

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**ORDINARY ORIGINAL CIVIL JURISDICTION**  
**CHAMBER SUMMONS NO. 42 OF 2020**  
**IN**  
**COMMERCIAL EXECUTION APPLICATION NO. 22 OF 2016**

Ashok Kashinath Avhad ... Applicant/Claimant

**In the matter between**

Pinak Bharat and Co. and ... Decree Holders

Bina V. Advani

vs.

Anil Ramrao Naik ... Judgment Debtor

**WITH**  
**CHAMBER SUMMONS NO. 43 OF 2020**  
**IN**

**COMMERCIAL EXECUTION APPLICATION NO. 22 OF 2016**

Vanita Ashok Avhad ... Applicant/Claimant

**In the matter between**

Pinak Bharat and Co. and ... Decree Holders

Bina V. Advani

vs.

Anil Ramrao Naik ... Judgment Debtor

**CHAMBER SUMMONS NO. 44 OF 2020**  
**IN**

**COMMERCIAL EXECUTION APPLICATION NO. 22 OF 2016**

Shripad Vaman Rajadhyax ... Applicants/  
(Since deceased through his legal heir ... Proposed Respondents/  
Rajaram Shripad Rajadhyax & Ors.) ... Interveners

**In the matter between**

Pinak Bharat and Co. and ... Decree Holders

Bina V. Advani

vs.

Anil Ramrao Naik ... Judgment Debtor

**WITH**  
**CHAMBER SUMMONS NO. 561 OF 2019**  
**IN**  
**COMMERCIAL EXECUTION APPLICATION NO. 22 OF 2016**

Vinayak Ramchandra Pitkar & Ors. ... Applicants/Intervener  
**In the matter between**  
Pinak Bharat and Co. and ... Decree Holders/Claimants  
Bina V. Advani  
vs.  
Anil Ramrao Naik ... Judgment Debtor

**WITH**  
**INTERIM APPLICATION NO. 319 OF 2019**  
**IN**  
**COMMERCIAL EXECUTION APPLICATION NO. 22 OF 2016**

Prasad Arvind Sant ... Applicant /Intervener  
**In the matter between**  
Pinak Bharat and Co. and ... Original Petitioners  
Bina V. Advani  
vs.  
Anil Ramrao Naik ... Judgment Debtor

Mr. Archit Jayakar a/w. Mr. Prasad Sawant i/b. M/s. Jayakar & Partners for the Applicants in CHSCD/42/2020 and CHSCD/43/2020.

Ms. Jyoti Chavan for the Applicant in CHSCD/44/2020.

Mr. Prasad Sant for the Applicant in IA/319/2019.

Mr. Clive Dsouza for the Applicant in CHSCD/561/2019.

Mr. Mayur Khandeparkar a/w. Mr. Prerak Sharma, Mr. Nihir U. Dedhia and Mr. Rushikesh G. Bhagat for the Original Applicant in COMEX/22/2016.

Mr. Sagar Patil for MCGM.

**CORAM : A. K. MENON, J.**  
**DATED : 16<sup>th</sup> DECEMBER, 2021.**

**P.C. :**

1. This common order disposes the above four Chamber Summonses and one Interim Application filed in Commercial Execution Application no. 22 of 2016. In Chamber Summons nos 44 of 2020, 561 of 2019 and Interim Application no. 319 of 2019 tenants of a building under redevelopment have sought payment of rent from and out of the funds lying with the Prothonotary and Senior Master, being the residual amount after an award passed by a sole arbitrator was executed and the property attached in the Execution Application has been sold. After payment of the decretal debt, the balance has been deposited with the Prothonotary and Senior Master and several amounts are to be paid out from this balance.

2. In Chamber Summons nos. 42 and 43 of 2020 the applicants are claiming as purchasers of premises in the building under redevelopment and seek refund of the part of the purchase price paid to the Judgment debtor ("Naik") who was the original developer. All these proceedings have been taken up for final disposal today and I have heard the counsel in support and in opposition. The Judgment debtor-Naik has not appeared at the hearing of these proceedings today.

3. The decree holder / their nominee is the present owner of the property having acquired the same in the auction sale conducted by the Sheriff of Mumbai. The other respondent is the original landlord and judgment debtor-Naik. The Municipal Corporation of Greater Mumbai has also appeared in these proceedings since it appears that they too have certain claims in relation to the property under redevelopment.

4. These matters have been heard extensively on 3<sup>rd</sup> June, 2021 by Court and that order has narrated in great detail the factual background. To that extent the order of 3<sup>rd</sup> June, 2021 today holds the field. I have not been informed of any challenge to that order. The matter then stood over for final disposal. To quickly recap, the order of 3<sup>rd</sup> June, 2021 after recording the submissions of various parties framed certain issues which will have to be considered. Since the order of 3<sup>rd</sup> June, 2021 has narrated the factual background it is today not in dispute that large number of persons are likely to be affected. The present purchasers/nominees who are also intending to develop the property had filed an application being Interim Application No. 1591 of 2021. That Interim Application came to be heard on 9<sup>th</sup> December, 2021. On 9<sup>th</sup> December, 2021 by consent an additional issue came to be framed as to maintainability. It will be convenient to reproduce all issues that have now been framed :

**Chamber summons Nos. 44 of 2020 and 561 of 2019**

- (a) Whether the applicants in the above two Chamber Summons are proper and necessary parties in respect of their claim in Commercial Execution Application No. 22 of 2016 ?
- (b) Whether the applicants in the above Chamber Summons are entitled to transit rent upto 30.09.2018 from the balance sale proceedings lying with the Prothonotary and Senior Master?
- (c) Whether the applicants in the above Chamber Summons are entitled to transit rent from 01.10.2018 till they receive the alternate rehabilitation premises from the applicants / new developer / owner ?

**Chamber Summons Nos. 42 of 2020 and 43 of 2020**

(a) Whether the reliefs prayed for in the above two Chamber Summons are maintainable ?

(b) Whether the applicants in the above two Chamber Summons, having obtained decrees from RERA are entitled to have their respective dues settled out of the monies lying deposited with the Prothonotary and Senior Master pursuant to the sale of the said property ?

**Interim Application No. 319 of 2019**

(a) Whether the applicant in the above Interim Application is entitled for arrears of transit rent from the monies lying deposited with the Prothonotary and Senior Master ?

**Commercial Execution Application No. 22 of 2016**

(a) Who is liable to pay the outstanding dues of the property tax/statutory charges payable to the Statutory Authorities in respect of the said property in respect of the period prior to 01.10.2018 and after 01.10.2018 ?

(b) If any property tax/statutory dues are due and payable in respect of the period prior to 01.10.2018, whether the same will have to be paid from the monies lying with the Prothonotary and Senior Master ?

(c) Whether the applicants / decree holders are required to pay the transit rent to the tenants who have been displaced out of the said property from 01.10.2018 onwards ?

(d) Whether the applicants / decree holders are required to enter into fresh/new agreements with the tenants of the said property for redevelopment, transit rent, alternate accommodation etc.?

**Additional issue common to all applications**

(a) Whether the Chamber Summons Nos. 561 of 2019, 42 of 2020, 43 of 2020 and 44 of 2020 and Interim Application No. 319 of 2019 are maintainable ?

5. When this matter was heard on 3<sup>rd</sup> June, 2021 Naik and the respondent were represented. The court recorded the submission of Mr. Kapse then appearing for the developer landlord-Naik. The liability of Naik in respect of the claim upto 31<sup>st</sup> September, 2018 could not be disputed. He agreed to co-operate in the matter of passing appropriate directions, being aware that a sum of Rs. 5.56 crores along with interest lies at the disposal of the Prothonotary and Senior Master subject to adjudication of claims.

6. The Municipal Corporation has certain demands. On that date Mr. Sharma the learned counsel appearing for the applicants also submitted that claims can be met from surplus sale amounts lying with the Prothonotary and Senior Master, because upto 31<sup>st</sup> September, 2018 claims were required to be met by the Naik and from 1<sup>st</sup> October, 2018 it would be the responsibility of the purchasers in the auction purchase. The common issue that requires to be answered is whether these applications are all maintainable, given the fact that this is the executing court. It is not in dispute that the property in question is required to be redeveloped, however only some of the tenants have vacated. The structure is said to be partly demolished. There are some tenants who are still occupying the structure and the scope of the present application is restricted to the claim for money

that is made by tenants and the two persons claiming to be purchasers of flats to be constructed.

7. In my view the question of maintainability will have to be decided first and that is something that all parties have agreed upon when the issue was framed. It is not necessary therefore to consider the other issues till I am convinced that these claims are maintainable before an executing court. There is of course the question of whether the executing court could decide these issues in respect of persons who are in that sense strangers to the execution proceedings. The execution is initiated by a judgment creditor and a successful party in an arbitration. The Arbitral Tribunal has vide an award dated 25<sup>th</sup> September, 2015 allowed the claims and directed the respondent who was the developer –landlord to pay a sum of Rs.3,50,30,150/- and interest thereon at the rate of 12% per annum from 22<sup>nd</sup> February, 2005 and costs of Rs. 10 lakhs. It is this award that has been put into execution.

8. The applicant in the execution application is a partnership firm engaged in the business of offset printing inks. The applicant no. 2 is one of the partners and it appears that they are now contemplating development of the property. The property was attached pursuant to the warrant issued in execution and the schedule of the execution application records the description of the property in column J. There is no dispute and this is the very property that has now been purchased by the decree holder. The sale proceeds having been appropriated by the decree holder the balance is now deposited in this court.

9. In these set of facts, it is appropriate that now we consider submissions in each of these chamber summons. Ms. Chavan who led the arguments on behalf of the tenants in Chamber Summons No.44 of 2020 which has the maximum number of applicants submitted that a sum of Rs.1,21,94,500/- is due to the applicants as of 31<sup>st</sup> August, 2018. They are facing a lot of difficulties ever since rent has not been paid. She submits that the 21 applicants be permitted to withdraw the aforesaid sums from the amount lying with the Prothonotary and Senior Master since according to her this is an overflow from the sale of the property and the auction purchaser has no occasion to claim these amounts since the auction purchaser has no right to these amounts. Ms. Chavan submits that she is entitled to release of the unpaid rent from and out of the balance of the sale proceeds. According to Ms. Chavan, Naik has not made any claim to this amount and this court has already recorded submissions on behalf of Naik that they are willing to comply with the directions of this court. According to Ms. Chavan the purchasers have stepped into the shoes of the Naik and are now bound to comply with the obligations of Naik and provide alternate accommodation by way of rehabilitation in the new building to be constructed and in the meanwhile make payment of the rent.

10. Ms. Chavan has also relied upon an updated computation of the unpaid rent which amounts to Rs.1,74,26,000/- as of September, 2018. Ms. Chavan submits that this must be paid over to the applicants who have been left in the lurch by Naik. She submits that upon the auction purchase going through the present purchaser who also intends to develop the property and

be held liable to pay the amount of rent. Till such time Ms. Chavan submits that the amounts lying to the credit of the execution application may be utilised to pay over the arrears of rent.

11. In support of her contention Ms. Chavan has relied upon a decision of the Supreme Court in the case of *Shreenath and Anr. vs. Rajesh & Ors*<sup>1</sup>. which observes that tenants in possession of a property obstructing a decree holder and filing an objection under Rule 97 of Order XXI would be entitled to be heard. Relying on the observation of the Supreme Court in paragraph 11 Ms. Chavan submits that under Order XXI Rule 101 all disputes between a decree holder and inviting my attention to provisions of Order XXI Rule 97 she submits that the auction purchaser is now in possession of the immovable property and the applicants in the Chamber Summonses being entitled to claim alternate accommodation, till such time rent in respect of the premises that they held in the building under redevelopment it is open for the applicants to approach this court under Order XXI Rule 97 and the present Chamber Summons be considered as one under Rule 97 sub clause (1) which will require this court to adjudicate upon the issues in this application.

12. Ms. Chavan relies on the Amending Act of 1976 which incorporates Sub-Rule (2) to Rule 97 where the court is required to fix a date for investigating the matter and summon parties against whom the application is made in order to appear. All persons who have a claim are entitled to approach this court as the executing court and the tenants cannot be asked to initiate a long drawn arduous procedure by filing a fresh suit. Ms. Chavan

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<sup>1</sup> (1998) 4 SCC 543

submits that all these issues can be decided before this court and there is no occasion for the tenants being asked to approach any other forum. Ms. Chavan states that the expression “any person” is wide enough to include a person who is not bound by a decree or claiming a right in the property on his own including that of tenant and a stranger. She submits that if the court is satisfied with the bonafides of the applicants, the rent can be directed to be paid over to the owners. Thus, she seeks relief in terms of the Chamber Summons directing the present purchasers to pay compensation in lieu of temporary alternate accommodation on a monthly basis, till permanent alternate accommodation is handed over to the applicants and in the meanwhile directing the arrears to be paid out of the amounts lying deposited in this court. Ms. Chavan submits that the applicants are all tenants and there is no dispute about the fact that they are bonafide tenants of the property which has since been acquired by the auction purchasers.

13. I may observe here that the Municipal Corporation has filed a claim in a sum of Rs. 28,58,756/- due as property taxes upto 31<sup>st</sup> March, 2021 and a further sum of Rs.2,82,040/- towards certain house with shops also in the adjacent property and repair cess of Rs.76,872/- due as of 31<sup>st</sup> March, 2020. In addition, the Corporation claims further amounts of property tax in a sum of Rs. 2,46,135/- and penalty and repair cess of Rs.2,41,872/- Total outstanding towards unpaid tax and penalty upto 31<sup>st</sup> May, 2021 inclusive of repair cess in respect of all the buildings in question is assessed at Rs.37,05,675/-. Details of bill wise outstanding are provided in Exhibits A

and B of the affidavit dated 10<sup>th</sup> June, 2021 filed on behalf of the Corporation.

14. In an affidavit in reply filed on behalf of the judgment creditor no. 2 and original decree holder the deponent has disputed all these claims and contended that they do not admit tenancies. The agreements under which the tenants claim are not registered and that the auction purchasers have succeeded in the auction and having purchased the property they are not bound by the various acts and omissions of Naik. The deponent has denied the factual narrations of the applicants for want of knowledge and submits that the agreements entered into between applicants and Naik were neither registered nor otherwise recognizable in law. That the Chamber summons is infructuous since the land has been sold by this court in a public auction which sale is confirmed on 30<sup>th</sup> October, 2018. The execution proceedings are therefore disposed finally as recorded in this court's order dated 30<sup>th</sup> October, 2018.

15. In a rejoinder filed by applicant no. 9 the contentions of the applicants are reiterated and it is contended that the judgment creditor was aware that the property has 73 tenants even prior to the auction and having acquired the property on "as is where is" basis this court has also recognised the fact that the 73 tenants were on the property and had reduced the reserve bid accordingly. The property was under redevelopment under DCR 33 (7) read with provision of the MHADA Act and the Competent Authority has certified these persons as tenants. 70% consent required of tenants has now been reduced to 50% and these applicants had given their irrevocable consent

for redevelopment and hence the rights of these tenants cannot be extinguished in the manner sought to be done. The MHADA Act is a special enactment which provides for benefits to tenants and to protect their rights. The tenants cannot be left in the lurch and hence Ms. Chavan submits that the application filed is entitled to be allowed and fully competent under the provisions of Order XXI since under Rule 97 it is the executing court that is entitled to and empowered to decide all issues between the parties.

16. Ms. Chavan relied upon an affidavit in rejoinder filed by one Prashant Chapekar reiterating that the judgment creditor and purchaser was aware of the fact that 73 tenants had to be accommodated within the new building and redevelopment being under DCR 33(7). She submits that the applicants in the chamber summons are entitled to protection inasmuch as MHADA has already certified this list of tenants in the year 2014 and the area occupied by them. Legal heirs of deceased certified tenants are also entitled to premises in the new building to be constructed. The obligations cast upon Naik would therefore have to be taken over by the present auction purchaser and there is no occasion for the applicants to file a separate suit at this stage. All these issues can and must be decided under Order XXI by the executing court. Ms. Chavan submitted that the application for recalling the order dated 3<sup>rd</sup> June, 2021 was untenable since the auction purchaser had stepped into the shoes of the judgment debtor-Naik.

17. Ms. Chavan has invited my attention to Exhibit C to the rejoinder which is communication dated 30<sup>th</sup> November, 2006 whereby the NOC for

redevelopment was granted by the Mumbai Board for Repairs and Reconstruction (M.B.R & R Board) in respect of the structure occupied by the tenants. It acknowledges the submission of a list of tenants and occupants with the carpet area and built up area in the office of the Executive Engineer (M.B.R.&R Board). She has also relied upon a communication addressed to the Deputy Chief Engineer, Building Proposal (City) providing the modified list of tenants and mentioning the appropriate area against the name of each tenant. Copy of this communication is marked to Naik and it includes the list of tenants occupants of the building.

18. My attention is invited to this tabulated form which sets out the names of all the tenants and occupants with reference to each floor and the shops/room occupied by the parties . This list is certified as correct by the Architect, the owner/developer-Naik, the Deputy Engineer of the M.B.R & R Board as also the Executive Engineer. Thus Ms. Chavan therefore submitted that there is no option but to seek relief from the executing court which is the appropriate court in these circumstances competent to grant the relief especially since the monies that the applicants seek to withdraw towards arrears of rent are lying deposited in this court pursuant to orders in execution.

19. In support of Chamber Summons No. 561 of 2019, Mr. Clive D'souza learned counsel appearing for the nine applicants submitted that all of them were certified tenants of the property and were entitled to intervene in the execution application. He therefore submits that he is entitled to an order and direction against Naik and/or his firm and in the alternative the auction

purchaser jointly and severally to pay the arrears Rs.30,12,000/- which amount has since been enhanced, since considerable time has gone by. He relied upon Exhibit I to his affidavit in support which lists out the names of 9 tenants with room number, details of rent paid and details of arrears due as of March, 2019.

20. Essentially it seeks intervention and directions against original landlord/judgment debtor Naik and and/or his joint venture partner viz. M/s. Dhoot & Associates Pvt. Ltd. and/or the Auction purchasers jointly and/or severally to pay transit rent which is said to be in arrears. Alternatively, it seeks a direction against these persons to deposit the monthly rent payable to the applicants in court from April, 2019 onwards till possession is handed over of the construction.

21. Mr. D'souza adopted the submissions made on behalf of the applicants in Chambers Summons no. 44 of 2020 by Ms. Chavan and contended that the tenants could not be left in the lurch, because Naik had defaulted, resulting in the sale of the property. According to Mr. D'souza the obligation to provide permanent alternate accommodation subsists and vests in the auction purchaser who have since entered into some arrangement with developers by name M/s. Win Win Associates ("WWA"). He therefore submits that in the interest of justice the amounts lying in this court should be distributed towards arrears of rent.

22. In an affidavit in reply filed on behalf of the successful bidder in the auction being the claimant/ judgment debtor it is contended that the Chamber

Summons is not maintainable. The relief claimed against Naik and the joint venture partners M/s. Dhoot and Associates is infructuous since property has been sold in an auction and purchased by the judgment debtors and their nominee WWA now proposes to take up the construction of the building. The affidavit therefore seeks to oppose the chamber summons.

23. Interim Application No. 319 of 2019 is filed by an individual, an Advocate by profession and in the capacity as son of the original tenant of the premises and the legal heir. In this application the applicant represents interest of his late father who was a tenant of the premises in Room no 25 of A Block. He has contended that his father was entitled to permanent alternate accommodation just as the other tenants and the plans for redevelopment having been approved in the year 2003. The developer had executed an agreement with his late father and thereafter obtained various approvals and permissions from MHADA, BMC and other authorities and requested the tenants of C building to vacate and handover the premises. It is contended that in respect of his father's premises being Room no. 25 they handed over possession to Naik the original judgment debtor who had undertaken to pay compensation for 24 months in advance and continued to pay rent for the premises till they were shifted in newly constructed flats.

24. According to the applicant since November 2008 the applicant's parents were receiving compensation of about Rs.20000/- till December, 2013 towards transit accommodation and that his parents have handed over possession of the tenement at that stage in November 2008. Naik stopped payment of rent from January, 2014 as a result litigation ensued. He submits

that his father's name too is part of the list of approved tenants and that an agreement for permanent alternate accommodation has also been entered into between Naik and his father. He has relied upon a copy of the same. The applicant therefore contends that he is also entitled to payment of rent from and out of the money deposited to the extent of Rs.11,40,000/- which is overdue as on 30<sup>th</sup> September, 2018.

25. Mr. Sant in support of his contention relied upon the fact that he filed a Writ Petition in this court being Writ Petition 2404 of 2017 against the developer Naik which remains pending and his right should be protected. The rent should be paid and the applicant should be put in possession of premises in the new building to be constructed. He also has sought to rely upon the submission made in other Chamber Summons in support of their claim to the effect that as auction purchaser the judgment creditors must and are obliged to carry out development work at the property and the applicants cannot be left in the lurch.

26. The remaining two Chamber Summons Nos. 42 and 43 of 2020 are of a different category. These are filed by two individuals husband and wife who claim to have agreed to purchase two flats bearing nos. A-502 and A-902 admeasuring 704 sq.ft. each in the building to be constructed on the suit plot. The relief sought in the both these Chamber Summons are identical. They seek a declaration that the applicants have right, title and interest in the flat. They seek release of attachment on the plot, continuation of attachment. In the alternative but subject to the rights and provisions of Maharashtra Ownership Flats Act, 1963 ("MOFA") and the rights of the applicants to

receive possession of their flats, they also seek to enforce their statutory right of seeking refund of the consideration paid to the Naik on account of his failure to deliver possession. These Chamber Summonses are filed in April, 2018 and the applicants represented by Mr. Jayakar submitted that the applicants had paid good money towards purchase of flats.

27. Mr. Jayakar has invited my attention to the affidavits in support of the Chamber Summons containing the relevant averments. According to him these flats were agreed to be sold to the applicants by the said Naik who had promised them that the plans of the proposed construction would be approved and sanctioned by the Municipal Corporation and till then the said Naik could not execute or register an agreement for sale. The applicants in Chamber Summons no. 42 of 2020 claim to have proceeded on the promise of performance and paid a sum of Rs.1,36,00,000/- and a sum of Rs.1,44,00,000/- in the case of Chamber Summons no. 43 of 2020. The applicants being identically placed as far as the project is concerned, have contended that they have invested their life savings in the project which was registered with Real Estate Regulatory Authority ("RERA"). They have therefore statutory right to seek refund as well, in the event of failure to be put in possession.

28. Mr. Jayakar had invited my attention to the fact that after strenuous efforts were made by the applicants, they realised that the property was being put up for auction under orders of this court and on making inquiries learnt of the award of September, 2015 passed against Naik. It is only in April, 2018 that Naik provided him with an affidavit filed in court in the Execution

proceedings wherein he had contended that he was not able to continue with the project. In view of the contentions taken up by Naik the applicants approached this court under Order XXI Rule 58 claiming that the attachment of the plot would be subject to the applicants right to receive possession of flats in the constructed building as also the statutory right to seek refund of monies for non-performance. The applicants have already availed of their remedy under the Real Estate (Regulation and Development) Act, 2016 since Naik had abandoned the project. Naik had also disclosed that out of four structures standing on the property, two had been demolished and almost 30 tenants had been shifted to transit accommodation. It is contended that it is necessary that the plot be released from attachment so that tenants and purchasers rights are protected. Mr. Jayakar has therefore contended that the property having been sold under the auction contended what now remains is for the applicants to seek repayment of the amounts advanced as aforesaid.

29. In this behalf my attention has been invited to the agreement executed on 3<sup>rd</sup> November, 2016 between the Naik and his son and partner as owners / owners and developers and the applicant. These are identical in both these applications. These agreements appear insufficiently stamped. They are not registered and the explanation in this behalf is that the judgment debtor had agreed to execute a duly stamped and registered agreement upon all sanctions being granted and it is only a set of terms and conditions that had been agreed prior to executing this agreement but the intention was always to execute and register a properly stamped agreement under MOFA.

30. Mr. Jayakar further submitted that a writing described as “*Terms and Conditions for sale of two bed room flats to Mr. Avhad*” was executed on 12th June, 2013 copies of which are annexed to the affidavit in support. Several payments have been made in installments and have set out in a tabulated form annexed to the affidavit in support. He has relied upon copies of cheques, entries in the pass book all of which indicates payment made to Naik. In an additional affidavit he has also annexed a copy of the agreement entered into which is not stamped and registered and also relied upon the fact that the Maharashtra Real Estate Regulatory Authority (MahaRERA) on a complaint by the applicant passed a final order on 6<sup>th</sup> February, 2019 whereby the applicants have been allowed to withdraw from the project and subject to orders of the High Court, Naik has been asked to pay to the two applicants sums of Rs.1,36,00,000/- and Rs.1,44,00,000/- along with interest at 10.70%. In view of the order passed under RERA it is contended that now it is crystal clear that sums of almost Rs. 2.80 crores and interest are to be paid to these applicants and in the facts of the case it is only the amount lying in this court that can be utilised for the payment of these monies, if the court permits. Mr. Jayakar therefore submits that the relief as sought be granted. These are the factual aspects on which learned counsel have addressed the court.

31. Mr. Khandeparkar appearing for the purchasers to oppose the Chamber Summons Nos. 561 of 2019 and 44 of 2020 and Interim Application no. 319 of 2019 has disputed these amounts, but more importantly the auction purchaser has questioned the right of these persons

to even claim tenancy. In the course of submissions Mr. Khandeparkar has made it clear that the auction purchasers do not recognise all the applicants as tenants. No doubt the fact that there were tenants on site has been known to the purchasers even at the time of the auction purchase and in fact the asking price was brought down, reserve price was brought down in view of the fact that they were tenants in the premises. The valuation was accordingly determined by the court and the auction has proceeded accordingly. Notwithstanding that position, the purchasers have not accepted all the claims. Mr. Khandeparkar placed reliance on the judgment of the Supreme Court in the case of *Asgar vs. Mohan Varma*<sup>2</sup> in support of his contentions. He therefore submits that the applications are not maintainable and that the issue of maintainability be answered accordingly.

32. Mr. Prerak Sharma appearing on behalf of the purchasers in Chamber Summons nos. 42 and 43 of 2020 has adopted the submissions of Mr. Khandeparkar to the extent relevant and further submitted that the claims of these two applicants are completely different from the others. These two applicants had exercised their right to obtain refunds from Naik and the purchaser/WWA had no obligations towards these applicants. Moreover, the agreements under which the applicants claim are not registered and not valid in law. Mr. Sharma therefore submits that the applications are liable to be rejected.

33. Having considered the factual background in each of these cases I find that there are two distinct categories of applicants. The first being the set of

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<sup>2</sup> (2020) 16 SCC 230

tenants who claim under the Chamber Summons no. 44 of 2020, Chamber Summons no. 561 of 2019 and Interim Application no. 319 of 2019 and the second set being the applicants in the Chamber Summons nos. 42 and 43 of 2020 who claim as purchasers of premises to be constructed on the suit plot. As far as the first set is concerned, the tenants/ occupants are claiming rehabilitation in the building to be constructed on the suit plot. They also seek payment of rent from the developer. In the present applications the relief is restricted to payment of arrears of rent from and out of monies lying deposited in this court. These are not proceedings where the tenants are claiming relief of possession of premises and protection of their rights as tenants / occupants of premises some of which have been demolished. Some of these tenants are in possession of their tenements. Others have vacated their premises and handed over possession to Naik. Those tenants today claim only their rehabilitation and rent for transit accommodation. There is a controversy as to the quantum of rent payable. For instance, in all these cases parties have claimed rent of about Rs.20,000/- per month in respect of the tenements.

34. In this respect I have called upon the purchasers to make their stand clear as to their rights of the tenants/ applicants of the premises to permanent alternate accommodation in a construction to be put up at the suit plot. The purchasers have through counsel made it clear that the intention of the purchasers is indeed to construct premises at the suit plot and that these will not be super luxury apartments which will have no place for rehabilitation of tenants. A nominee of the purchasers, WWA is proposing to set up the

new building/buildings on the plot and Mr. Khandeparkar has, without prejudice to the rights of the purchasers conveyed to the court on instructions that if all tenants/occupants approach the purchasers in one voice it will be possible to consider their claims. There is no way of ignoring the fact that there are occupants, many of whom may be tenants, some may be legal heirs of tenants entitled to transmission of these tenancies, others may be mere occupants. However, in my view this is not the proceeding in which these aspects can be considered. Those claiming possession as on date will no doubt be on site and can be recognised as occupants/tenants. Those who have already vacated the premises and surrendered their premises to the owner developer at the material time will no doubt have to be heard and their claims will also be considered in accordance with law. This opportunity cannot be denied to them. The question is whether these aspects can be gone into in these proceedings and in my view they cannot.

35. The scope of Order XXI Rule 58 and 97 has been explored in the course of these proceedings. The tenants/occupants rights as such are not being negated by the unwillingness to accept them as tenants at this stage. What is being done is their attempts at recovering arrears of rent from the monies deposited in this court is being opposed. There are different reasons why this is so. Thus, to make the position of the tenants and occupants clear and to set their concerns at ease it is evident that the purchasers may not deny them their rights, if any, available in law. That having been said, I proceed to now consider the claims on merits.

36. The tenants have spoken in one voice through their counsel Ms. Chavan who led the arguments in Chamber Summons no. 44 of 2020 ably supported by Mr. D'souza and Mr. Sant who appears in person. These are the tenants who have approached the court seeking diverse reliefs against the owner developer and in the alternative against the auction purchaser. The auction purchaser has already stated that they will consider the claims of the tenants and occupants and in my view there is no occasion to grant any of the reliefs in this Chamber Summons by the tenants. As far as their prayers against the owner developer is concerned that is a closed issue. The property has been sold in auction and the prayers against Naik cannot be granted in these proceedings.

37. Coming to the prayers in Chamber Summons no. 44 of 2020 I find that prayers (a) to (f) cannot be granted today. There is no purpose in engaging in a discussion on merits of these claims, since the property has changed hands by virtue of the auction having been completed and the sale having been upheld. The only prayer in my view that survives as far as Ms. Chavan's application is concerned is prayer clause (g) wherein the applicants claim a sum of arrears presently to the tune of Rs.1.74 crores. Prayers (h), (i) and (j) are directed against the auction purchasers seeking a direction to them to complete the project of redevelopment and to put the tenants in possession and meanwhile pay compensation in lieu of rent and continue to pay rent for alternate accommodation. Those prayers cannot be granted in these applications for multiple reasons. Before we enter upon the exercise of considering individual prayers, I must not lose sight of the fact that issues

have been identified and framed by order dated 3<sup>rd</sup> June, 2021. However, in paragraph 24 of that order the court has observed that all contentions are kept open. This has led to the framing of an additional issue by consent of all concerned on the aspect of maintainability. Having considered the provisions of Order XXI Rule 58, 97 and 101 and also having considered the inherent powers of the court, I am of the view that none of these applications are maintainable.

38. As far as the claims of the tenants are concerned, their submissions are rooted in the provisions of Order XXI, Rule 58, Rule 97 read with Rule 101. Rule 58 is reproduced below for ease of reference:

**Order XXI Rule 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 lie claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive.*

39. It is clear that Rule 58 deals with adjudication of claims and objections to the attachment of the property. This rule is of no avail today since the attachment has now resulted in a sale. The scheme of Rule 58 contemplates of receipt of claims and objections in respect of property, property attached has already been sold, but where the court considers the claim being unnecessarily delayed, Sub-rule (2) of Rule 58 contemplates decisions on questions arising as between parties to the proceedings or their representatives and Rules 3, 4 and 5 deal with consequences upon determination of those questions. Thus Rules 3, 4 and 5 do not come into play in the present case as at this point in time since they would all depend on the decisions on questions arising *"between the parties to a proceeding or their representatives under this rule."*

40. The Rule itself contemplates objections to attachment on the ground that property is not liable to such attachment, only then is the court required to adjudicate upon the claims or objections. In the present case none of the applicants are in a position to contend that the property is not liable to attachment. The property has already been attached and sold in execution of the award and that is a forgone conclusion. All applicants have accepted this position, none are in a position to contest this factual aspect. The owner

developer-Naik himself has not appeared during the hearing of this application on 9<sup>th</sup> December, 2021 and today in which he has recognised the rights of the tenants and intending purchasers. He has also clearly submitted to orders of the court. While the tenants and other applicants may have claims against Naik, the question is whether these rights can be now enforced against the purchasers. That is an aspect which will have to be decided in independent proceedings that may be filed by the tenants and applicants. In the present case the claim is for payment of arrears of rent and refund of advances paid to Naik from the amounts lying deposited in court and in my view those amounts are primarily held to be available for discharging the dues in respect of the property prior to the auction purchaser acquiring the property and this is where the orders passed earlier become relevant.

41. All parties have drawn my attention to the order dated 30<sup>th</sup> October, 2018 passed by this court whereby the decree holders were confirmed as purchasers of the property for consideration of Rs. 15.30 crores. The decretal sum was Rs.9,39,21,640/- and after adjusting this, the decree was directed to be marked fully satisfied. The balance was found to be Rs.5,40,78,360/-. The decree holders' request to confirm the sale in favour of its nominee WWA, was permitted and accordingly a sale certificate is issued to WWA. The Sheriff was directed to clear all statutory liabilities on the property from the surplus funds in his hands and the auction purchasers and its nominees were not entitled to claims or charges arising in respect of a property prior to the date of acceptance of their bid. The balance amounts have been deposited by

the Sheriff with the Prothonotary and Senior Master. The Prothonotary and Senior Master was then directed to inform the Revenue and Municipal Authorities of confirmation of the sale in favour of WWA. The decree holders and WWA were entitled to then apply to Revenue and other Authorities including MHADA for updating their name in the land records and property registers.

42. Reference to MHADA in this order clearly contemplates the fact that the property was under redevelopment under DCR 33 (7) as otherwise there would be no occasion to refer to MHADA in this order. The execution application was disposed on that date. The order further records that claims received from Associations of tenants / occupants, etc would be considered by granting liberty to pursue those claims against the original owners in a court of competent jurisdiction and all contentions in that behalf are left open.

43. Reference in paragraph 9 of that order to the original owners may lead to some confusion as to whether this liberty can be exercised by claiming against the present purchasers and WWA and in this behalf paragraph 9 makes it clear that all contentions in that behalf are kept open. Accordingly I am of the view that the statement on behalf of the purchasers / WWA that the claims of tenants and occupants will be considered if they approach the purchasers / WWA their claims would be certainly looked into and to that extent I must observe that the liberty to pursue these claims will not only operate against original owners but also against the purchasers and WWA since if the tenants/occupants cannot be

presented a fait accompli whereby their rights disappear into thin air only on account of the purchase of the property in an auction purchase.

44. The Purchasers/WWA through counsel fairly stated that the right to rehabilitation of tenants/occupants will be considered if they approach the present purchasers and they would be treated in accordance to their entitlement. It is in this behalf that Mr. Khandeparkar has pointed out that several conflicting claims are being made. For instance, one of the agreements for sale tendered to court shows that the rent payable is far lower than what was been claimed in these applications. These are all aspects that cannot be gone into in these proceedings since I am of the view that these claims are not maintainable under Order XXI Rule 58. It is also pertinent to mention that the owner / developer had in his affidavit clearly admitted that the maximum rent paid was Rs. 20000/- per month and minimum was about Rs.14000/-. This is yet another aspect which cannot engage the attention of this court under Rule 58 and I therefore proceed to consider the case of the applicant under Rule 97. Rule 97 is reproduced below for ease of reference.

***Order XXI Rule 97 . Resistance or obstruction to possession of immovable property"***

*(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.*

*(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate the upon the application in accordance with the provisions herein contained.*

45. Rule 97 as we have seen deals with circumstances where there is resistance or obstruction to possession of immovable property. In the present

case there is no question of resistance to possession since possession is already handed over after the auction purchase and possession has been acknowledged by all these parties. In other words, none of these parties who are before this court today are obstructing possession of the property being handed over to the purchasers / nominees. It is only in case where the holder of the decree or the purchaser is resisted or obstructed by any person in obtaining possession that the purchaser is entitled to make an application complaining of such resistance. Thus, this is an application to be made by a purchaser and/ or a decree holder and not by a tenant or other applicant. Rule 97 empowers the court to deal with such obstruction and adjudicate upon the same at the instance of the purchaser and / or decree holder. Thus, in my view this is a Rule which clearly cannot apply to the facts of the case or come to the assistance of the applicants.

46. Ms. Chavan had referred to the decision of Supreme Court in *Shreenath and Anr (supra)* and had invited my attention to the observation in paragraph 11 that under Order XXI Rule 101 all disputes between decree holder and any person is to be adjudicated by the executing court and that a party is not to be thrown out to relegate itself to a long drawn out arduous procedure of new suit. That Order XXI Rule 97 conceives of cases where delivery of possession to the decree holder is resisted by any person and any person is a person not bound by the decree or claiming a right in the property on a zone including that of a tenant or stranger. I am afraid reliance placed on this judgment is misconceived inasmuch as the judgment clearly observes that in case of any obstruction Rule 97 could be availed of. But the basic

requirement of Rule 97 is intended to protect cases of delivery of possession and resistance to delivery of possession to a decree holder or purchaser by any person and that person could include a tenant. Quite contrary to the submission made by Ms. Chavan, this Rule would in fact apply to purchasers and decree holders where attempts at possession has been obstructed by a tenant and therefore the court was empowered to take into consideration such obstruction and decide the obstructionist's plea to handing over possession to a purchaser or decree holder. It does not in my view come to the assistance of the tenants or applicants in the present case. Rule 97 thus is of no assistance to the applicants.

47. The next question is whether Rule 101 can come to their assistance. Rule 101 is reproduced below for ease of reference.

***Rule 101 . Question to be determined***

*All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.*

Rule 101 provides that all questions arising between parties to a proceeding on an application under Rule 97 and the relevant adjudication of the application shall be determined by the court dealing with the application and not by a separate suit. In my view none of these applications come within the scope of Rule 97 and once I come to that conclusion the question of determining those issues under Rule 101 will not arise. Thus, I am of the view that the applications are misconceived.

48. The rights of the parties have been protected by the court by the order dated 30<sup>th</sup> October, 2018 in paragraph 9 and 10. Paragraph 10 of that order records that if there is any surplus amount in the hands of the Deputy Sheriff no amount is to be released to the judgment debtors or tenants or claimants without a specific order of court and made on a formal application filed and served on all parties. No doubt these applications seek to take shelter under paragraph 10 but the question is whether these applications are maintainable. In the facts of this case it must be borne in mind that when the order dated 30<sup>th</sup> October, 2018 was passed only one of these Chamber Summons was filed namely Chamber Summons no. 44 of 2020 which was then noted as Chamber Summons (L) no. 1388 of 2018. The further Chamber Summonses have all come forward in a similar form. One of these is in the form of an Interim Application. Many of these raise disputed questions of fact which cannot be gone into in these proceedings under Rule 58 or 97 and therefore certainly not under Rule 101. These persons will therefore have to adopt their own separate proceedings, if they so desire.

49. As far as the intending purchasers represented by Mr. Jayakar are concerned, they have already adopted proceedings. They appear to have given up their rights to possession of newly constructed flats but have obtained an order from RERA Authority allowing them to withdraw from the project and recover the advance of the purchase price said to have been paid from the owner developer/Naik along with the interest thereon. These applicants in Chamber Summons Nos. 42 and 43 of 2020 are entitled to execute that order in accordance with law. The question is whether in these

Chamber Summonses any relief can be granted. Prayer clause (a), (b), b(i) and b(ii) and prayer clause (c) incorrectly described as prayer clause (d) are incapable of being granted today since the property is already been sold. All these prayers contemplate reliefs prior to sale of the property.

50. Mr. Jayakar has canvassed the point that in prayer clause b(ii) he had prayed for relief subject to the statutory right to seek refund and the RERA Authority having granted an order for refund he is entitled to recover the monies from the residual amounts with the Prothonotary and Senior Master. This is not an Execution Application filed by the applicant who have secured the order under RERA but parties who sought to protect their right, title and interest in the two flats that they had agreed to purchase. While those rights have now been waived or given up by the said two applicants by approaching the RERA and seeking leave to withdraw from the project, what appears to survive now is money claim and that money claim will have to be pursued by adopting suitable proceedings. In my view the present Chamber Summonses are not competent to grant that relief.

51. The statutory right they claim has already been protected by the RERA Authority. Having obtained such an order it is a question of executing that order. Prayer clause b(ii) in its restricted form and as canvassed by Mr. Jayakar cannot come to his assistance in getting any reliefs in the present application. I may also mention that the relief sought by Mr. D'souza and Mr. Sant in their applications are similar to those that have been pressed into service by Ms. Chavan. The reliefs in those applications are narrower and seek to protect their rights as tenants / occupants to receive permanent

alternate accommodation and rent. That is something that will have to be urged in separate proceedings.

52. The Supreme Court has in the case of *Asgar v/s. Mohan Varma*<sup>3</sup> had occasion to consider provisions of Order XXI Rule 97 and 99 and the remedy available to a stranger to a decree and reiterated that a stranger can apply both under Rule 97 and 99 but what the court held that a stranger to a decree is entitled to agitate his grievance and claim for adjudication for an independent right, title and interest in the decretal property, even after being dispossessed in accordance with Order XXI Rule 99. Order XXI Rule 97 deals with the stage which is prior to actual delivery of possession and the grievance of the obstructionist can be adjudicated upon before the actual delivery of possession to the decree holder and under Rule 101, questions as to right, title and interest in the property arising between parties to a proceeding could be determined under Rule 97 or 99 and not by a separate suit. Adverting to the scope of Rule 97 to Rule 103, the Supreme Court observed that it is a complete code for the parties to the suit and strangers to the decree and the Executing Court shall adjudicate all questions relating to the right, title and interest in the property in proceedings under Rule 97 or 99. The decision in *Shreenath (supra)* has also been considered in *Asgar (supra)*. Paragraph 10 of *Shreenath (supra)* has been highlighted in *Asgar*. Paragraph 43 reproduced extracts of paragraph 10 of *Shreenath (supra)* and identifies the use of the expression “any person” to include **persons resisting delivery of possession** including claiming right of property. Paragraph 44

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<sup>3</sup> (2020) 16 SCC 230

records that this principle has been reiterated in *Har Vilas vs. Ms Mahendra Nath & Ors.*<sup>4</sup>. In the case at hand there is no resistance to possession. The claim of the applicants is primarily against Judgment Debtor Naik. How then can the claim of applicants claiming tenancy be determined under Order XXI?

53. I find that in *TCI Finance Ltd. v/s. Calcutta Medical Centre Ltd. and Anr.*<sup>5</sup> the Supreme Court was considering a challenge to the judgment of the Division Bench of Calcutta High Court in regard to a claim of tenancy. An intervention application came to be filed on the basis of the expression "*all questions arising between the parties to the suit*" "*or their representatives*" under Section 47 of the Code of Civil Procedure and in connection with Order XXI Rule 54 and 58 and adjudication of claims or objections to the attachment of the property. The Supreme Court observed that the High Court misconceived the nature of the claim set up by the tenant. The agreement under which the claim was made was not produced before the court and the single Judge drew an adverse inference. Before the Division Bench, it was contended by the respondent that it was a tenant but the Division Bench enlarged the scope of the controversy and directed the Executing Court to decide the question of tenancy. The Supreme Court found that the Division Bench had enlarged the scope of the controversy observing that the matter had assumed the proportion of a full-blown trial and the judgment of the Division Bench, High Court came to be set aside and that of the Single Judge affirmed.

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<sup>4</sup> (2011) 15 SCC 377

<sup>5</sup> (2005) 8 SCC 41

54. In the present case, the applicants in my view are expecting the Executing Court to expand the scope of the enquiry to determine whether the applicants in the Chamber Summons are entitled to reliefs in their capacity as tenants and /or their right as occupants especially when the purchasers are denying that the applicants are tenants. Mr. Khandeparkar had submitted that MHADA has not certified tenancies and indeed it cannot but it only verifies occupancy at the time of considering a proposal for re-development. Occupants they may be but as to how many of them are entitled to tenancy for permanent alternate accommodation as tenants and as occupants. As a matter of fact, the Executing Court cannot go on expanding the scope of the enquiry. More so since the Execution Application has been disposed. Rule 58 in my view or Rule 97 are not Rules that the present applicants can be permitted to take for the purposes of claiming their rights against the owner developer and/or the auction purchaser in respect of the plot. The present application and canvassed before me by the applicants is restricted to a claim that money lying in this court should be distributed amongst them towards arrears of rent on the basis of claims of tenancy which is being disputed and it is not possible for this court to expand the enquiry for obvious want of jurisdiction to entertain claims of tenancy.

55. Considering the facts in the instant case, this court is not empowered to decide the question of tenancy. Thus, although the Executing Court is empowered to determine several questions under provisions of Rule 97 to Rule 103, one must not lose sight of the fact that these rules relate essentially to resistance to a person seeking possession of property. The scope of Rule 97

is therefore well defined and unless the case being agitated falls within the scope of the Rule 97, Rule 98 and the subsequent Rules are not attracted. For instance, Rule 98 and Rule 100 are both premised on determining questions under Rule 101 arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or representatives of the parties. These are to be decided by the Executing Court and not by filing a separate suit.

56. Rule 99 contemplates dispossession of a person by decree holder or purchaser where property has been sold in execution of a decree and in such cases, he may approach the court complaining of dispossession, a fact that is not contemplated in any of these situations and hence no relief can be granted. That having been said, I am of the view that these applications cannot succeed on the ground that they are not maintainable in this disposed Execution Application. In view of my aforesaid finding, it is obviously not necessary to enter upon the aspects of the issues that have been framed by the court and to that extent those issues need not be answered. These applications are now liable to be disposed without affecting any of the directions passed in earlier orders pertaining to the disposal of the amount lying with the Prothonotary and Senior Master. Those orders will be continuing to be operative.

57. I therefore pass the following order :

- (i) Chamber Summons Nos. 42, 43, 44 of 2020, 561 of 2019 and Interim Application No. 319 of 2019 are dismissed.

(ii) Needless to mention that none of the observations in this order shall prejudice the case of the applicants to the Chamber Summons or Interim Applications in relation to their entitlement, if any, (a) to receive unpaid rent or claim tenancy or occupancy and permanent alternate accommodation on the strength of their tenancies and occupancies as against the owner developer/judgment debtor and/or the auction purchaser or his nominees. (b) recover advances paid to Naik as in the case of Chamber Summons nos. 42 and 43 of 2020.

(iii) All the above Chamber Summonses and Interim Applications are disposed as above.

(iv) No Costs.

At this stage, the learned counsel for the applicants in the Chamber Summonses requests that no amounts be paid out of the sum of Rs.5 crores lying deposited with the Prothonotary and Senior Master for some time. That is a reasonable request, despite opposition on behalf of the purchaser / WWA. Accordingly, for a period of eight weeks from today, no monies shall be paid out from the sums lying deposited with the Prothonotary and Senior Master.

**(A. K. MENON, J.)**