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

CHAMBER SUMMONS NO. 129 OF 2012
IN
EXECUTION APPLICATION NO. 325 OF 2003
IN
SUMMARY SUIT NO. 4190 OF 1998

Suresh Gyanchand Kumar ...Plaintiff
Vs.
M/s. Nitul Textiles & Ors. ...Defendants
And
Bank of Baroda ...Respondent

Mr. Sanjay Jain a/w. Ms. Sarika Mehra, Advocates
for the original Decree Holder / Original Plaintiff
Mr. Anant B. Shinde, Advocate for the Applicant
i/b. Bank of Baroda
Mrs. Rohini M. Amin, Advocate for Defendant No.2
Mr. Harshad Sanghvi, Defendant No.2 present in person

CORAM : MRS. ROSHAN DALVI, J.
DATED : 30TH MARCH, 2015

ORDER:

1. This chamber summons is taken out by the plaintiff/decree holder to set aside the report of the commissioner for taking accounts dated 25th July, 2011 and to direct the Commissioner to decide the issue of distribution of sale proceeds after considering whether the respondent bank has proved its claim of equitable mortgage on the suit plot.

2. The plaintiff filed the above summary suit for recovery of money on 15th July, 1998. A money decree came to be passed against the defendants on 18th February, 2002. The plaintiff has sought to execute the money decree under the above execution application by attachment and sale of the two flats of the judgment debtors / defendants.

3. The respondent bank has sought to intervene. The respondent bank claims that the two flats have been validly mortgaged / charged in favour of the respondent bank and accordingly the plaintiff cannot attach and sell the said two flats in execution of the plaintiff's money decree.

4. The attachment levied has proceeded to sale upon the directions of the Court. The sale proceeds are required to be paid either to the bank, if the flats were validly mortgaged to the bank and the bank had a prior charge thereon or to the plaintiff / decree holder, if the bank did not have a prior charge, the flats not being mortgaged to the bank.

5. This Court directed the Commissioner for taking accounts, to consider the documents of the respondent bank and to report whether there was a valid mortgage in favour of the bank.

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7. Incidentally the bank sued in the DRT. The DRT passed an order on 23rd March 2005 granting relief to the bank in respect of its claim against the defendants / judgment debtors herein. DRT-3 passed the recovery certificate in favour of the respondent bank on 11th May, 2005. The respondent bank also filed an execution application in 2006 upon which notice has been issued to the Commissioner for taking accounts to send the sale proceeds to the DRT, Mumbai. The plaintiff / decree holder herein intervened in that application. We are not concerned with what transpired in the DRT thereafter. The validity of the mortgage has to be seen in view of the fact that both the plaintiff herein as also the bank are decree holders. The prior right of one of these two parties has to be determined.

8. The Commissioner for taking accounts has made its report on 25th July, 2011 holding that a valid mortgage in favour of Bank of Baroda, the respondent bank herein, has been created. It was observed that the bank would have priority over the defendant for satisfaction of its claim under

a recovery certificate issued in its favour by the DRT.

9. The plaintiff / decree holder has sought to challenge this report / order in this chamber summons on the ground that the title deeds were not deposited with the bank. The bank has filed its original documents before the Commissioner for taking accounts which would be required to be seen by this Court itself.

10. These consist of the memorandum of deposit of title deeds of immovable property of the defendants herein containing two schedules A & B. The copy of the agreement for sale of the two flats are in both the schedules. One is with regard to flat No. 408 of the judgment debtors in Neminath Apartment. The other is the copy of the agreement of sale dated 16th March, 1992 for flat No.001 in Panchkamal Co-op. Hsng. Society Ltd. Along with both these copies of the agreement of sale are the original registration receipts bearing serial No.659 of 1993 dated 25th May, 1993 and receipt No.2182 of 1997 dated 23rd June 1997.

11. Aside from these two main documents are the NOC of the society, the deed of confirmation, a power of attorney, a deed executed by the defendants, the title report of the Advocate, original maintenance receipts of the society as also a letter of the society, original share certificate of Panchkamal

Co-operative Society Ltd., and the title report of the Advocate.

12. The main documents are the copy of the agreement and the original receipt of registration.

13. It is a well known fact, and of which judicial notice is required to be taken, that in the years 1993 and 1997 the original agreements lodged for registration were kept with the Sub-registrar of assurances, Mumbai for a number of years. They would be sent to the registrar's office in Pune. They would be returned to the executing parties after many years. Consequently the original registration receipt would be the main document along with the copy of the agreement lodged for registration and received by the Registrar of Assurances which would remain with the parties.

14. In this case, therefore, the copies of the agreements for sale received by the Registrar of Assurances, Mumbai and the original receipts for registration showing the registration charges paid were the documents of title of the two flats and the judgment debtors / defendants with the judgment debtors which would be deposited with the bank upon obtaining any loan for creation of equitable mortgage.

15. These are, therefore, the title deeds of the defendants / judgment debtors.

16. It is argued on behalf of the plaintiff / judgment creditors that under Section 58(f) of the Transfer of Property Act 1882 a mortgage by deposit of title deeds would mean only deposit of the original title deeds and not the photocopies thereof accompanied by the original receipt of registration and payment of registration fees.

17. Mr. Jain on behalf of the plaintiff / decree holder / judgment creditor drew my attention in the case of **Syndicate Bank Vs. Estate Officer & Manager, APIIC LTD & Ors. (2007) 8 SCC 361** in which the letter of allotment was held not to be a title deed and a deposit of letter of allotment was held not to create a valid mortgage upon deposit of title deeds under Section 58(f) of the Transfer of Property Act.

Indeed a letter of allotment would precede an agreement of sale / purchase or a sale deed. The letter of allotment, therefore, would not be the title deed. It would only show the flat allotted to the person to whom the letter is issued. A letter of allotment is wholly different from the copy of the agreement of sale / purchase or a copy of the sale deed accompanied by the original receipt of registration and payment of registration fee.

18. It may be mentioned that if the copy of the agreement cannot be accepted by the bank no party could have raised

any loan from any bank creating any charge in favour of any bank until the original document of title, duly registered, was returned by the Sub Registrar of Assurances years after the agreement of sale / purchase is entered into. That has not been the case. Judicial notice is required to be taken of such fact also.

19. Consequently the original documents of title are seen to be deposited with the bank. The respondent bank obtained the recovery certificate and started execution proceedings. The respondent bank is required to be paid off the sale proceeds prior to the plaintiff who is an unsecured creditor and has sued as such and has executed the decree as such.

20. Consequently the report of the Commissioner is not seen to be erroneous or requiring it to be set aside.

21. Though not required it may be mentioned that the plaintiff claims that it has produced original title deeds itself. This is in respect of flat Nos. 406 and 001 of the defendants. The plaintiff would claim that it has obtained the original documents from the Sub Registrar of Assurances under the original powers of attorney executed by the judgment debtors / defendants. Obtaining of original documents under powers of attorney, without producing the original receipt of registration / payment of registration fee is unknown to law.

The defendants / judgments debtors would claim that the plaintiff has committed criminal offence in producing a fake power of attorney and FIR has been lodged. The criminal prosecution would be prosecuted separately. The plaintiff has claimed in the suit that the defendants have executed a letter in favour of the plaintiff that they had deposited the title deeds relating to the immovable properties being flat No.406 in Neminath Apartment with the plaintiff. The letter showed the list of documents which were deposited with the plaintiff being the sale deed dated 28th March, 1992 and receipt No.89 issued by the Sub Registrar on 25th March, 1992 with the plaintiff. The said letter with the list of documents is marked **Exhibit-A** to the plaint.

22. A deed of mortgage by deposit of title deeds is also stated to have been executed by the defendants in favour of the plaintiff on 3rd March, 1998 which is annexed as part of **Exhibit-B** to the plaint. The deed of mortgage shows the same flat mortgaged under the same sale deed and the receipt.

23. The plaintiff has however not sued upon the mortgage. The suit is a summary suit merely for recovery of Rs.10.36 lakhs with interest thereon. The plaintiff has also not claimed a prior charge under a mortgage in favour of the plaintiff in the suit that is filed and the decree that is obtained the

plaintiff cannot claim as such. Hence the plaintiff has sought to execute the decree obtained by the plaintiff as the purely money decree executable by attachment and sale of the properties of the judgment debtors / defendants. The plaintiff has levied attachment in execution and sought the sale. After the intervention of the respondent bank the sale has been ordered subject to the claim of the bank to be decided by this Court as the executing Court and hence the Commissioner for taking accounts has been directed to see the original title deeds produced by the bank to claim the prior charge as aforesaid.

24. The plaintiff has also deposited his own title deeds with the Commissioner. This consists of a deed of confirmation dated 19th May, 1993 and 23rd June 1997 and the deed of mortgage dated 3rd March, 1998 and 3rd March, 1998.

25. The original receipt of registration / payment of registration fee No.89 shown in the plaint to have been deposited with the plaintiff is not produced by the plaintiff before the Commissioner for taking accounts along with the other aforesaid documents. In the absence of the original receipt of registration the obtaining of the original document of title by the plaintiff cannot be comprehended except upon practice not known to law. That aspect would be determined in the criminal prosecution as and when prosecuted.

26. Consequently the bank's title is clear there has been a mortgage of deposit of title deeds with the bank. The title deeds deposited are copies of the agreement with the original, receipt of registration / payment of registration fees. The bank would have a prior charge. The report of the Commissioner for taking accounts does not require to be set aside. It is confirmed.

27. The amount lying to the credit of the above execution application shall be paid by the Prothonotary and Senior Master of this Court to the respondent bank with all accrued interest thereon.

28. The Commissioner for taking accounts shall handover the agreements and share certificates of the aforesaid two flats to the respective purchasers of the flats from the documents on record of the Commissioner for taking accounts.

29. The chamber summons is dismissed with costs fixed at Rs.25,000/- to be paid by the plaintiff to the respondent bank.

(ROSHAN DALVI, J.)