq yards, i.e., 12,601.44 sq mtrs. This is an Indenture of 10th February 1972 and it could not have been unknown to either Kukreja or the Developer.

6. Mr Jagtiani submits that the Award itself is collusively obtained. Whether that is or is not correct is of no moment to the present discussion. It is abundantly clear, and in fairness Mr Menon does not contest this, that the Decree Holder has no right to proceed against the property of the Society. Mr Menon says that the whole of 8,700 sq mtrs does not belong to the Society. It is unclear from his documents and submissions what, according to the Decree Holder, does in fact belong to the Society.

7. The prayers in the Chamber Summons, when they speak of 8,700 sq mtrs, only follow the prayers in the execution application and the schedule to the warrant of attachment. Nothing further has been added by the Applicant-Society itself.

8. In my view, no Decree Holder is entitled to proceed against the property in this ad hoc or random fashion. It is always for the Decree Holder to show that the property is an asset of the Judgment Debtor and is an asset against which execution can be legitimately pursued and prosecuted. The title document of the Society shows an area of over 12,000 sq mtrs. The MoU between Kukreja and the

Developer shows the area to be 4,790.40 sq mtrs. That, therefore, is the very minimum area that even according to the Decree Holder has to be released from the execution.

9. It is, as I said, unclear from the Decree Holder's Execution Application whether the Judgment Debtor had any right to the remaining property, i.e. 8,700 sq mts or 4,790.40 sq mtrs. This is by no means clear and after all what the Decree Holder has today is a money decree not a decree for specific performance, Kukreja having given up that completely before the sole Arbitrator.

10. The attachment of Plot No. 75, Shree Navbharat CHSL, Mahul Road, Chembur, Mumbai 400 071 is raised.

11. It is clarified that no property that belongs to the Society is liable to attachment at the hands of the present Decree Holder, Kukreja Construction Co, in execution of the Award dated 19th July 2012. It is lastly clarified that the Decree Holder is not entitled any longer to rely on any rights or obligations under the MoU of 25th August 2005 since this MoU was explicitly given up before the learned Sole Arbitrator. All attachments, therefore, in regard to the property of the Society stand raised forthwith.

12. If the Decree Holder claims title to any property vested in the Society, that must be the subject matter of separate substantive proceedings, and not in execution of this Award. All contentions as between the Judgment Debtor and Decree Holder are expressly kept open.

13. The Chamber Summons is disposed of in these terms. No costs.

(G. S. PATEL, J)