

## **Sumikin Bussan International vs Manharlal T. Mody And Mrs. Kalpur Gandhi ... on 5 April, 2004**

**Equivalent citations: 2004(4)MHLJ919**

**Author: Anoop V. Mohta**

**Bench: Anoop V. Mohta**

ORDER

Anoop V. Mohta, J.

1. The applicants, in this Chamber Summons, being third persons to the Judgment and Decree dated, 31st May, 2002, prayed that the warrant of attachment, dated 12th January, 2004, issued in respect of the flat bearing No. 20, admeasuring 3300 sq.ft., on 20th floor of Silver Arch, 66, Napean Sea Road, Mumbai, together with two car parking spaces bearing Nos. 12 and 85, on P1 and P2 levels,<sup>1</sup> in Malbar Co-operative Housing Society, Ltd., (for short Society) and the shares pertaining to the said flat described in Schedule "A", be vacated and/or set aside.

2. The present execution Application No. 13/2004, is at the instance of original plaintiffs, Sumikin Bussan International (Hong Kong), whereby the immovable property, owned by Manharlal Trikamdas Modi, defendant No. 2, (Judgment Debtor) has been attached, by order dated 12th January, 2004. The plaintiffs, (Judgment Creditors) have initiated execution proceeding under Order 21, Rule 54 of Civil Procedure Code (C.P.C.) based on an order dated 31st May, 2002 of High Court of Hong Kong, against defendant 1 and 2, through Hong Kong Action No. 4761/2001.

3. The case of the applicants in briefly stated is as under ;

By the memorandum of understanding dated 6th June, 2003, applicants alleged to have enter into an agreement for sale with Mr. Manharlal T. Mody (Judgment Debtor), Defendant No. 2 and his wife Mrs. Meena M. Mody i.e. defendant No. 1 in respect of the premises in question. According to the applicants, they have deposited earnest money of Rs. 26,50,000/-, in terms of clauses of the Memorandum of Understanding. The first payment was made on 29th April, 2003 of Rs. 2,50,000/-. The next two payments were made on 6-6-2003 of Rs. 25 lacs. They have signed the form of consent, to the proposed transfer of shares and interest of the Society. Some forms were signed by the judgment debtor, Mr. and Mrs. Mody and submitted to the Society, on 6-6-2003. Relying on these, applicants have submitted that, even though the document has been styled, as memorandum of understanding, the same is in fact, an agreement for sale and the applicants are ready and willing to complete the said transaction with the judgment debtor (original defendants). It may be mentioned here that the property in question is in occupation of tenant/licensor of the

judgment debtor. The applicants as well as, judgment debtor, therefore, are not in actual occupation of the same premises in question.

4. Submissions :- In the Chamber Summons No. 777/2003, admittedly, there is an order of injunction in respect of the said premises in question. The applicant have taken out Chamber Summons No. 1776/2003 12th December, 2003 for vacating the said order of injunction and the same is still pending. Applicants contended that they are bona fide purchasers of the suit premises and had no notice of the earlier orders of injunction passed in the matter. The applicants have filed on record public notice, dated 17-6-2003 in respect of the said property. As agreement of sale has been entered into much prior to an order of injunction, or purported attachment, therefore, attachment is illegal. Applicants will suffer great irreparable harm, loss and injury, if the sale, in favour of the applicants, is not completed. Applicants came to know about the attachment on 29-1-2004 and therefore, they have preferred this chamber summons by 5-2-2004 itself.

5. Mr. D.D. Madan, Counsel for the applicants, in support of this Chamber Summons, relied on , Vennarakkal Kallalathil Sreedharan vs. Chandramaath Balakrishnan and Anr. and 1990 Mh.LJ. 206, Usha Arvind Dongre vs. Suresh Raghunath Kotwal.

6. Mr. Virag Tulzapurkar, Counsel, appearing on behalf of judgment debtor supported the Chamber Summons and argument of the applicants.

7. Mr. Madan, Counsel, appearing on behalf of appellants, relied on Vannarakkal (supra), in support of this case, that said memorandum of understanding in favourof a party entered into, prior to the order of attachment in execution of decree and therefore, such contract and rights flow from it should prevail over the attachment in question. Relevant paras referred are, paras 7, 8 and 9.

"Hence under a contract of sale entered into before attachment the conveyance after attachment in pursuance of the contract passes on good title in spite of the attachment. To the same effect are the decisions of the Bombay High Court in Rango Ramchandra Kulkarni vs. Gurlingappa Chinnappa Muthal and Yeshvant Shankar Dunkhe vs. Pyaraji Nurji Tamboli. The High Court of Travancore - Cochin in Kochuponchi Varughese vs. Ouseph Lonan has also adopted the same reasoning." "The Punjab and Harayana High Court, however, has taken a contrary view in Mohinder Singh vs. Nanak Singh. It has been held that a sale in pursuance of a pre-attachment agreement is a private alienation of property and must be regarded as void against the claim of the attaching creditor. In support of this proposition, Section 64 of the Code of Civil Procedure was relied upon which according to the High Court was intended to protect the attaching creditor against private alienation. This was also the observation of the Lahore High Court in Buta Ram vs. Sayyad Mohammad."

"In our opinion, the view taken by the High Courts of Madras, Bombay, Calcutta and Travancore-Cochin in the aforesaid case appears - to be reasonable and could be accepted as correct. The agreement for sale indeed creates an obligation attached to

the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the judgment-debtor, the attachment cannot be free from the obligations incurred under the contract for sale. Section 64 Civil Procedure Code no doubt was intended to protect the attaching creditor, but if the subsequent conveyance is in pursuance of an agreement for sale which was before the attachment, the contractual obligation arising there from must be allowed to prevail over the rights of the attaching creditor. The rights of the attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property. The attaching creditor cannot ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. We cannot, therefore, agree with the view taken by the Punjab and Haryana High Court in Mohinder Singh case."

7A. He further relied on Usha Arvind Dongre's case (supra) to support his case, that the transfer of shares, of flat in question does not require registration under Section 17(lb) of the Registration Act. Therefore, applicants transaction and right flow for it are enforceable.

8. Plaintiff s/judgment Creditor's by its affidavit in reply dated 6-2-2004 resisted the present Chamber 'Summons and reiterated the contents of the affidavit filed by the plaintiffs in reply to the applicants averments made in Chamber /summons No. 1776/2003. It is contended by the original plaintiffs, that by order dated 8th December, 2003, in Chamber Summons No. 777/2003, interim relief/injunction granted by this Hon'ble Court has been confirmed in terms of prayer clause (c). The Chamber Summons as taken out by the applicants (proposed purchaser) is already fixed for hearing. It is contended that the present chamber summons, raising same issues and facts deserves to be dismissed with exemplary costs. The issue about gross delay and laches in taking out this Chamber Summons is also raised. Plaintiffs, resisted and denied that the memorandum of understanding, dated 6-6-2003, is an agreement for sale, as alleged and in any way, cannot defeat the attachment order of the plaintiffs. It has been contended that the said document is collusive, back-dated document which confers no enforceable rights. The Defendant, Mr. M. T. Mody, has 100% right, interest and title of the property in question and therefore, is liable to be attached and sold, in execution. The case of joint ownership with his wife, applicant No. 2 is also challenged. It has been contended that as per memorandum of understanding, the agreement or transfer has to be completed on July 31st, 2003 and that date has lapsed long back, and therefore, said document is not enforceable. The applicants were at all material time aware of the order of the injunction against the said property. Their alleged attempt of transfer is not bona fide and relief as prayed cannot be granted to the applicants. There is no interim order or relief granted in favour of the applicants in this Chamber Summons No. 242/2004. The applicants have filed an affidavit in rejoinder dated 19-1-2004 and reiterated their case, as per the affidavit in support of the Chamber Summons No. 242/2004.

9. Mr. R. M. Kadam, Counsel, appearing on behalf of plaintiff/judgment creditors, resisted the argument of applicants Counsel. Relied on newly amended provision of the Section 64 of Civil Procedure Code contended that in view of this amendment (Civil Procedure Code amendment 2002) (22 of 2002) (with effect from 1st July, 2003) and as admittedly, the document in question

i.e. memorandum of understanding is unregistered, prior to the order of attachment attachment, therefore, on face of it, those judgments are inapplicable to the facts and circumstances of the case.

10. Mr. R. M. Kadam, learned Counsel for plaintiffs made reference to the amended Section 64 of the Civil Procedure Code which is reproduced as under:

Section 64: -

"Private alienation of property after attachment to be void.- (I) where an attachment has been made, any private transfer or delivery of the property attached or of any interest there in and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

(2) Nothing in this Section shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment.

"Explanation ; - For the purposes of this Section, claim enforceable under an attachment included claims for the rateable distribution of assets.

We cannot skate over the newly amended Section 64 of the Civil Procedure Code while considering objection" raised by the applicants in this Chamber Summons proceeding in question.

11. Reason :- Apex Court decision (supra) based on, then prevailing provisions of Civil Procedure Code, included unamended Section 64 of Civil Procedure Code and Order 38 Rule 10 and other related provisions. This was a case under attachment before Judgment and not of attachment after decree. There is no case of registration of sale deed or conveyance or even of memorandum of understanding in question, in the present case.

12. The Civil Procedure Code Amendment Act 2002 (22 of 2002) with effect from 1st July, 2002, has introduced basically Sub-section (2) of Section 64 to the Civil Procedure Code. The above referred amended provision has been inserted on the basis of 54th Law Commission. Specially, in view of the various conflicting issues relating to the transfers, which were entered into before or after order of attachment, and to avoid abuse and practice of entering into such antedated agreements or contracts and such other transactions. Sub-section (2) as referred above, now, contemplate that any private transfer or delivery of the property or of any interest therein, made in pursuance to such contract, and same if, registered before the attachment, then such transfer or delivery will not be affected by the attachment order, as contemplated under the provisions of Section 64 of Civil Procedure Code. Therefore, any private alienation of the property through any contract, if, registered prior to the date of the attachment, such sale or delivery or transfer, would prevail over the order of attachment of such property. Now, therefore, registration of such document before attachment order is a must, to claim right over the property under the attachment.

13. Admittedly, the warrant of attachment is of dated 12th January, 2004. The memorandum of understanding, as relied by appellants, dated 6-6-2003 which was entered into between the applicants and Mr. Manharlal Mody and Mrs. Meena M. Mody. Applicants contended that it is agreement of sale, whereas Mr. Kadam, appearing on behalf of Judgment Debtor, opposed the same. In the commercial world, memorandum of understanding and agreement for sale are two different documents. The payment in reference to this transaction, was made on 29th April, 2002, of Rs. 2,50,000/- and on 6-6-2003 Rs. 25 lacs, were paid and received by the Judgment Debtor Mr. Manharlal Mody and Mrs. Meena M. Mody. Admittedly, there is no actual delivery of possession of the property in question to appellants till this date. There is no dispute that execution application No. 18 of 2004, whereby, the property in question has been attached by the judgment creditors, based on the judgment and decree or order dated 31st May, 2002. In view of this admitted position, unless there is registration of contract/document, prior to the attachment, such sale or transactions cannot be recognised. It shall not prevail over the order of attachment of the same property. In the present case, as document of transaction (M.O.U.) is not registered, and property not delivered or transferred actually to the applicants, there is no right as such, in favour of the applicants, which will prevail over the attachment order dated 12th January, 2004. Therefore, on these facts and circumstances and in view of the new specific amended provisions of the Section 64 of Civil Procedure Code the decision of Supreme Court in Vennarakkal Kallalathil Sreedharan case (supra) is distinguishable.

14. The documents placed on record in reference to the consent of transfer of shares, cannot itself prevail over the warrant of attachment in question. Such transfer of shares, cannot be said to be transfer or delivery of property, Rights or interest, in favour of applicants, in view of Section 64 (amended) of Civil Procedure Code cannot prevail over attachment order in question. The creditor's claim remained unhampered.

15. In view of this new amendment to the Section 64 of Civil Procedure Code and in the facts and circumstances of the case, the Judgment of Usha Dongre (supra) is also distinguishable. That was a case of the tenant-Cooperative Housing Society, where the title to the flat remained in the society. The shares, thereby itself, do not become immovable property. Transfer of such shares do not require registration. In the present case, no such facts are placed on record. Nothing on record to show that right or interest even in the shares, have been transferred and or accepted by the Society.

16. It is pertinent to note, that as per the memorandum of understanding, itself, time schedule was fixed for further payment including the date of sale. All those dates were expired long back before attachment, itself. There were no effective steps taken by the parties to claim their respective rights, based on the said memorandum of understanding at appropriate time. The present Chamber Summons has been taken out by the applicants, to vacate or set aside the warrant of attachment dated 12th January, 2004. In my opinion there is no case made out by the applicants for the prayers, as prayed. Having regard to the above facts and the provisions of the amended Section 64 Civil Procedure Code, I am of the view that the present Chamber Summons need to be dismissed. Hence, order accordingly.

17. I, therefore, in view of the above facts and circumstances, dismiss the chamber summons No. 242 of 2004 taken out by the applicants.

18. No order as to costs.

19. Certified copy be expedited.

Parties concerned to act on a simple copy of this order, duly authenticated by the Court Stenographer/Chamber Registrar of this Court.