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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 845 OF 2013
IN
EXECUTION APPLICATION NO. 1471 OF 2012

The Saraswat Coop Bank Ltd …Claimant
Versus
Mine Stone & Ors …Respondents
And
Subodh Journal Mehta & Bharat J Mehta ...Applicants

Mr Sumit Raghani, *i/b PDS & Associates, for the Applicants.*
Mr Bhupesh Narkar, *i/b Vishal Narkar, for the Claimant.*
Mr Yogesh Dabholkar, *Chief Manager, Saraswat Bank Ltd., is present.*

CORAM: G.S. PATEL, J
DATED: 29th March 2019

PC:-

1. This is a Chamber Summons in a group of similar matters, all filed by various parties to raise attachments allegedly wrongly levied by the Saraswat Cooperative Bank Limited in execution of an arbitral Award dated 1st December 2011 under the Multi State Cooperative Societies Act, 2002. The present two Applicants are not Award Debtors. They are not guarantors. They are not parties to the arbitral proceedings. They never were. They jointly owned Flat

No. B 52, Acropolis, Little Gibbs Road No. 3, Malabar Hill, Mumbai 400 006. The Affidavit in Support says that they purchased this property from one Ms Rajniben Ranjit Khatau under a registered sale deed dated 18th April 1998. At that time, a 25% contribution came from the 1st Applicant Subodh's son, Sachin and, to that extent he was a joint owner of the flat. Sachin apparently needed money for his partnership venture and he sold his 25% share in the subject flat to his father Subodh by a registered sale deed dated 27th May 2009. A copy of this sale deed is annexed. Sachin is himself a judgment debtor in his capacity as a partner of one of the Defendant firms.

2. The reply by the Bank takes up a stand that is wholly untenable in law. It says that this transfer by Sachin of his 25% share, right, title and interest in the Acropolis flat is a fraudulent transfer, and is therefore voidable. It does not tell us how or why this is a fraudulent transfer or what action the Bank had taken in that regard apart from merely saying so in opposition to this Chamber Summons. Importantly, Sachin's transfer pre-dates the filing of the arbitration claim in the first place. That claim is of 2010. The transfer certainly pre-dates the arbitral Award which was of 2011.

3. Further, merely saying that a transaction is "voidable" is never enough where the transfer is effected by a registered instrument. The Bank has filed no substantive proceedings to impeach the transactions or to have the registered document delivered up for cancellation. It has made no application for an order in these terms.

4. In any case, if there was to be an attachment it could only be to the extent of Sachin's previously pre-existing 25% share, right, title and interest in the flat and no further. What the Bank seems to have attached is the entire flat including a share that never belonged to Sachin.

5. Mr Narkar submits that the Bank need take no separate proceeding to impeach the transaction or have the document cancelled. It is enough, he says, if the Bank says so in reply to an application for raising the attachment. That is incomprehensible, for it means that the Bank can seek an order for a relief it has never sought and for which it has never made any sort of application or filed any proceeding at all.

6. In support of this proposition, Mr Narkar relies on the decision of the Supreme Court in *C Abdul Shukoor Saheb v Arji Papa Rao*.[1] There the Supreme Court was dealing with a defence taken in the written statement and mounted under Section 53 of the Transfer of Property Act. In paragraphs 29 and 31, on which Mr Narkar relies, the Supreme Court referenced Order 21 Rule 63 of the Code of Civil Procedure, 1908. Mr Narkar fails to point out that this Rule, along with Rules 60 to 62, was deleted by the 1976 amendment, with effect from 1st February 1977.[2] That amendment did away with the need to file a separate suit. It has to be read with the significant

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[1] AIR 1963 SC 1150.

[2] Before its deletion, Rule said: "63. *Saving of suits to establish right to attached property*.—Where a claim or an objection is preferred, the party against whom an 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, the order shall be conclusive."

amendment to Rule 58, including Rule 58(2), which tells us that all questions, including as to any right, title or interest in any property attached must be determined by the court dealing with the claim or the objection *and not by a separate suit*. But this does not mean that the Bank does not need to file a *proceeding in execution* for a declaration that transaction is a fraudulent transfer, and for a direction that, following such a finding being returned, the document effecting that transfer be delivered up for cancellation. This is plainly necessary, for an order can only be passed by a civil court in terms of a relief actually sought. Nothing in *Abdul Shukoor Saheb* militates against this, even de hors the 1976 amendment. Indeed, paragraph 31 is against Mr Narkar, for it specifically contemplated a suit being filed under Rule 63, but clarified that it would need to be brought in a representative capacity. There is nothing in these observations of the Supreme Court that say that a registered document of transfer or title can be deemed to have been declared void on the basis of an assertion made in an Affidavit in Reply without the person who made that assertion filing a proceeding seeking that relief. It is always possible for an attaching Creditor to argue in opposition to an application for raising attachment that a particular transaction is fraudulent. But when it is shown that there is an registered document of title effecting the transfer, merely saying it is fraudulent is not enough. There is an effect to registration under Section 17 of the Registration Act and this cannot be nullified on an argument in opposition. The person who seeks to invalidate the transfer must seek that relief, but he is required to do so in execution, not, any longer, by a separate suit. That is the only effect of the deletion of Rule 63 and the amendment of Rule 58. Mr Narkar cannot explain how that declaration of a fraudulent transfer and that direction for delivery of the document for cancellation can be granted to the Bank without there being a prayer for it anywhere in any application or proceeding.

7. In any case, it is not shown how such a transfer is invalid, let alone fraudulent. The only argument seems to be that the transferors and transferee of the flat entered into this arrangement only after their loan granted by the Saraswat Bank to the principal debtor 'went bad'. But it is not shown that this transfer was in violation of any order of injunction, restraint or any order of Receivership. A loan remaining unpaid or overdue does not self-generate any injunction or restraint. The property in question was not charged to the Bank or given as security. Even Sachin's share was not security to the Bank. This is not one of the properties that was the subjected to a restraint in the arbitral Award either; and even then, any such restraint could not have acted retrospectively to affect or invalidate a pre-existing transfer unless there was an application to do so either in the arbitration claim, or in a suit, or even in this proceeding. The Bank has, simply put, done nothing at all ever to impeach the transaction.

8. What Mr Narkar's argument amounts to is this: if a loan 'goes bad', then there is automatically a charge created over any and every property of a borrower, and of the borrower's partners, including fractional interests, even if the loan in question is secured by other properties and assets, and even if the lender has not even initiated any recovery proceedings, let alone obtained any injunctive order.

9. There is no substance to the defence of the Chamber Summons. The Chamber Summons is made absolute in terms of prayer clauses (a), (b) and (c).

10. The request for a stay of this order is rejected. The Bank is unable to demonstrate even prima facie how that transfer is bad, and how it could have attached the entire flat in execution. The attachment is raised and released forthwith and all will act immediately on production of an authenticated copy of this order.

11. No costs.

(G. S. PATEL, J)