

(2004) 05 BOM CK 0020

In the Bombay High Court

Case No : Chamber Summons No. 175 of 2004

R. Daga and Another

APPELLANT

Vs

Mr. and Dr. Thacker and Co.

RESPONDENT

Date of Decision : 06-05-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 21 Rule 41, Order 21 Rule 50

Citation : AIR 2004 Bom 412 : (2004) 6 BomCR 280

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Shailesh Shah and N.C. Parekh, instructed by Mansukhlal Hiralal and Co, for the Appellant; Mahendra Ghelani and Ali Muntaza, instructed by . Law Charter, for the Respondent

Judgement

Anoop V. Mohta, J.—The present Chamber Summons has been taken out. pending Execution Application by the Plaintiff No. 1 for the relief namely notice to the defendants under Order 21, Rule 22 of the CPC be dispensed with, defendants be directed to instruct their Advocates to hand over six cheques mentioned in the Escrow letter dated 7th December, 2000 to the plaintiff and/or to issue plaintiff cheques for the same amount, order of injunction from any manner alienate or disposing of or parting with the possession of the immovable property, to disclose their assets in accordance with Order 21 Rule 41 of Civil Procedure Code. The Plaintiffs have added Mr. Mahendra R. Thakur as respondent in the present Chamber Summons and accordingly Chamber Summons dated 28th January, 2004 along with the affidavit and documents, prayed for reliefs as referred above.

2. The defendant through one Mr. Dilip Thacker, partner of defendant No. 1 and being the defendant No. 3 resisted the said Chamber Summons by his affidavit dated 3rd February, 2004. The rejoinder dated 9th February, 2004 has been filed by the plaintiff and reiterated their original contentions with additional material on record.

3. The basic facts which require for decision of the present Chamber Summons can be crystallised as under :-

a) On 25th July, 1996 the plaintiffs had filed the suit against defendants for the Specific Performance of the agreement dated 30th, September, 1986 read with letter dated 30th September, 1986, agreements dated 26th September, 86 and 5th February, 1997. The, suit was settled, between the plaintiffs and the, defendant Nos. 1 and 2, and accordingly consent terms were signed. On 24th February, 1997 the consent decree came to be passed accordingly. Defendant No. 2 now, added as respondent, had retired "from the partnership of the defendant No. 1 and "therefore plaintiff had dropped the defendant No. 2 from the suit.

b) On 23rd March, 1998 supplementary consent terms were filed recording further arrangements between the defendant No. 1 and the plaintiffs. Some time between June, 2000 to December. 2000 the defendants had carried out additional construction in excess of 30843 sq. ft. As per Negotiations between the plaintiffs and defendant Nos. 1 and 3 for allotment of 25% of F.S.I, of excess constructed area in terms of F.S.I, again the consent terms, were signed by the parties, on 7th December, 2000. The relevant clauses of those Consent terms are Clauses 9. 10 and 11.

c) As per Consent Terms dated 7th December, 2000 as referred above, defendants 1 and 3 deposited various cheques with their Advocates M/s, Law Charter to be kept in Escrow account with them. which was recorded by the letter dated 7th December, 2002. The earlier consent terms were modified. On 15th March, 2001 plaintiffs by their Advocate's letter called upon the Advocate for the defendants to release the said six cheques as defendant had become entitled to receive the said six cheques in terms of the consent terms. The defendants by their earlier letter dated 21st October. 2000 had made a claim of 643,48 sq. mtrs. and enclosed a copy of the said letter for the first time. By letter dated 20th March. 2001 defendants through its Advocate contended that in the meeting it was decided to keep" the matter in abeyance. By letter dated 4th April. 2001 the plaintiffs Advocates resisted these pleas. The Defendants replied by their letter dated 5th April. 2001. By the letter dated 10th May. 2001 plaintiffs" Advocate requested defendants" Advocate to hand over those cheques. The Draft of Consent Decree dated 23rd January. 2001 was submitted to the office oh" 5th November. 2001, The Draft of Consent decree dated 23rd February, was submitted on 16th January, 2002. Draft Consent Decree dated 23rd March, 1998 submitted on 17th January, 2000. On 18th March, 2002 issuance of certified copy was expedited. The Plaintiffs have received the certified copies of decree on 6th November, 2002. Thereafter present execution application has been lodged on 16th December, 2003 by the plaintiffs.

4. On the above basic facts plaintiffs" have taken out this Chamber Summons by affidavit dated 27th January. 2004. On 17th February. 2002 after hearing both the parties assurance was recorded that the defendants would revalidate the

cheques lying in the Escrow Account, This assurance has been accepted and as submitted by the Counsels, is still in force. Admittedly present execution application is filed on the basis of consent decree of the said Execution and is still pending. Admittedly six cheques have been deposited with M/s. Law Charter in escrow. Original defendant No. 2, now respondent in the present Chamber Summons was deleted and no consent decree was obtained against him. The consent decree, was admittedly signed by defendant Nos. 1 and 3. Plaintiffs in view of the apprehension as recorded and mentioned in affidavit in support of the Chamber Summons. as in spite of the repeated demands made by the plaintiffs, to the defendants, unable to make the payment of said amount. M/s. Law Charter are duty bound to honour the commitment made in the letter dated 7th December. 2002 therefore, they are bound A. I. R. to hand over the said cheques to the plaintiffs.

5. The reference is also made of the suit No. 4687 of 2000 filed by one Danji Lalji Sharma against M/s. M. R. Thakkar (defendant No. 1 herein) and the said suit was also settled by Consent terms dated 8th November, 2000. Plaintiffs have also mentioned that the defendants are insolvent to hand over the possession of the area 1627 sq.ft. built-up area and payment of decree for the sum of Rs. 2.60.00.000/- and sum of Rs. 9.00.000/- and therefore, M/s. Law Charter are under obligation to hand over the said cheques to the plaintiffs. The plaintiffs are now entitled to execute the decree as against the defendant Nos. 1 and 3 and the respondent No. 6.

6. The advertisement of the sale of Flat No. 10-A on the 20th floor of the said suit building by the defendant No. 1 to M/s. Puloma Dalal was also additional cause of action for the present Chamber Summons. The apprehension was that the defendant may complete the sale in favour of M/s. Puloma Dalal & Company and defendants will also sell their other properties.

7. The plaintiffs in the above background and as two years have already passed from the date of passing of the consent decree dated 23rd February. 2001 therefore, sought leave under Order 21 Rule 22 of C, P. C. to execute the decree against the defendant Nos. 1 and 3 and respondent being partner of the defendant No. 1. As the respondent is not the party, plaintiffs have also applied by way of Chamber Summons to allow the decree to be executed against all,

8. As averred, the defendants 1 and 3 would dispose of their property to defeat and delay the decretal claim of the plaintiffs. The Consent Decree dated 23rd February, 2001 has become executable and therefore, plaintiffs prayed to attach the property of defendant Nos. 1 and 3 and the respondent and ad-interim orders are also sought.

9. The plaintiffs further submitted that the nature of procedure for getting the notice involve the following events :

"47. The Plaintiffs further respectfully submit that the routine procedure for getting the said Notice made absolute involves the following events :-

1. Lodging the execution Application.
2. Scrutiny of the Execution Application.
3. Numbering the Execution Application.
4. Issuance of Drafts of Notice under order XXI Rule 22 of the C.P.C.
5. Engrossing the said Notice and Lodging the engrossed Notice in the department.
6. Signing and sealing of the Notice by the Department.
7. Serving the said Notice upon the defendants in the same manner as serving a Summons in a suit filed in this Honourable Court.
8. Preparing Affidavit proving service. Proving service.
9. Appearing before the Honourable Chamber Judge on the date (Some time it may take a year also) when the notice is shown on the board, tendering the affidavit of service and the original Notice and getting the Notice made absolute" (thus making the decree executable again).
10. In the above background the plaintiffs submitted that in order to avoid further delay and to save time and energy, in recovery of the decretal amount delay be condoned if any, as defendants are taking undue advantage of the technicalities and therefore, issuance of notice under Order 21 Rule 22 would cause unreasonable delay and would defeat the ends of Justice. Therefore, sought dispensation of notice under Order 21 Rule 22 of C.P.C. is to execute the decree against the defendants.
11. Thus further delay, if any, will only benefit the defendants who are taking undue advantage of technicalities. Plaintiffs have trusted the Advocate for the Defendants who held the said cheques in Escrow and who refused to release the said cheques in spite of the obligations to release the same in terms of the said Escrow letter. Therefore, submitted that the above issuance of the said Notice under Order XXI, Rule 22 would cause unreasonable delay and would defeat the end of Justice. The delay would permit the Defendants to dispose of the flat, their assets and defeat the decree.
12. The Plaintiffs have also prays that the defendants be directed to disclose their assets to enable the plaintiffs to attach the property in execution of the decree in question.
13. Plaintiffs have also prayed in the background an order of an injunction against the defendants, in any manner selling or disposing off or parting with the possession of flat No. 10 on the 19th floor and the flat No. 21 /22 on 21st floor of the building known as Suraj Apartment, situated at 71, Bhulabhai Desai Road, Bombay. In this background also it is submitted that plaintiffs would suffer irreparable loss and injury if ad-interim prayer as prayed, if not granted. Those injuries cannot be compensated in terms of the money. No harm, loss or injury

would lie caused to the defendants or respondents, if Chamber Summons is allowed.

14. Learned Counsel for defendants refers and relies on the affidavit of Mr. D. R. Thacker dated 3rd February, 2004 and resisted the case and all the prayers of the plaintiffs.

15. The defendants/respondents contentions can be crystallised as under :

a) No reliefs can be granted against the Respondents as no decree was passed against the: said Respondent. Respondent therefore, cannot be added and/or joined as a party for the first time through such Chamber Summons. The execution is admittedly pending. A decree sought to be executed is not annexed with the affidavit in support of the Chamber Summons. By the Chamber Summons order is sought under Order 21 Rule 22 (2) and at the same time prayers were sought dispensation of notice. The reason of delay in pursuing the Court process in getting execution through the Court is no ground to dispensing with such mandatory statutory notice. Such dispensation of mandatory notice on such grounds as referred in Para 47 of the affidavit of the plaintiffs, is not permissible. There is delay at their end. The consent decree dated 23rd January, 2001 is a conditional decree. The decretal amount and its assortment is also based upon ascertainment of conditions reasons which have not been offered therefore, this application itself is prematured. It is also contended that order dated 23rd January, 2001 is void and without jurisdiction and it is unenforceable.

16. The provisions of Section 152 or 153 of C.P.C. cannot be availed of. Executing Court will have to decide this application u/s 47 by considering notice under Order 21 and Rule 22 of C.P.C.

17. Counsel appearing for the defendants also submitted and supported his submissions by relying on the following cases :

1. AIR 1924 Mad 431. Rajagopala Ayyar v. Ramanujachariyar
2. AIR 1954 Nag 78, Mansaram v. Kamarall
3. AIR 1977 Bom 305 , M/s. Bhurmal Kapurchand & Co. v. M/s. Premier Machine Tolls Co.
4. Union of India Vs. Swaran Singh and others,
5. AIR 2001 SC 43 . Hari Singh Mann v. Harbhajan Singh Bajwa
6. Jayalakshmi Coelho Vs. Oswald Joseph Coelho,
7. M/s. Plasto Pack, Mumbai and Another Vs. Ratnakar Bank Ltd.,
8. State of Punjab Vs. Darshan Singh,

18. Learned Counsels for the parties read and relied on various provisions of CPC (C.P.C.), including Section 41, Sections 152 and 153. Order 21 Rule 22. Counsel

for plaintiff also relied on Baldevdas Shivilal and Another Vs. Filmistan Distributors (India) P. Ltd. and Others, , in support of this case and Chamber Summons as it is based on the Consent terms/Decree of the Parties.

19. Considering the rival contentions raised by the parties as the plaintiffs have not pressed prayer Clause (c) and admitted that there is no -ad interim order passed or pending in terms of prayer Clause (c) till the date of final hearing of this Chamber Summons, I am also not granting any interim relief in terms of prayer Clause (c),

20. So far as prayer Clause (b) is concerned in view of the admitted position that the execution application is pending pursuance to the consent decree, such relief can also be prayed and/or executed in the main execution application itself. The plaintiffs if advised amend its execution application which is admittedly pending and can execute the said consent decree, which may cover the prayer Clause (b) as prayed for in the Chamber Summons also.

21. There is no question of allowing prayer Clause (b) in the Chamber Summons as sought to be prayed by the plaintiffs. No such submissions as prayed against defendant Nos. 1 and 3 can be issued at this stage in such chamber summons at the instance of plaintiffs. No additional reasons, or case made out by the plaintiffs to grant such reliefs in such Chamber Summons pending execution. No provisions have been pointed out under which such prayers can be granted to the plaintiffs pending execution of its consent decree in question which will cover the present clauses also. Anyhow, even if it is within or beyond the consent decree, that issue itself cannot be decided while deciding the Chamber Summons in question, merely on the basis of affidavits between the parties and/or of the parties. This issue is otherwise needs determination and adjudication. Therefore, prayer Clause (b) as prayed for in this Chamber Summons cannot considered at this stage, at the instance of plaintiffs. The plaintiffs are free to take appropriate steps of amending the same pending execution application or take such steps to pray for this consequential relief, based on the consent terms in question.

22. So far as any relief, against the respondent or leave or permission to add respondent in this Chamber Summons, is rejected. There is no specific prayer made in the Chamber Summons to that effect. Admittedly, the consent decree dated 23rd January, 2001, the respondent/original defendant No. 2 was not the party. Whatever may be the reason by this Chamber Summons no execution application can be executed against the person who was not party to the Consent Decree in question. Admittedly plaintiffs want to execute the consent decree in which defendant Nos. 1 and 3 were the parties and not the respondent (defendant No. 2). There is no question of granting any permission as prayed by the plaintiff to proceed against the said respondent in this execution application. This execution application itself is not executable against respondent (original defendant No. 2), as admittedly plaintiffs had not pressed for the decree against defendant No. 2. There is no question of allowing this Chamber Summons or permitting through this chamber summons to add respondent as a party.

Therefore, the permission as prayed against the respondent is rejected.

23. The defendants are definitely bound by the provisions of C.P.C. and specially, under Order 21 Rule 41 of C.P.C. to disclose their assets so that appropriate steps and or execution proceedings can be initiated by the plaintiffs, to execute their consent decree. Therefore, there is no reason not to allow prayer Clause (d) of the Chamber Summons as prayed. In the interest of justice or even otherwise it is necessary that defendants should disclose all assets as per the law to the plaintiffs, irrespective of their defences including of issue under Order 21 "Rule 22 of C.P.C. This is a fit case to pass order under Order 21 Rule 41 of C.P.O., as I execution is of consent decree.

24. Considering the averments made in the affidavit in support of the Chamber summons I am of the view that the Consent Decree, at this stage unless declared to be void or nullity, is binding between the parties. The obligations relied and referred between I the parties in those consent decrees cannot be over-looked. The concerned parties are bound by the said obligations. If there are defaults made, as per the consent terms itself, and as agreed, said consent term is executable. Therefore, there is no reason not to grant leave under Order 21 Rule 22 as prayed by the plaintiffs. In the facts and circumstances of the case as read out and submitted by the Counsel for the parties, I am of the view that further delay would defeat the whole purpose of consent decree in question. Admittedly, execution application is filed after two years, from the date of consent decree dated 26th January, 2001, the dispensation of notice as per Order 21 Rule 22 is necessary. In the present case in my view as I am satisfied and accordingly, the leave is granted and the procedure under Order 21 Rule 22 is dispensed with as prayed in terms of prayer clause (a). Defendants however, are at liberty to agitate and raise pleas, as may be available in their defences by appropriate application or steps or affidavits, if permissible under the law. The parties are entitled for full opportunity, to defend their case, if execution application is filed after two years from the date of the decree. The filing of execution application after two years, that itself cannot be reason to disallow such prayer of the plaintiff. The whole purpose is that the party should not suffer more and defendant should not be taken by surprise, if such execution application is filed after two years. Defendants cannot get more premium than this that for two years the plaintiffs could not execute the said decree. In a given case it could have been executed within or immediately after the date of the decree. The delay in filing the execution application cannot be the reason and or ground for rejecting their application for dispensing with the notice under Order 21 Rule 22 of CPC as prayed. I am of the view that prayer (a) is required to be granted,

25. Considering Rajgopal Iyyer.AIR 1924 Mad 431 (supra) facts of which are distinguishable, the preposition in a given case cannot be disputed. Mansaram AIR 1954 Nag 78 (supra) is also not applicable in the present case, as after considering the facts and circumstances and by recording the reasons, notice

under Order 21 Rule 22 have been dispensed with in the present matter. M/s. Bhurmal Kapurchand AIR 1977 Bom 305 (supra) is also distinguishable. The Principle of Order 21 Rule 22 is not in dispute. On the contrary these issues support the proposition and the purpose of provisions of the Order 21 Rule 22, which is to prevent surprise being sprung upon judgment-debtor, in the present case the leave is sought by the plaintiff to avoid that defence of surprise. One cannot overlook the fact that defendants are now opposing the said leave itself. Union of India v. Swarna Singh (AIR 1977 SC 462) (supra) deals with the principle of Sections 151 and 152 which cannot be disputed. There is no question of invoking provisions of Sections 151 and/or 152 to correct any decree which has become final. Harisingh Maan AIR 2001 SC 43 (supra) is based on criminal law and is distinguishable on facts as well as on law itself. Jayalakshmi Coelho Vs. Oswald Joseph Coelho, is also decision on Section 152 of CPC and its principle including the rectification of decree. There is no such case here, and there is no question of granting such relief. M/s. Plasto Pack (AIR 2001 SC 3851) (supra) is also based on the principle of Section 150. In the present case also there is no question of granting any amendment to the consent decree. No such relief is liable to be granted in the present case also. State of Punjab (supra) the principle of S. 152 is again reiterated. This section cannot be pressed into service to correct or to modify, alter, the basic terms of the original judgment, decree or order.

26. In view of this matter the judgments cited by the respondents which are admittedly distinguishable on facts itself cannot be made applicable to the facts and circumstances of this case. In the present case, specially when, the plaintiff wants to execute the consent decree. Parties comes to particular conclusion and settlement and accept such consent decree, cannot be permitted to go back and oppose the said consent decree or its execution. In view of this, affidavit of opposition filed by the defendants on this ground also, cannot be accepted.

27. In view of the above chamber summons is allowed in terms of prayer clauses (a) and (d), prayer clause (b) is rejected. Prayer clause (c) is not pressed is also not granted.

28. Learned counsel appearing for the defendants requested for stay of this order for a period of four weeks. Considering the reasons given above, the prayer is rejected.

Parties to act on the copy of this order duly authenticated by the Chamber Registrar of this Court.

Certified copy expedited.