

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

CHAMBER SUMMONS NO. 981 OF 2019

**IN
COMMERCIAL EXECUTION APPLICATION NO. 565 OF 2019**

Parasram H. Bhojwani	...	Applicant/Plaintiff/ Judgment Creditor
Versus		
Pravinchand Sehgal & Ors.	...	Defendants/Respondent Judgment Debtors

Mr. S.C. Naidu a/w Mr. Aniketh Poojary i/b M/s. C.R. Naidu & Co. for the Applicant/Plaintiff.
Mr. Pritvish Shetty i/b Vidhi Partners for the Defendants.

CORAM : R.I. CHAGLA, J.

DATED : 13th SEPTEMBER, 2019.

P.C. :

1 This Chamber Summons had come up before this Court on 05.08.2019 when this Court in paragraph 6 recorded thus :

“6. Having considered the submissions, in my view, after the lapse of the conditional stay of 16 weeks to the decree which had been effected as a reason of non deposit of the decretal amount on or before 25th February 2019, transfer had been effected by Defendant No. 3 to the Respondent's Account No. 4711502686 held with Kotak Mahindra Bank, Colaba Branch on 6th March

2019. It is clear from the Affidavit of disclosure that no explanation had been given for the breaking of the fixed deposit as well as transfer of the said sum to the Respondent by Defendant No. 3. It is only for the first time by way of current Affidavit of disclosure filed on 2nd August 2019 that details of the transfer from Defendant No. 3's account to the account of the Respondent held with Kotak Mahindra Bank has been disclosed. It would thus, be appropriate in the circumstances of the case and particularly considering Section 51(b) read with Section 51(a)(ii) that a show cause notice be issued under Order XXI Rule 46(a) of the Code of Civil Procedure, 1908 to the Respondent viz. Dilip Dewanchand Kapoor under Order XXI Rule 46(a) of the Code of Civil Procedure, 1908 to show cause as to why the sum of Rs. 10,05,083/- should not be paid into the Court as well as why attachment should not be levied on Kotak Mahindra Bank Account No. 4711502686 of the said Dilip Dewanchand Kapoor as disclosed by the Defendant No.3 by Affidavit dated 2nd August 2019.”

2 Accordingly, ad-interim relief in terms of prayer clause (c) of the Chamber Summons was granted. The Respondent was directed to file an affidavit upon being served with the show cause notice issued under Order XXI Rule 46 (a) of the Civil Procedure Code to show cause as to why the sum of Rs.10,05,083/- should not be paid in the Court as well as why attachment should not be levied on the said bank account of the Respondent as disclosed by Judgment Debtor No.3 in affidavit dated 02.08.2019. The Respondent has filed an affidavit dated 04.09.2019 to show cause.

3 The learned Counsel for the Applicant submits that in the affidavit dated 04.09.2019 of the Respondent which is being tendered the same averments are made as had been made by the Judgment Debtor No.3 that the Respondent had granted Judgment Debtor No.3 additional financial assistance to the tune of Rs.2,00,000/- and that an amount of Rs.15,68,000/- remained due and payable as on 31.03.2018 by the Respondent as evident from the balance sheet as on 31.03.2018. It is further stated in paragraph 6 that an amount of Rs.10,05,083/- was transferred to the Respondent towards repayment of the outstanding amounts owed to the Respondent by the Judgment Debtor No.3. In paragraph 8 it is stated that the transfer of the amount of Rs.10,05,083/- happened before the prohibitory orders were passed by this Court. The learned Counsel for the Applicant has referred to the said order dated 05.08.2019 where it is recorded that after the lapse of the conditional stay of 16 weeks to the decree granted by the Appellate Court since the decretal amount was not deposited on or before 25.02.2019, the transfer had been effected by the Judgment Debtor No.3 to the Respondent's account held with Kotak Mahindra Bank, Colaba Branch, on 06.11.2019. He has submitted that under Section 51(b), the Judgment Debtor has clearly displayed that although there was means to pay a part of the decretal amount, the Judgment Debtor No.3 had refused or neglected to pay the

same by transferring this amount to the Respondent. He has submitted that although a garnishee order may not be granted against the Respondent in view of the fact that the sum of Rs.10,05,083/- was paid by the Judgment Debtor No.3 to the Respondent and this sum is not due to the Respondent, an order in terms of prayer clause (a) can be granted directing Judgment Debtor No.3 to forthwith deposit to the credit of the Execution Application a sum of Rs.10,05,083/- which had been transferred by the Judgment Debtor No.3.

4 The learned Counsel for the Respondent has submitted that Section 51(a)(ii) as well as 51(b) will not be applicable since this Provision is only in the event of the Judgment Debtor being given an opportunity to show cause as to why he should not be committed to prison and it is only in that case that the Court for reasons recorded in writing is to be satisfied that the Judgment Debtor has dishonestly transferred, concealed or removed any part of the property or committed any other act of bad faith in relation to his property or refused or neglected to pay the same to the Decree Holder. He has submitted that order 21 Rule 46 also will not apply since in order 21 Rule 46(1)(c)(iii) it is applicable only when the movable property is in the possession of the third party and which is being paid to the Judgment Debtor and that attachment is made in respect of the

movable property prohibiting the Respondent's from paying it over to the Judgment Debtor. He has submitted this provision will not be applicable since the sum of Rs.10,05,083/- has been repaid by the Judgment Debtor No.3 to the Respondent and which sum had been given as and by way of a loan advanced by the Respondent to the Judgment Debtor No.3. Hence, the sum is not due by the third party Respondent to the Judgment Debtor No.3.

5 The learned Counsel for the Applicant has in rejoinder submitted that there are no documents in support of the alleged underlying loan given by the Judgment Debtor No.3 to the Respondent other than the Respondent relying upon the balance sheet as on 31.03.2018 in the said affidavit. He has also submitted that the Section 51(e) which provides for the executing Court to execute the decree in such other manner as the nature of the relief granted may require, would apply in the present case.

6 Considering the rival submissions, it is an admitted fact that after the lapse of conditional stay of 16 weeks to the decree which had been granted by the Appellate Court and which lapsed on account of non-deposit of decretal amount on or before 25.02.2019, the Judgment Debtor No.3 had within 9 days transferred the sum of Rs.10,05,083/- to the Respondent's accounts held with Kotak Mahindra Bank, Colaba Branch, on

06.03.2019. Though it may be stated by the Respondent in the affidavit dated 04.09.2019 that this transfer was only by way of repayment of loan advanced by the Respondent to the Judgment Debtor No.3, it is clear that this transfer have been made by Judgment Debtor No.3 shortly after the conditional stay to the decree had lapsed. Further, other than the Respondent relying upon the balance sheet as on 31.03.2018, there are no underlying documents which have been relied upon by the Respondent to establish that such loan had been advanced by Judgment Debtor No.3 to the Respondent. It is also necessary to note the relationship between the Respondent and the Judgment Debtor No.3 being that of father and daughter.

7 The Executing Court under Section 51(e) of the C.P.C. has the power to execute the decree in such other manner as the nature of the relief granted may require. In the event of the Judgment Debtor having means to pay part of the amount of the decree refuses or neglects to pay the same, this shall be taken into consideration by the executing Court. The learned Counsel for the Respondent may be correct in submitting that the proviso to Section 51 would apply in the case when detention in prison is ordered after granting the Judgment Debtor an opportunity of showing cause and upon the Court being satisfied for reasons recorded in writing

that the Judgment Debtor with the object or effect of obstructing or delaying the execution of the decree has in Section 51(b) neglected or refused to pay the decretal sum although having the means to pay the same or under Section 51(a)(ii) dishonestly transferred, concealed or removed any part of his property or committed any other act of bad faith in relation to his property. However, this does not mean that the acts of the Judgment Debtor as mentioned in Section 51(b) and/or Section 51(a)(ii) cannot be taken into consideration for the purposes of Section 51(e) under which the executing Court has the power to execute the decree in such other manner as nature of the relief granted may require.

8 In view of the observations made in paragraph 6 of the order dated 05.08.2019 that the transfer of the said sum of Rs.10,05,083/- was effected by the Judgment Debtor No.3 to the Respondent's account shortly after the lapse of the conditional stay to the decree on account of non-deposit of the decretal amount on or before 25.02.2019, it is apparent that the Judgment Debtor No.3 has neglected or refused to pay the sum of Rs.10,05,083/- towards the decretal amount. The Judgment Debtor has with the object or effect of obstructing or delaying the execution of the decree transferred the said amount by prematurely encashing the fixed deposit.

9 Order XXI Rule 46 would apply to a debt, share and other movable property not in possession of the Judgment Debtor and which is in the possession of a third party and where a garnishee order is required to be passed attaching the movable property in order to prevent the third party from giving it over to the Judgment Debtor. In view of the wide power of the executing Court to enforce execution as provided in Section 51(e) of the C.P.C., it would be appropriate to grant prayer clause (a) of the Chamber Summons. Accordingly, the Judgment Debtor No.3 is ordered and directed to deposit to the credit of the Execution Application a sum of Rs.10,05,083/- being the proceeds of premature encashment of fixed deposit on 06.03.2019 and which shall be done within a period of three weeks from the date of uploading of this order. The relief in terms of the other prayer clauses are not required to be granted.

10 The Chamber Summons is accordingly disposed of in the above terms.

(R.I. CHAGLA, J.)