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

CHAMBER SUMMONS NO.35 OF 2020
IN
COMMERCIAL EXECUTION APPLICATION NO.252 OF 2019
IN
SUMMONS FOR JUDGMENT NO.39 OF 2017
IN
COMMERCIAL SUMMARY SUIT NO.140 OF 2017

Mukesh Nenshi Gala .. Applicant-Intervenor
In the matter between
Anita Rajinder Rishi .. Plaintiff-Judg.Creditor
v/s.
Deepak Pandurang Pawar .. Defendant-Judg.Debtor
And
The learned Sheriff .. Respondent

Mr. Shreepad Murthy a/w Vishal Jathar, Ms. Khushboo Chaurasia i/b. MDP & Partners for the applicant.

Mr. Prathamesh Kamat a/w Nakul Jain & Ms. Bency Ramakrishnan i/b. Akash Menon for the plaintiff.

None for the defendant/Judgment Debtor.

CORAM : A. K. MENON, J.
DATED : 7TH OCTOBER, 2021.

P.C. :

1. The present Chamber Summons seeks raising an attachment levied

on certain immovable property with buildings standing thereon at the instance of the Applicant developer who has Joint Venture Agreement with the defendant/owner of the property. The plaintiff having obtained a decree has attached the property in execution. The property belongs to defendant who now seeks to support the applicant. The applicant is a JV partner as aforesaid in respect of a redevelopment agreement of "Likhite House" situate at Mahim, Mumbai. The applicant claims that he acquired right title and interest for consideration. The Joint Venture Agreement is a registered document. Possession has said to have been handed over to the applicant. Mr. Murthy on behalf of the applicant submits that his clients, the applicants, have acquired rights in the property prior to the decree being passed and prior to the attachment being levied and that being so the property cannot be sold in execution of the decree.

2. According to Mr. Murthy, the Joint Venture Agreement provides for profits and losses to be shared equally between the applicant and the defendant. The Joint Venture contemplates the rehousing of tenants who are part of the old structure and who are required to be given permanent alternate accommodation. The applicant claims rights to consume FSI and load TDR and has the power to sell the redeveloped

property to the extent it concerns the free sale area. Mr. Murthy has taken me through the salient provisions of the Joint Venture Agreement and it is his contention that the defendant owner was only entitled to sharing the profit and loss and nothing more. The defendant had executed an irrevocable power of attorney in favour of the applicant, that power of attorney is registered and the applicant is required to provide permanent alternate accommodation to the tenants. The applicant is empowered to and has obtained the consent of the various tenants. Acting on the said powers granted to him, the applicant has applied for and obtained several permissions from the Fire Brigade from the authorities of Municipal Corporation and the Traffic Department.

3. According to the applicant, he has spent about 1.38 crores on the various expenses incurred by him towards preparing for redevelopment of the property. In addition, the applicant claims to have paid a sum of Rs.1.69 crores to the defendant as advance share of profit. He claims he is entitled to interest on that amount. Mr. Murthy further submits that in the JV Agreement the defendant had declared that he had clear title. The defendant handed over possession to the applicant for redevelopment and agreed not to transfer the property without the consent of the applicant. He

stressed upon the fact that the JV Agreement contained a very clear provision declaring that there were no pending proceedings against the defendant owner. Mr. Murthy submitted that the object of the JV was to redevelop "Likhite House" and to house the existing tenants and thereafter sell the free sale component and share the profit of the defendant. Under clause 4, of the agreement, the defendant had indemnified the applicant. Under clause 5, he declared that de-facto possession of the property was with the applicant.

4. Mr. Murthy relied upon an additional affidavit filed on behalf of the applicant in which the deponent has contended that prior to the JV Agreement from 29th January, 2014, a Memorandum of Understanding had been signed and that sought to record the payments made till then. In the additional affidavit certain corrections were made to the effect that as against the statement in the application that Rs.1.69 crores had been paid over to the defendant in fact only Rs.1.67 crores had been paid and this excludes the interest on the advance. Mr. Murthy submitted that instead of Rs.1.38 crores as set out in the application, the actual expenses about Rs.54 lakhs and therefore the total of Rs.2.21 crores had been spent. Mr. Murthy was at pains to submit that the plot area is small, it is difficult to develop and a huge amount has already been invested.

The plot area being only 212.19 sq. mtrs., a building of only 7 storeys could be constructed. The project is yet to be registered under the Maharashtra Real Estate Regulatory Authority and the plans will be subject to amendment pursuant to DCR 2034. Mr. Murthy submitted that the built-up area is approximately 859.369 sq. mtrs. and that may enable the applicant developer to just about break even and make every small profit if at all.

5. In respect of the profit, he has relied upon a project report which shows that the total cost would be Rs.919,18,546/-, the total recovery from sales was expected to be Rs.13,39,83,383/-. This would result in a net profit of about Rs.4,20,64,837/-. The applicant had already spent Rs.2,21,00,000/-. Thus, the tentative project report which is dated 28th September, 2019 would clearly evidence the fact that the project was not capable of generating large amounts of money and accordingly, it would not be practical for the applicant to pay over the decretal amount or any part thereof to the plaintiff-decree holder.

6. The principal submission is that the applicant had acquired rights much before the transaction between the plaintiff and the defendant which was a money transaction and which led to the decree being

passed. There is an irrevocable power of attorney in favour of the applicant and in that view of the matter the property is now under the absolute control of the applicant, the judgment debtor can only seek to recover monies to the extent of the share of the owner and the owner share is at best only 50% in the net profit and nothing beyond. This he submitted is the factual aspect which cannot be disputed and in the light of this there is no occasion to remit any monies to the judgment debtor or permit sale of the property since that would have the effect of the depriving the applicant of his rightful dues and his rights which had crystallized prior to the decree.

7. Mr. Murthy relied upon the following decisions in support of his case:-

   1) *Vannarakkal Kallalathil Sreedharan v/s. Chandramaath Balakrihnan and another*[1]

   2) *Kancherla Laxminarayana v/s. Mattaparthi Shyamala & Ors.*[2]

8. The defendant is absent though he is said to be served. He has however filed an affidavit-in-reply to oppose the attachment proceedings and it appears that he is supporting the applicant. In his affidavit, the defendant claims that he is the sole owner of the

[1] (1990) 3 SCC 291
[2] AIR 2008 SC 2069

property and that he had suffered an exparte decree. He has already sought setting aside of that exparte decree. He however, confirms the execution of the Memorandum of Understanding, the Power of Attorney and the Joint Venture Agreement. Incidentally, he admits receipt of Rs.1.69 crores although the plaintiff seems to suggest that the amount is only 1.67 crores.

9. Mr. Kamat on behalf of the respondent, opposing the application submitted that the attachment was valid. The property was attached in pursuance of a decree obtained against the defendant. The defendant is admittedly owner of the property even in terms of the JV Agreement and hence the submissions on behalf of the applicant are of no avail. He submitted that the applicant has no locus to apply to this Court to vacate the order of the attachment. The warrant was admittedly pasted on the property on 6th May, 2019. The Chamber Summons was affirmed on 10th July, 2019 but was served only on 20th September, 2019. The application is therefore an afterthought. Mr. Kamat submitted that the contents of the JV Agreement cannot override the effect of the decree. The decree was passed by a competent court, it is executable under law and is being so executed inter alia by attachment of the property belonging to the Judgment

Debtor. The amount of the decree was more than 7½ crores and the present property claimed by the applicant is only one of the properties that will have to be sold. He therefore submits that there is no occasion to raise attachment.

Mr. Kamat relied upon the following decisions;

1) *Barses J.A. D'Souza v/s. Municipal Corporation of Gr. Brihan Mumbai and others*[3]

2) Sushil Kumar Agarwal v/s. Meenakshi Sadhu and others[4]

3) Shantilal J. Shah and others v/s. Jitendra Sanghavi and others[5]

10. Having heard the learned counsel for the parties and having perused the pleadings and document, I find that in the Chamber Summons the reliefs sought are (i) to permit intervention; (ii) to hold an enquiry under Order 21 Rule 58 of the Code of Civil Procedure to determine right, title and interest under the JV Agreement; (iii) to lift the attachment levied on 11th April, 2019; (iv) to declare the applicant has a legal, valid and subsisting charge on the said property for a sum of Rs.3.7 crores as of 2018 and (v) to direct the Sheriff not to act pursuant to the attachment and to restrain the defendant from alienating, transferring or encumbering the suit

3 2003(4) Mh.L.J.
4 (2019) 2 SCC 241
5 2014(1) Mh.L.J. 193

property. Likewise, to restrain the Sheriff from proceeding with auction and sale by the attached property and in the meantime, permit the applicant to redevelop the plot.

11. Having permitted intervention, the application is being treated as one under Order 21 Rule 58 as an objection to the attachment of the property. Mr. Murthy has submitted that the property is not liable to be attached since the applicant has already a prior right therein and since the property has not been sold, such objection can be considered by the Court and determined by the court. Order 21 Rule 58 provides that the court shall determine all questions including the questions relating to right, title and interest in the property attached in these proceeds. The question that arises in the present case is whether, by virtue of the JA Agreement, part payments made thereunder, the attachment is bad and as a consequence whether the respondent-judgment creditor must be prevented from proceeding in execution. In deciding this issue, it is appropriate that consider the factual background that has caused, the applicant to approach this court.

12. The decree came to be passed on 12th March, 2018 and attachment of various properties have been sought. The present

property is one amongst many sought to be attached and sold. The decree in favour of the plaintiff is for a principal sum of Rs.7.35 crores and interest of Rs.98,10,739.72 is payable @ 12% from the date of suit. The applicant has contended that the JV Agreement was executed on 20th March, 2014. The applicant is a builder has developed a several properties in and around Mumbai and that the project in question is based on a small plot of land which vary limited scope. The defendant is the owner of the property has acquired only 50% of the property and that he has already paid a sum of Rs.1.67 crores as advance.

13. In the case of *V.K. Sreedharan* (supra), the Supreme Court was considering Order XXXVIII Rule 10 and Section 64 pertaining to an Agreement for Sale of land in favour of the appellant which had been executed prior to the attachment levied on the land. Although the agreement of sale was executed prior to attachment a sale deed came to be executed after the attachment. The Supreme Court held that the Agreement for Sale having been entered into prior to attachment, the sale deed would prevail over the attachment. The Court considered that a contractual obligation that leads to attachment in respect of ownership of the land would create an obligation and that the attachment could not be free of obligations incurred under the

contract for sale. The Supreme Court thus overturned the decision of the Kerala High Court which held that the sale deed having been executed after the attachment, it was bad in law. The Supreme Court relied upon decision of the Calcutta High Court and of the Bombay High Court and held that where the attaching creditor attaches only the right title and interest of the debtor, the attachment cannot confer upon any right higher than that the judgment debtor had as on date of attachment.

14. An agreement for sale creates an obligation attached to the ownership of property and since the attaching creditor is only entitled to attach right title and interest, the attachment cannot be free from the obligations incurred under a contract for sale. In other words, the ownership does not vest in the person attaching the property. In this view of the matter and applying the principle herein to the facts at hand, I find that no assistance can be drawn from these decisions by the applicant since the present case is not one where the applicant is the owner of the land. All that the applicant holds is the right to develop the land and to sell the develop property house the tenants and take away his share of profit. The land is not owned by the applicant and in this context, the provisions of the JV

Agreement are clear. Ownership will always vest in the defendant and not in the applicant. This is obvious from clause 7 of the JV Agreement. Clause 7 reads as follows;

> *"**No transfer of interest in property :-***
>
> *There is no transfer or assignment in respect of the said property, as the developer shall bring required money for the development of the same, and the existing ownership rights shall always remain with the owner."*

Thus, in the facts at hand, *Sreedharans*' decision (supra) is of no assistance to the applicant.

15. In *Kancherla Laxminarayana (supra)*, the Supreme Court while following *V. K. Sreedharan* (supra), was considering a fact situation where objections to attachment of property were raised and an auction sale was held. The court found that the words "sold" in clause (a) of proviso to Rule 58 of Order XXI has to be read meaning thereby, a complete sale including the confirmation of the auction. The attachment could not be free from the prior obligations. Mr. Murthy seeks to canvass the point that the JV Agreement having been in place and rights having been created, the Judgment Creditor could not get a right of sale of the property even to the extent of the

entitlement of the defendant- judgment debtor. Once again, this decision will not come to the assistance of the applicant since we are not concerned in the instant case with the sale of property to the applicant which necessarily contemplates transfer of ownership. In the case of *Laxminarayana* (supra), the sale was via auction. The auction had not concluded by confirmation of the sale and the Supreme Court held that till the sale is confirmed, the contract pursuant to the auction was not concluded.

16. In the facts at hand, it is obvious that the applicant did not become the owner and never could become the owner even under the JV Agreement. Particular reference being had to the effect of clause 7 which clearly reiterated the ownership of the property vesting in the defendant.

17. In *Barses J.A. D'Souza (supra)* a Single Judge of this court has ruled that mere mention in the title of the body of a power of attorney that it is irrevocable does not make it irrevocable. Only if the agent himself was an interest in the property which forms the subject matter of the agency, the agency cannot in the absence of the express contract be terminated. We are here concerned with the case not of termination of the JV or of the Power of Attorney but the

question that arises is whether interest if any is created in the land which is subject matter of attachment. In this behalf, *Barses* (supra) considers the judgment of the Andhra Pradesh High Court in *M. Johan Kotaiah v/s. A. Divakar & ors.*[6] in which the court held that if an interest created in the agent is the result or the proceeds arising after the exercise of the power then the agency is revocable and cannot be said to be an irrevocable agency but if the interest in the subject matter, say a debt payable to the principal, is assigned to the agent as security simultaneously with the creation of the power and thereafter the agency exercises the power to collect the debt owed by the principal in favour of the agency, the agency becomes irrevocable. This court has agreed with the observation of the Andhra Pradesh High Court in paragraph 18 of the judgment in *Kotaiah (supra)* where it found that the principal had not assigned any interest simultaneously with the execution of the power of attorney, but only created an interest in the resultant product or produce arising out of the exercise of that power. In the instant case, the product of exercising the power of attorney is to redevelop the property and to sell the flats that are constructed pursuant to the JV Agreement. There is no alienation of the land itself since the land is what is now been attached.

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[6] AIR 1985 AP 30

18. In *Sushil Kumar Agarwal (supra)* the court was considering provisions of Section 14 (3)(c) of the Specific Relief Act and the specific performance of a Development Agreement. Although we are not directly concerned with the factual aspects, in that case, one may to take into consideration the interpretation placed by the court on the concept of ownership of property which reiterates the decision of the Supreme Court in *B. Gangadhar v/s. B.G. Rajalingam*[7] observing that the ownership denotes the relationship between a person and an object forming subject matter of the ownership. It consists of complex of rights, all of which are rights in rem, being good against the world and not merely against specific persons. There are various rights or incidents of ownership all of which need not necessarily be present in every case. They may include a right to possess, use and enjoy the thing owned and a right to consume, destroy or alienate it. Thus, the essential incident of ownership of land is the right to exploit it. The question that it arises is whether the attachment of the defendants interest in the land could prevail over the rights of the JV partner? The irrevocable nature of the power of attorney has to be tested considering the peculiar facts of the present case. I am of the view that the attachment of the property is not

[7] (1995) 5 SCC 238

liable to be raised but will prevail over the rights of the JV partner except to the extent of the share of the Applicant in the redeveloped property. The sale of the land may proceed subject to the rights created in favour of the applicant. In other words, if the property was to be put to sale, at this given moment, the purchaser would be bound by the terms of the JV Agreement in favour of the applicant and the right title and interest of the defendant as curtailed by the JV agreement would alone be available for purchase by interested parties. It is not possible to accept a consequence that would result in the applicant being deprived of all its rights under the JV Agreement merely because of the attachment.

19. In *Shantilal Shah* (supra), the Division Bench of this court considered the power of the developer and in the context of Section 202 of the Contract Act dealing with the situation where the agent has himself interest in the property forming subject matter of the agreement and following the judgment of the Supreme Court in *Seth Loon Karan Sethiya v/s. Ivan E. John, AIR 1969 SC 73*, the Supreme Court observed that the agency is created for valuable consideration and to secure the interest of the agent, the authority cannot be revoked but before Section 202 can be invoked, the agent must have an interest in the property. In the facts of that case it was found that

the Development Agreement between the parties did not create any interest of the agent in the property and the power conferred to negotiate or settle with the tenants and to obtain a surrender of the tenancy rights for facilitating on redevelopment would not by itself create an interest in the property. In the present case it is evident that the applicant is also entitled to sell flats to the exclusion of the owner.

20. On a fair reading of clause 7 of the JV agreement it is evident that the Applicants obligation is to invest money in the project. Ownership rights continue to vest with the defendant. It has been contended by Mr. Murthy that any amount withdrawn by the developer out of cash in hand and the JV shall be debited to the personal account of the owner. To this effect he has relied upon clause 9(b) but at the end of the day we are not concerned with the relationship inter se between the applicant and the defendant. The property has been attached along with the rights of the owner therein. Even considering the various provisions of the JV agreement to which Mr. Murthy has referred to. It may be that the owner has made an incorrect declaration that there are no proceedings pending and that his title is clear but the fact remains that the owners interest in the property continue to subsist although it has been said about the small size of the project and the impracticality generating much

profits. These are the matters which are not within the scope of the present controversy on the applicants in showing the project is yet to be registered with Maharashtra Real Estate Regulatory Authority (MahaRERA). The plans may be subject to further amendments and in line with Development Control Regulation Act 2034 and there is a possibility of their being larger area available for sale as part of the free sale of the component. Thus, the attempt of the applicant to project a picture that nothing whatsoever will be payable to the owner nor a chapter to be taken into consideration.

21. In the present case, there is no doubt that an interest in developing the land has been created in favour of the applicant but that cannot translate to ownership unless there is an express grant in favour of the applicant and as the facts reveal in the present case, clause 7 of the JV Agreement clearly provides that ownership of the land will continue to vest in the defendant. That being the case, it is not possible to accept the applicant's contention that he is entitled to resist the attachment and have the attachment vacated unconditionally. No doubt, if the property is put to sale, the scope of the alienation by sale may be restricted by the interest created in favour of the applicant under the JV Agreement but that aspect does not arise for consideration. What one has to considered here is

whether the attachment is liable to be vacated. It may be of academic interest and may lead to an awkward situation where the prospective purchaser would be faced with acquiring right title and interest of the judgment debtor in the land, in the face of a JV agreement and the rights and obligations that are attached with it, but the fact situation at hand certainly does not justify an order vacating the attachment of the property.

22. In conclusion, I am of the view that the present application cannot be succeed, the attachment to continue and in the result, I pass the following order;

(i) Chamber Summons is dismissed.

(ii) No orders as to costs.

At this stage, after the order is pronounced, Mr. Murthy seeks stay of operation of this order. Request is declined.

(A. K. MENON, J.)