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

INTERIM APPLICATION NO.1814 OF 2019
IN
COMMERCIAL EXECUTION APPLICATION NO.1728 OF 2018
IN
MESNE PROFIT NO.651 OF 2012
IN
L.E. & C. SUIT NO.14/16 OF 1994

1.	M/s. Ram & Company, Mumbai	]	
2.	Late Mr. Chetan S. Mehta (Deceased)	]	
	Through Legal Heirs :	]	
	2(a). Smita Chetan Mehta	]	
	2(b). Harsh Chetan Mehta	]	
	2(c). Jessica Pinank Valia	]	
	2(d). Anuja Chetan Mehta	]	
3.	Karunakar Shetty	]	.. Applicants-Decree Holders
	Vs.		
1.	Polyvin Industries, Mumbai	]	
2.	Jitendra Bhogilal Ghia	]	
3.	Kishore Gambhirdas Parekh	]	.. Respondents-Judg. Debtors
	And		
4.	Parul Kishore Parekh	]	.. Obstructionist

Mr. Prasad Shenoy, i/by Ms. Priyal Sheth, for the Applicants-Decree Holders.

Mr. Yash Tiwari, i/by K.P. Tiwari & Co., for the Respondents-Judgment Debtors and the Obstructionist.

Mr. D.S. Chaudhari, Dy. Sheriff, is present.

CORAM : A. K. MENON, J.
DATE : 23RD DECEMBER, 2021.

P.C. :

1. The applicant nos.2 and 3 are claiming as decree holders under a decree dated 10th December 2014 passed by the Court of Small Causes at Bombay in Mesne Profit Application No.651 of 2012 in L.E. & C. Suit No.14/16 of 1994. The applicants seek leave to proceed with sale of office no.202, admeasuring 513 sq.ft., on the 2nd floor of Sai Heritage Commercial Co-operative Society Ltd., Tilak Road, Junction of Bhaveshwar Lane, Final Plot No.34A, TPS-III, Ghatkopar (East), Mumbai – 400 077 *(hereinafter referred to as **"the office unit"**)*. Further the applicants seek a declaration that the purported gift deed executed in respect of the office unit in favour of the obstructionist, who is the wife of judgment-debtor no.3, is void ab initio. These are the limited reliefs that are being pressed at this stage in this IA. The other reliefs being in the nature of detention in civil prison and for enforcement of the decree by appointing Court Receiver, High Court, Bombay, are not being pressed at this stage.

2. It is the case of the applicants, as canvassed by Mr. Shenoy, that the decree holders have to recover a sum of Rs.2,30,41,294/- towards mesne profits and interest of Rs.69,12,388/- @ 6% p.a. from 10th December 2014 and costs of Rs.4,05,801/-. In the process of executing the decree, seven warrants of attachment were issued and on 31st August 2018, the Sheriff's bailiff proceeded to visit commercial premises of respondents-judgment debtors 2 and 3 at (i) 2 Selarka Sadan, M.P. Vaidya Marg, Ghatkopar (East), Mumbai 400 077; (ii) 202, Ashok Silk Mills Compound, LBS Marg, Ghatkopar

(West), Mumbai; (iii) 39/43, Abdul Rehman Street, Near Pydhonie Police Station, Mandvi – 400 003 and residential premises at (i) Sareena Building, A Wing, Flat No.401, 4th Floor, Shanti Park, Ghatkopar (East), Mumbai 400 077; (ii) Flat No.2, Selarka Sadan, M.P. Vaidya Marg, Ghatkopar (East), Mumbai – 400 077, but the bailiff was unable to attach the office unit due to improper description of the unit and absence of signage. An amendment has been carried out since in the particulars of property mentioned in Column "J" of the execution application. Later it transpires that the applicants have, after search of the records of the Ministry of Corporate Affairs, ascertained that the property in question belonged to the judgment-debtor no.3. Chamber Summons No.1380 of 2018 then came to be filed on 29th October 2018 inter alia seeking a full and complete disclosure of assets. Subsequently, the applicants learnt that judgment debtor no.3 owns the aforesaid office unit and hence Chamber Order No.625 of 2019 was filed for adding office unit in Column "J" of the execution application and for consequent amendment in warrant of attachment issued. This chamber order was served upon the Advocates for the respondents-judgment debtors on 27th June 2019. This aspect is not in dispute.

3. On 1st July 2019, the applicants-decree holders were directed by the Prothonotary and Senior Master to file an additional affidavit confirming that the judgment debtor no.3 is in physical possession of the property. At that stage, it is submitted, the Advocates for judgment debtors were present. My attention is invited to the order dated 1st July 2019, annexed at Exhibit-C to

the IA, which records the presence of Advocates for judgment debtor no.3. On 8th July 2019, amendment was permitted to Column "J" of the execution application and the warrant of attachment, issued under Order XXI Rules 43 and 54 of the CPC, issued against judgment debtor nos.2 and 3. Thereafter, the amendment was carried out on 11th July 2019 and an amended warrant of attachment was lodged with the office of the Sheriff of Bombay, whose representative visited the property on 17th July 2019 with the intention of executing the amended warrant of attachment. The warrant of attachment was served on the judgment debtor no.3 and a report issued confirming service. After the bailiff executed the warrant of attachment on 17th July 2019, the representative of the applicants-decree holders notified the Secretary of the society of the attachment of 17th July 2019 by a letter by hand delivery as also by recorded delivery by post. A warrant of sale then came to be issued on 8th August 2019, which was affixed on 6th September 2019 on the outer door of the property in the presence of judgment debtor no.3. It is also stated to be published in English and Gujarati newspapers on 17th September 2019, inviting claims in respect of the property from the public at large.

4. According to Mr. Shenoy, the applicants-decree holders were then shocked to learn that the obstructionist-Parul Kishore Parekh, who is the wife of judgment debtor no.3, filed an affidavit dated 4th October 2019 in the office of the Commissioner for Taking Accounts claiming that she is the legal owner of the property. Since no documents were provided along with the affidavit,

the applicants took search of the title in respect of the offices in question with the Sub-Registrar of Assurances and were shocked to find that a Gift Deed dated 12th July 2019 has been registered in favour of the obstructionist. According to Mr. Shenoy, the transfer of the property by gift was impermissible since the decree was passed and in view of the various orders passed by this court. Pleadings have since been filed and completed. In view thereof, this IA has been heard today for final disposal.

5. In the interregnum, there was a change of Advocates. Judgment debtor no.3 and the obstructionist are today represented by Mr. Tiwari. Mr. Shenoy submitted that the so called gift deed is a sham and bogus document, executed to defeat the attempt at execution. The deed of gift was only an instrument executed to avoid sale of the property and by perpetrating a fraud on the court. Judgment debtor no.3 and the obstructionist are parties to the fraud. Having gone ahead with the purported transfer by executing the gift deed during the pendency of the execution application and the warrants of attachments having been executed, Mr. Shenoy submitted that this is a fit case where the application can be allowed and transfer by gift deed be declared bad in law, void ab initio and for cancellation of the gift deed.

6. Mr. Shenoy, in the course of submissions, has invoked the Bombay Amendment to Rule 54 of Order XXI of the CPC. He submits the present gift deed is null and void. Transfer, if any, of the property in any way cannot take effect, because there is no consideration for such transfer and because a

prohibition against transfer took effect from the date of the warrant of attachment. Inviting my attention to Exhibit-E to the IA, Mr. Shenoy points out that when the application was first moved for amendment, the Prothonotary and Senior Master directed the party to file an affidavit affirming that the judgment debtor no.3 was in possession of the property in question. The matter came to be adjourned to 8th July 2019. On 8th July 2019, the respondents remained absent. According to Mr. Shenoy, this was by design since they were aware that the amendment sought was likely to be allowed. An additional affidavit of the applicants-decree holders came to be filed, which was dated 3rd July 2019. In paragraphs 3 and 4 thereof, the deponent stated that judgment debtor no.3 has his office at the unit described above and that the property can be put in execution since the society's name board also disclosed that judgment debtor no.3 was in possession.

7. On 8th July 2019, after hearing the applicants-decree holders and upon perusing the additional affidavit dated 3rd July 2019, the amendment sought to the execution application and the warrants of attachment was allowed. According to Mr. Shenoy, to the knowledge of the respondents-judgment debtors, a prohibition against transfer of the suit premises was effective. Warrants of attachment were served upon the judgment debtor no.3 at the office unit on 18th July 2019. Subsequently, the amended warrant of attachment was executed by attaching the property viz. the office unit and serving upon the judgment debtor no.3. Mr. Shenoy contended that the court may cancel the gift deed since it is a sham and bogus document.

8. On behalf of the judgment debtor no.3 and the obstructionist, Mr. Tiwari submitted that the deed of gift was executed prior to the attachment and hence there was no occasion to deny the same. The deed of gift having been executed and registered with the Sub-Registrar of Assurances, Mr. Tiwari submitted that the present application cannot succeed. There is no dispute that the warrant of attachment had been served; however it is the case of the respondent-judgment debtor no.3 that the attachment is bad and that the sale cannot take place since the property did not belong to the judgment debtor no.3.

9. In the affidavit dated 7th November 2021, it is stated that the judgment debtor no.3 has received a warrant of sale dated 17th August 2019 under the seal of the Commissioner for Taking Accounts and he had also received a notice dated 19th September 2019 inviting objections in respect of the attached property. The deponent states he has already filed his affidavit and lodged his written objections to the proposed sale. He has then made several statements pertaining to the merits of the decree and the fact that a Civil Revision Application bearing no.232 of 2007 was admitted on 28th June 2007 and is pending. There was a stay in operation till 2013, thereby admitting that the stay does not continue today. This CRA appears to have been dismissed for default on 12th December 2011, only to be restored on 17th December 2012.

10. The deponent refers to sale of other properties with which we are presently not concerned. Several other contentions set out in the affidavit are

not relevant for the present purposes, all of which advert to the merits of the CRA. In paragraph 29, the deponent states that the decree holder has sought to illegally attach the office unit and in that affidavit. Paragraph 30 of the affidavit dated 7th November 2021 makes interesting reading. It states as follows :

> *"30. I say that the attached premises is not a purchased premises. Actually me and my husband both were the tenants in respect of two premises Nos.... and ..... in erstwhile Sarvodaya Chawl at Road No.34, Tilak Road, Ghatkopar (East), Mumbai – 400 077. The said chawl was developed by constructing a commercial building. I say that the premises no.201 was allotted and owned by me and premises no.202 was allotted to my husband. Copy of her alternate accommodation agreement in respect of the said premises no.201 is annexed hereto and marked as Exhibit-I. I will rely upon the leave and license agreement in respect of sad premises when produced."*

11. In paragraph 31, the deponent states that as a family arrangement, it was agreed that he would transfer his premises to his wife – the obstructionist. The premises no.201 was meant for security of his wife but since unit 201 is to be sold, he has legally gifted premises no.202 to his wife and no one has right to deal with the property owned by his wife since there is no prior attachment. This is the extent of the response to the application

that we are concerned with. The rest of the contents of the deposition is of no avail. The reply is voluminous and it runs into 577 pages, but most of these contained annexures which are not relevant for the purposes of the present applicant and hence I am not required to deal with those annexures.

12. There is also an affidavit-in-reply filed by the obstructionist - Mrs. Parul Kishor Parekh dated 7th November 2021. That affidavit runs from page nos.578 to 951, once again annexing therewith numerous documents which are not relevant for the purposes of the present IA. What is of relevance in her deposition is that, in paragraphs 2 to 4, she claims that she has not been personally served with the copy of this IA and that her husband has filed a detailed affidavit and she adopts the contentions in the affidavit of her husband. Rest of the deposition is mere repetition of whatever is contained in the affidavit of Kishor G. Parekh. In paragraph 32, she states that she has been legally gifted the premises by her husband and that the applicants-decree holders ought to have taken search of the land records office before attaching the property; but the fact remains that the gift deed was executed after the warrant of attachment was issued.

13. Most of the exhibits to the affidavit-in-reply are not relevant. They are copies of the CRA and various annexures to the CRA. Prima facie, the attempt is merely to burden the court with a huge record so as to create the semblance of a meritorious defence. Hence, I am not making reference to these numerous annexures.

14. Having heard the counsel for the parties, I find that the date of the Gift Deed being one day after the amendment to the warrant of attachment is of considerable relevance. On a perusal of the record, I find that the execution application was initially filed on 27th June 2018 and total decretal amount as of June, 2018 is Rs.2,83,25,537=47. After the warrants of attachment were issued in August 2019 and disclosures were sought, on 15th June 2019, Chamber Order No.625 of 2019 sought inclusion of office unit in Column "J" of the execution application. At that stage, it was a matter of record that the property was standing in the name of judgment debtor no.3. On 27th June 2019, the Advocates for judgment debtors were served with the copies of the Chamber Order seeking amendment to include this office unit in Column "J" of the execution application. On 1st July 2019, that application came to be adjourned in the presence of Advocate for judgment debtor no.3 with a direction to file an affidavit confirming physical possession by judgment debtor no.3. On the adjourned date, the judgment-debtors' Advocate remained absent and the submission of Mr. Shenoy is that the attachment of the office unit came into effect, upon amendment being allowed. The amendment was carried out on 11th July 2019. On the next day, the deed of gift appears to have been executed and registered. It is a matter of record that when the amended warrant of attachment was served upon judgment debtor no.3, he did not claim that the property has been gifted. On 17th July 2019, the society has also been informed that the property stands attached. The Sheriff's office thereafter is said to have issued report of the attachment on or

about 18th July 2019 and a warrant of sale was issued on 8th August 2019. On 8th November 2021, the obstructionist has filed her reply claiming under the gift deed. This is a factual background when this matter was proceeded with.

15. In the course of the hearing and on a query from the court, the applicants-decree holders' Advocate has relied upon a communication dated 9th January 2020 addressed by the society to the Commissioner for Taking Accounts confirming that the office unit stood in the name of Kishore Gambhirdas Parekh and it was seen to be gifted to his wife and that the document has been provided to the society on 17th July 2019 at 5:30 p.m. to be taken on record, but the premises have not been transferred to Mrs. Parekh. The office premises have not been let out to any third party and no NOC has been issued by the society in the matter. Copy of the share certificate has been provided to the Commissioner for Taking Accounts. I also find from the record that on 29th November 2021, I have recorded a statement of the Advocate for the respondents-judgment debtors, who promised to deposit the share certificate and gift deed in the office of this court and that has apparently been done. All original documents were directed to be retained by the Prothonotary and Senior Master in a sealed cover. On account of change of Advocates, M/s. K.P. Tiwari & Co. was permitted to file appearance by 1st December 2021. On 27th October 2021, this court has directed, after perusal of the letter dated 9th January 2020 addressed to the Commissioner for Taking Accounts, the Advocate for the obstructionist to submit the original agreement

and shares in this court. The operative portion of the order dated 27th October 2021 is reproduced below :-

> (i) *Sai Heritage Commercial Co-operative Society Limited, situated at Tilak Road, Bhaveshwar Lane, Ghatkopar (East), Mumbai – 400 077 is restrained from entertaining any request for transfer of shares or for letting the premises on Leave and License or in any other manner whatsoever.*
>
> (ii) *The society shall make a note and display the fact of this order being passed on the Notice Board of the society and shall pass an appropriate resolution at the next meeting notifying all concerned of the attachment.*
>
> (iii) *Judgment Debtor no.3 shall deposit with the Prothonotary and Senior Master the original agreement for sale and all the documents of title including share certificate(s) evidencing 5 shares bearing distinctive nos.31 to 35 and such other shares that may have been issued or may be issued by the society on or before 30th October 2021.*
>
> (iv) *Mrs. Parul Kishore Parekh shall deposit the original Gift Deed with the Prothonotary and Senior Master on or before 30th October 2021.*
>
> (v) *Vakalatnama and reply, if any, to be filed on behalf of the judgment debtor no.3 and the obstructionist on or before 8th November 2021.*
>
> (vi) *No extension of time will be granted.*
>
> (vii) *Rejoinder, if any, to be filed on or before 15th November 2021.*
>
> (viii) *S.O. to 17th November 2021."*

16. The original documents are said to have been deposited in the court on 18th December 2021. Meanwhile, at the hearing of the application on 15th December 2021, Mr. Tiwari has clarified that he also appears for the

obstructionist and therefore she has been represented. Considering the only submission made by Mr. Tiwari to the effect that the gift deed is executed prior to the attachment, I have proceeded to consider the matter in the light of the Bombay Amendment to Rule 54 of Order XXI of the CPC. That rule reads as follows :-

> ***"54. Attachment of Immovable Property :-***
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> *(1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge, such order shall take effect, where there is no consideration for such transfer or charge, from the date of such order, and where there is consideration for such transfer or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged.*
>
> *(1A) The order shall also require the judgment-debtor to attend Court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale.*
>
> *(2) Copies of the order shall also be forwarded to the Collector with a request that appropriate entries showing the attachment levied on the property may be caused to be made in the revenue records, city survey records or village panchayat records, as may be required in the particular case.*
>
> *(3) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be*

affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the District in which the land is situate, and also, where the property is situate within Cantonment limits, in the office of the Local Cantonment Board and the Military Estates Officer concerned, and where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village."

17. A fair reading of Rule 54 reveals that in respect of the immovable property, an order of attachment shall be made prohibiting the judgment-debtor from transferring the property in any way and prohibiting all persons from taking any benefit from such transfer. The order is to take effect from the date of such order in cases where there is no consideration for such transfer or charge and where there is consideration for such transfer or charge, the order would take effect from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged.

18. The rest of the sub-rules relates to the requirement of judgment debtor attending court on a particular day for settling proclamation of sale. Rules (1A), 23 and 52 are not relevant for the present purposes since what is required to be considered is whether the execution of the gift deed would in any manner negate the attachment already levied on the property. In my view, the date of the order prohibiting the judgment debtors from transferring

the suit property would be the crucial date, from which no further alienation of the property could take place. Therefore, the test is to ascertain as to when the order prohibiting the judgment debtor from transferring the property was passed. If I come to the conclusion that a prohibition was in place before execution of the gift deed, it would obviously mean that the gift deed could not have been executed in the face of such a prohibition since the order would come into effect on the date the order was passed. If not, one will have to consider whether such relief can be granted on the basis that the order of prohibition is not passed as on date of execution of the gift deed. Mr. Shenoy has contended that the effective date for the purposes of Order XXI Rule 54 is 8th July 2019, on which date the amendment to Column "J" of the execution application and the warrant of attachment was allowed.

19. While I am unable to accept the contention that a prohibition came into effect on the amendment being allowed, the fact that the property in question is owned by the co-operative society is well settled. The judgment debtor no.3 was only a shareholder and by the Deed of Gift, what is sought to be gifted is the office unit. In my view, unless the shares are transferred on a proper application to the society and upon compliance of the requirements of the society, the transfer will not take effect and to that extent, the gift will not take effect. The intention to gift is evident from the execution of the gift deed but the society has since confirmed that the shares have not been transferred and that the shares have not even been deposited with the society. The society has vide letter dated 9th January 2020 confirmed that the shares have not

been transferred and the unit is not subject to third party rights. In any event, the society has not issued NOC for transferring the shares and as on date, there is no application to transfer the shares to the obstructionist. Thus, no effective transfer can take place in favour of the obstructionist unless the shares are transferred. The shares not having been transferred, the right to occupy the property, in my view, continues to vest with judgment debtor no.3.

20. The gift deed therefore could not be validly executed and in my view, it is executed only to defeat execution proceedings. The date of execution of the gift deed is material. It was executed one day after the amendment was allowed. The transfer of the property would necessarily entail transfer of the shares and the execution of the gift deed. The share transfer not having taken effect, the share transfer would take effect only upon the society transferring the shares, the society has confirmed that as on 11th July 2020, the judgment debtor – Kishore G. Parekh was the member of the society. The society bills have also issued in his name. There is no NOC for transfer of the shares, nor has the deed of gift made reference to any application for transfer having been accepted.

21. Thus, in my view, the transfer had not taken effect and by that reckoning, the acceptance of the gift by the obstructionist would not by itself deprive the judgment debtor of his rights in the shares and therefore the right to occupy the office unit. If the judgment-debtor does not sign the transfer deeds and submit the same to the society in compliance with bye-laws of the

society, no transfer takes effect. It is possible that the transfer forms will be never submitted and this appears to be only a device to avoid execution and that cannot be countenanced. A donee would only be a beneficial owner and entitled to claim ownership of the property only by virtue of ownership of the shares and hence, that not having been done, in my view, it can be safely concluded that the gift deed is only a colourable document with the intention of depriving the judgment creditor's attempt at executing the warrant of attachment. Furthermore, the warrant seen to have been duly served upon the judgment-debtor, who has accepted the same on 18th July 2019. At the time of execution, the bailiff's report indicates that he has acknowledged service of the warrant without any protest. This is a further indication of the fact that the gift deed is a sham and bogus document and accordingly, I have no hesitation in allowing the IA.

22. I therefore pass the following order :-

(i) IA is made absolute in terms of prayer clauses (a) and (b).

(ii) IA is disposed in the above terms.

23. Meanwhile, it is noticed that in several Execution Applications, there are numerous delays on account of the process being followed by the registry. The present procedure delays execution, which aspect has been noticed by the supreme Court in *Rahul S. Shah Vs. Jinendra Kumar Gandhi & Ors., 2021 SCC OnLine SC 341.* The judgment-debtors are then able to obstruct execution in many ways, one of which is exemplified by the case at hand. This

leads to multiplicity of proceedings which is avoidable. The Prothonotary and Senior Master is therefore directed to put in place a simpler process in compliance with the Code of Civil Procedure and the rules considering the features available in the CIS which has now been deployed and its upgrades. In coordination with the Central Project Co-ordinator, the Prothonotary and Senior Master should set up an efficient mechanism to ensure that automated processes are followed to the extent practical in the Execution Department including without limitation, automated single numbering upon an application being filed, a standard form check list for raising of objections, prompt communication of these objections to the applicants by email, specifying time to comply with the office objections and for issuance of warrants in complaint applications directly to the office of the Sheriff of Bombay.

24. Over time eFiling of Execution Applications can be activated. The current practice of physically preparing and lodging of drafts by applicants, correction by the registry and replacing those with engrossed copies and manually lodging it with the Sheriff's office must be reviewed. The Warrants can be electronically generated and transmitted to the Sheriff's Office. This will entail that the Sheriff will act upon authenticated communications from on the registry via a dedicated email address on email IDs to be identified by the CPC. The Sheriff's office can likewise be allotted a dedicated email address preferably only for receipt of the Warrants from the registry. Service Reports

for all processes, unless otherwise directed by court, could also be generated and transmitted by the Sheriff's office authenticated by digital signature. The Registrar General of this court is requested to ensure that this direction is taken to its logical conclusion at the earliest.

(A.K. MENON, J.)