

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**NOTICE NO. 47 OF 2019
IN
COMMERCIAL EXECUTION APPLICATION NO. 2179 OF 2018**

**WITH
CHAMBER SUMMONS NO. 1270 OF 2018
IN
COMMERCIAL EXECUTION APPLICATION NO. 2179 OF 2018**

Devabrata Bhabatosh Moulick & Ors.	...	Applicants/Claimants Judgment Creditors/ Decree Holders
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Versus

Shrusti Sangam Developers Pvt. Ltd. & Ors. ...	Respondents/ Judgment Debtors
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Mr. Bhavin H. Gada a/w Ms. Najafia i/b Harakhchand & Co. for the Applicants/Decree Holders.

Mr. Rohan Deshpande a/w Ravi S. Kotian i/b Soumitra Gokhale for Respondent Nos.1, 2, 7 and 8.

Ms. Jyoti Agarwal i/b Chetan Agarwal for Respondent No.3.

CORAM : R.I. CHAGLA, J.

DATED : 18th SEPTEMBER, 2019.

P.C. :

1 This is a Notice issued under Order XXI Rule 22 of the Code of Civil Procedure, 1908 (C.P.C.) to appear in person or by an Advocate

entitled to practise in this Court to show cause why the award passed by the Sole Arbitrator, Mumbai against the person, should not be executed against him. An objection has been raised to the Notice being issued against Judgment Debtor No.3. The Judgment Debtor No.3 has filed an affidavit-in-reply dated 21.08.2019 wherein he has stated that he was never a Director of the Judgment Debtor No.1 Company and has relied upon the copy of the ROC-Company master data of Judgment Debtor No.1 which does not show Judgment Debtor No.3 as a Director of the Judgment Debtor No.1 Company. The learned Counsel for Judgment Debtor No.3 states that since Judgment Debtor No.3 is not a Director of Judgment Debtor No.1 Company, the execution of the award cannot proceed against Judgment Debtor No.3. She further states that Judgment Debtor No.3 has never been served with the Arbitration proceedings. She has stated that the Judgment Debtor No.3 was promised to be made a Director of Judgment Debtor No.1 Company but was never made. The Judgment Debtor No.3 had upon assurances and representations of being made a Director of Judgment Debtor No.1 Company signed and executed the development agreement. This is prior to the registration of the Company and upon registration, the Judgment Debtor No.3 has not been included as a Director of the Judgment Debtor No.1 Company till date. She has relied upon the affidavit of Judgment Debtor No.3 to state that the Judgment Debtor No.3 has never been a

Director and/or associated in that capacity with the Judgment Debtor No.1 Company. She has also submitted that Judgment Debtor No.3 was not a signatory to the consent terms dated 09.03.2012 in pursuance of which the award dated 21.03.2012 had been passed by the learned Sole Arbitrator of which the execution is sought by the Judgment Debtors by virtue of the execution proceedings. Accordingly, she has submitted that the Notice is not maintainable against Judgment Debtor No.3.

2 The learned Counsel for the Judgment Creditors/Decree Holders has relied upon the affidavit in rejoinder which deals with the affidavit-in-reply filed by Judgment Debtor No.3, and which is dated 13.09.2019. In the said affidavit in rejoinder, the memorandum of association and articles of association of the Judgment Debtor No.1 Company has been annexed where the name of Judgment Debtor No.3 appears and which has been also executed by the Judgment Debtor No.3 as a subscriber to the shares of the Judgment Debtor No.1 Company. He has further relied upon Item No.4 of the Annual Return for the year ending 31.03.2004 which has been annexed to the said Affidavit where again Judgment Debtor No.3's name is shown as Director of Judgment Debtor No.1 Company from his date of appointment i.e. 17.07.2003. He has also relied upon Item No.5 of the Annual Return for the year ending 31.03.2004 which is also annexed to the said affidavit and in which the Judgment

Debtor No.3's name appears as shareholder of Judgment Debtor No.1 Company. Further, in the Search and Status Report of the Judgment Debtor No.1 Company, the name of Judgment Debtor No.3 has again been shown as the shareholder of the Judgment Debtor No.1 Company. He has placed heavy reliance on the extracts of the minutes of the board of Directors meeting held on 01.03.2006, where Judgment Debtor No.3 is shown as a Director and he has signed in that capacity.

3 The learned Counsel for the Judgment Creditor has also relied upon the notice issued by this Court on 29.04.2011 enclosing copy of order dated 08.04.2011 passed by the learned Judge of this Court, communicating the appointment of the Arbitrator as well as the addresses of the parties concerned and which include the Judgment Debtor No.3.

4 The learned Counsel for the Judgment Creditor has submitted that on and of the Judgment Debtor No.3 has from time to time represented himself as Director of the Judgment Debtor No.1 Company. There has never been any objection raised by Judgment Debtor No.3 to his being joined as a party to the arbitration proceeding and it is for the first time when the Notice under Order XXI Rule 22 of the C.P.C. had been issued to him and which is being sought to be made absolute that Judgment Debtor No.3 has raised the contention that he is not a Director of the Judgment

Debtor No.1 Company and/or has not been served with the arbitration proceedings. He has accordingly submitted that such a contention raised for the first time after the Notice was issued cannot be accepted and that the Notice under Order XXI Rule 22 of the C.P.C. be made absolute.

5 Having considered the rival submissions, it is apparent that Judgment Debtor No.3 has consistently been shown both as Director and shareholder in the documents which have been relied upon by the Judgment Creditors in their affidavit of rejoinder dated 13.09.2019. In the Annual Return of the Judgment Debtor No.1 Company for the year ending 31.03.2004, the Judgment Debtor No.3 is clearly shown as a Director of the Judgment Debtor No.1 Company and the date of appointment is shown as 17.07.2003. Further, in the extract of the minutes of the board meeting of the Judgment Debtor No.1 Company, held on 01.03.2006, Judgment Debtor No.3 has signed as Director of the Judgment Debtor No.1 Company. It is further apparent that the arbitration proceedings which culminated in the award of which execution is being sought, Judgment Debtor No.3 was a party and he never raised any objection as to his not being a Director of Judgment Debtor No.1 Company. Judgment Debtor No.3 had also signed the Development agreement dated 31.07.2003 under which the arbitration clause had been invoked. It is further apparent to note that the Judgment Debtor No.3 had neither oppose nor challenge the award dated 21.03.2012

passed by the Learned Arbitrator in favour of the Judgment Creditors and against the Judgment Debtors including Judgment Debtor No.3

6 Thus, the said award is a consent award albeit not signed by Judgment Debtor No.3. For the first time in the affidavit-in-reply filed by Judgment Debtor No.3 to the notice that such a contention has been made that Judgment Debtor No.3 is not a Director of Judgment Debtor No.1 Company and an extract of the ROC-Company master data of Judgment Debtor No.1 Company has been relied upon to show that the name of Judgment Debtor No.3 does not appear as Director of the Judgment Debtor No.1 Company. It is too belated a stage for Judgment Debtor No.3 to contend that he was not a Director of Judgment Debtor No.1 Company and/or that the notice of arbitration proceedings was never issued to Judgment Debtor No.3. It is clear that Judgment Debtor No.3 had participated in the arbitration proceedings which culminated in the said award and never objected to the arbitration proceedings being instituted against him and/or never challenged the consent terms dated 09.03.2012 on the basis of which the said award was passed.

7 Accordingly, the notice under Order XXI Rule 22 of the C.P.C. which has been issued to the Judgment Debtor requires to be made absolute.

8 The learned Counsel for the Judgment Creditors on instructions, makes a statement that the execution of the said award shall not be proceeded with against Judgment Debtor Nos.4, 5 and 6. The statement is accepted.

9 Accordingly, the notice under Order XXI Rule 22 of the C.P.C. which has been issued, is made absolute. Notice is accordingly, disposed of.

10 The Chamber Summons No.1270 of 2018 be placed on board on 04.10.2019, high on board.

(R.I. CHAGLA, J.)