

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

**APPEAL NO. 27 OF 2021
IN
CHAMBER SUMMONS NO. 795 OF 2006
IN
EXECUTION APPLICATION NO. 260 OF 2004**

Naman Madhav Patel

....Appellant

V/s.

Sundaram Finance Service Ltd. and Ors.

...Respondent

Ms. Vilasini Balasubramanian a/w Ms. Jyoti Ghag and Mr. Vishal Sapre i/b
Dua Associates for Appellant.

Mr. Gaurang Mehta a/w Ms. Vidhi Dhania for Respondent No.1.

**CORAM : K.R. SHRIRAM &
KAMAL KHATA, JJ.
DATED : 5th DECEMBER 2022**

P.C. :

1. The appeal is impugning an order dated 22nd January 2020 passed by the learned single judge in dismissing the Chamber Summons taken out by appellant to set aside the execution of warrant of attachment issued by this court against the property in question. The said property is Flat No.12-C, First Floor, Atlas Apartment, Harkness Road, Malabar Hill, Mumbai – 400 006 (the said flat).

2. Briefly stated, appellant had taken out Chamber Summons No.795 of 2006 in Execution Application No. 260 of 2004 wherein Respondent No.1, the award holder is executing arbitral award dated 30th

May 2005. By the said award the claim of Respondent No.1 as against the borrower one Dravya Industries Chemicals Ltd. and one Mr. B. Mukesh Patel - guarantor was allowed. In the impugned order it is recorded that it is not disputed that Mr. Naman Madhav Patel – Applicant is the grandson of Mr. B. Mukesh Patel – guarantor. Ms. Balasubramanian disputed this fact but we have to note that when we initially asked briefly to explain Ms. Balasubramanian had informed the court that this is a case where appellant's grand father had been the guarantor.

3. Mr. B. Mukesh Patel was owner of the said flat which was the only property that was the subject matter of the execution proceeding. In some earlier proceedings the matter was carried to the Appeal Court and the Appeal Court while disposing the appeal, by an order dated 6th April 2010, with the consent of the parties, framed the following four issues :

- (i) Whether the Gift of the share certificate by Mr. B. M. Patel to Mr. Naman M. Patel is vitiated because of fraud?
- (ii) Is the document of Gift of shares of a Tenant co-partnership society compulsorily registerable under the Registration Act?
- (iii) If yes, what is the consequence on membership of Mr. Naman M. Patel of the concerned Co-operative Society as also transfer of shares of that society in his favour?

(iv) Whether the stamp duty on the document as per the Law has been paid?

4. After the appeal was disposed appellant herein, who was a minor at that point of time and who attained age of majority later, was added as a party to the Chamber Summons, i.e., the Chamber Summons No.795 of 2006 (the said Chamber Summons). This Chamber Summons had been filed by the mother of appellant as the guardian. Appellant through his mother had approached this court opposing the warrant of attachment and warrant of sale with regard to the said flat and the case of appellant was that said Mr. B. Mukesh Patel had no right, title or interest as owner or otherwise of the said flat pursuant to declaration gift deed dated 5th August 1993. That gift deed was gifting said flat by Mr. B. Mukesh Patel to his grandson – appellant herein. Therefore, the issue which had to be first determined was whether it was a valid gift in the name of appellant.

5. It is recorded in paragraph no.6 of the impugned order that on 13th November 2019 the counsel for applicant, i.e., appellant herein had made a statement that appellant does not intend to lead any evidence in regard to Issue Nos. 1 to 3 as framed by the Appeal Court and as regards Issue No.4 in regard to the stamp duty on the document, if necessary, appellant be permitted to lead evidence. The court while hearing the said Chamber Summons by the order impugned in this appeal rightly came to

the conclusion that to decide the issues as framed by the Appeal Court, what was necessary and incumbent for appellant was to prove the gift deed dated 5th August 1993.

6. It was necessary and incumbent upon appellant to prove the gift deed. Since no evidence was led and appellant, through his counsel, made a statement that he had no wish to lead any evidence, neither the original gift deed dated 5th August 1993 was placed on record nor the same was proved in any manner. Therefore, learned single judge, in our view, rightly came to the conclusion that when the document of gift itself is not a part of the record as per the requirement much less proved, Issue No.1 as framed will have to be answered in the negative. Consequently, Issue No.2, 3 and 4 which are interconnected the court correctly said cannot be decided.

7. We entirely agree with the learned single judge that when a party claims to have independent rights in respect of the said flat which has been attached in execution, the burden is certainly on that party, appellant, to establish such rights in evidence. Since the court correctly concluded that in the absence of any basic evidence to prove and make good such a claim by leading evidence to prove his right, title and interest in respect of the said flat, the claim of appellant to have independent right cannot be accepted.

8. The learned single judge has also recorded inconsistent stand that appellant had taken and has correctly observed that there is one more fault on the part of applicant that he is uncertain about his right in respect of the said flat.

9. In the circumstances, we see no reason to interfere. Appeal dismissed.

(KAMAL KHATA, J.)

(K.R. SHRIRAM, J.)