IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 1990 OF 2007
IN
CHAMBER SUMMONS NO. 212 OF 2007
IN
EXECUTION APPLICATION (L) NO. 57 OF 2010
IN
AWARD DATED 4TH APRIL, 1997

Pratap G. Somaiya .... Claimant

vs.

1. Rajesh Thakker
2. Late Satyajit Thakkar
3. M/s. Prabhudas Hirji & Co.
4. Prabhu Hira Ice & Cold Storage Ltd .... Respondents

AND

Asset Reconstruction Company (I) Ltd ..... Applicant

* * * * *

Ms. Deepti Panda i/by. Mr. R.R. Sharma, Advocate for the claimant.

Mr. Chirag Balsara i/by. Vaibhav Mehta and Associates, Advocate for respondents no.1, 3 and 4.

Mr. Ashish Kamat a/w. Mr. Rohit Gupta a/w. Mr. Vinod Kothari i/by. Apex Law Partners, Advocate for the applicant.

Coram : **Smt. R.P. SondurBaldota, J.**
Date : 21st March, 2016.

P.C.

1 This Chamber Summons is taken out by the third party in the above execution proceedings which are already disposed off, for certain directions to the Court Receiver, High Court, Bombay.

2 The above execution proceedings were filed by the claimant on 5th February, 2007 against the respondents for execution of an arbitral award. On 4th April, 2007 the parties to the execution proceedings tendered consent terms stating that they had amicably resolved all the disputes inter-se. By the order passed on that day, the then pending Chamber Summons as well as the Execution Application were disposed off on the basis of the consent terms.

3 The consent terms provided for the appointment of the Court Receiver, High Court, Bombay in respect of three properties belonging to the respondents i.e. (i) Office premises being No.89, Mittal Chambers, Nariman Point, Mumbai -21, (ii) Godown no.9 situate at basement of Mittal Chambers, Nariman Point, Mumbai -21, and (iii) The factory premises situate at 10-11, MAFCO APM Yard, Vashi, Turbhe, Navi Mumbai. Under the consent terms, the

parties agreed that, the Court Receiver, would take only formal possession of the properties and respondents/the judgment debtors would continue in possession as the agents of the Court Receiver without royalty and without security. Thus the effect of the order in terms of the consent terms, disposing off the execution proceedings is that, the Court Receiver, is continued in perpetuity for being in formal possession of the three properties, with the respondents continuing in perpetuity as his agents without royalty and without security. Undisputedly, neither the award put up for execution has been satisfied till date by the respondents by making payment to the claimant. It is also undisputed position that, no agency agreement has been executed by the respondents with the Court Receiver. In such fashion, the respondents have been continuing in possession of the properties for the last nine years.

4 The execution proceedings were for execution of the arbitral award dtd. 4th April, 1997 passed by the sole Arbitrator at Hyderabad, in the dispute between the claimant and the respondents. According to the claimant, he had advanced Rs.50,00,000/-to the respondents under a memorandum of understanding of the year 1996. The arbitral proceedings had been contested by the respondents in a strange manner. They made a statement before the learned Arbitrator that, they did not want to file any reply to the statement of claim and that were

ready to argue the matter by making oral submissions. Thereupon, the learned Arbitrator heard the submissions and passed the award directing the respondents to pay jointly and/or severally a sum of Rs.50,00,000/- to the claimant with interest @18% per annum w.e.f. October, 1996 till payment. The award permitted the respondents, to make the payment in eight equal instalments within a period of eight years. On failure to make the payment, the claimant was entitled to take possession of the above-mentioned three properties. It is not the case of either the claimant or the respondents that, the respondents paid even a single instalment to the claimant after passing of the award.

5 About ten years after passing of the award i.e. on 5th February, 2007, the claimant filed execution proceedings for recovery of a sum of Rs.1,40,30,000/- due as on that date from the respondents. The claimant had disclosed in the Execution Application and his affidavits filed therein, that initially he had filed proceedings for execution in the City Civil Court at Hyderabad, Andhra Pradesh being E.A. No.90 of 2006. Since the properties against which the award was to be executed, are situate in Mumbai, the City Civil Court at Hyderabad appointed Advocate, Mr. Mudigunti Damadar Reddy as Receiver for the limited period of six months for the purpose of taking formal possession of the properties. Pursuant to the order, the Receiver visited Mumbai,

took formal possession of the properties and appointed respondent no.1 as his agent to look after and control the properties. Thereafter, on 5th February, 2007 the claimant filed the present execution proceedings. On 14th August, 2008, respondent no.1 filed an undertaking in this Court stating, inter-alia that, he shall not deal with the properties and/or part with their possession and that he shall use the same for his personal use and business. He also undertook that, he shall handover vacant and peaceful possession of the properties to the Court, as and when demanded and/or directed by the Court.

6 The Chamber Summons as taken out initially was by the Central Bank of India. Later pursuant to the order dated 13th February, 2012 it was amended and the present applicant i.e. Asset Reconstruction Company (India) Ltd, a company registered as a Secrutisation and Asset Reconstruction Company pursuant to Section 3 of Secrutization and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act") has continued the same as the successor of the Bank.

7 The case of the applicants, as set out in the affidavit-in-support of the Chamber Summons is as under :-

. Respondent no.4 is the owner of the property at 10/11, MAFCO APM Yard, Vashi, Navi Mumbai. Respondent no.3, the partnership firm is the owner of the two properties, described earlier at Mittal Chambers, Nariman Point, Mumbai. In the year 1997, the Central Bank of India had granted various credit facilities to, (i)respondent no.3, (ii)respondent no.4 (iii)one, M/s. Prabhu Hira Travels Ltd, (iv)respondent no.1 as the sole proprietor of M/s. Satyajit Traders and (v)Prabhu Hira International and Industrial Ltd. On 27th September, 1997, respondent no.3 created an equitable mortgage in respect of the two properties at Mittal Chambers in favour of the Bank by depositing the title-deeds in respect thereof to secure the loans i.e. the loan in the sum of Rs.70,00,000/- granted to respondent no.3, the loan in the sum of Rs.1,25,00,000/- granted to Prabhu Hira International and Industrial Limited and the loan in the sum of Rs.35,00,000/- granted to respondent no.1 as the sole proprietor of M/s. Satyajit Traders. On 1st January, 1998 respondent no.4 created an equitable mortgage by depositing the title-deeds in respect of the land and building at plots no.10 and 11, MAFCO, APMC Yard, Vashi, Navi Mumbai to secure loan in the sum of Rs.540 lacs given to it. Respondent no.4, Company had recorded the charge of the Central Bank of India over the properties by filing Form no.8 and 13 with the Registrar of Companies on 14th January, 1998. In the year 2001, the credit facilities given to the five entities described above was enhanced. The facilities given to respondent no.3 was increased to Rs.110 lacs from Rs.70 lacs, that given to respondent no.4 was increased to Rs.610 lacs from Rs.540 lacs. The facility given to M/s. Prabhu Hira International and Industrial Limited was increased to Rs.250 lacs from Rs.125 lacs, that given to M/s. Satyajit Traders was increased to Rs.68 lacs from Rs.39 lacs and the facility to M/s. Prabhu Hira Travels Ltd to Rs.40 lacs. Thereafter, on 8th October, 2001 further equitable mortgage was created to cover the enhanced credit facilities.

8 In the year 2003, when all the five entities failed to make repayment of the monies under the loan agreements, their respective accounts were declared as non-performing assets and demand notice dated 7th March, 2003 issued under Section 13(2) of the SARFAESI Act calling upon the respondents to repay outstanding amount of Rs.8,28,22,035.32 within a period of 60 days from the receipt of the notice. The respondents neither replied the notice nor complied with the same. Therefore, on 14th May, 2003 the Bank took measures under Section 13(4) of the SARFAESI Act and took physical possession of the office premises. As already mentioned above, the respondents challenged the action by filing Writ Petition No. 1368 of 2003 in this Court. By the order dated 17th June, 2003 passed therein, by the Division Bench, the bank was directed to restore physical possession of the office premises to the respondents by retaining symbolic possession

thereof. By the same order, the respondents were restrained from creating any third party rights and/or interest in the said premises. On 28th April, 2004 writ petition filed by the respondents was disposed off upholding the action under the SARFAESI Act and granting liberty to the respondents to approach the Debt Recovery Tribunal for redressal of their grievances. Thus, the respondents failed to secure any relief in respect of the three properties in the writ petition filed by them.

9 In the meantime, the Bank during the period October, 2003 to January, 2004 had filed five applications in the Debt Recovery Tribunal against the five borrowers. During the pendency of these proceedings, the claimant moved the Court at Hyderabad for execution of the alleged award dated 4th April, 1997. Undisputedly, the claimant had not sought leave under Order 21 Rule 22 Civil Procedure Code for the delay in applying for execution. Before the Hyderabad Court, the claimant and the respondents made a joint application for appointment of Receiver for taking formal possession of the three properties and by the consent order the Receiver, as stated hereinabove, was appointed by the order dated 11th August, 2006. By the same order, the parties were directed to approach the appropriate Court at Mumbai for appointment of Receiver within 6 months from the date of the order as the properties are lying within the jurisdiction

of Mumbai Court. The claimant, however, made no application for transfer of the execution application to Mumbai for execution of the award. Instead, in the month of February, 2007 he filed a fresh execution application alongwith the affidavit-in-support. Immediately, thereafter i.e. on 9th February, 2007 the claimant took out Chamber Summons No. 212 of 2007 for appointment of Court Receiver in respect of the three properties that had already been mortgaged to the Bank. Within two months thereafter, the parties filed the consent terms and got the Chamber Summons and the execution proceedings finally disposed off.

10 Upon becoming aware of the orders passed in the execution proceedings, the Bank on 4th August, 2007 filed Chamber Summons No.1268 of 2007 for setting aside the order dtd. 4th April, 2007 and for seeking leave to proceed under SARFAESI Act for sale of the mortgaged properties. By it's order dtd. 14th August, 2007, this court disposed off the Chamber Summons holding that the Bank was at liberty to adopt appropriate proceedings in accordance with law against the Court Receiver including the proceedings under the SARFAESI Act. The Bank was also granted liberty to apply subsequently for setting aside the order dtd. 4th April, 2007 on the execution application. The Bank, then, by it's letter dtd. 1st October, 2007 called upon the Court Receiver, High Court, Bombay to handover peaceful possession of the three

mortgaged properties to enable the Bank to proceed under the provision of SARFAESI Act. The Court Receiver, by his letter dtd. 8th October, 2007, declined to handover the possession and stating that there was no specific order to the Court Receiver to handover possession of the properties to the Bank. Thereafter, the Bank filed the present Chamber Summons seeking specific direction to the Court Receiver to handover peaceful possession of the three mortgaged properties.

11 The claimant opposed the Chamber Summons by filing affidavit-in-reply dtd. 20th February 2008 through his constituted attorney. Respondents no.1, 3 and 4 filed their joint affidavit dtd. 5th March, 2008 to oppose the Chamber Summons. Then the affidavit-in-rejoinder dtd. 30th April, 2008 of the applicant was filed. Later on 30th January, 2012 the applicant filed an additional affidavit to support the Chamber Summons, which was replied to by the additional affidavit-in-reply dtd. 13th August, 2015 of respondents no.1, 3 and 5.

12 In his affidavit-in-reply the claimant alleges that the Chamber Summons by the applicants is not maintainable as the same goes beyond the decree and the orders passed by this Court as well as the court at Hyderabad. According to him the applicants do not have any locus standi to take out the present Chamber

Summons. He cannot be affected by the same. He states that the property allegedly owned by respondent no.4 is a leasehold property of which M/s. CIDCO are the lessee. According to him, under the arbitral award in his favour, as on the date of filing of the execution application, the respondents were liable to pay a sum of Rs.1,40,30,000/- to him with further interest at the rate of 18% p.a. from the date of the execution till payment. According to him, the award in his favour is much prior to the loan transaction between the applicants and the respondents and since there was Court Receiver appointed in respect of the three properties and the Court Receiver was continuously in possession thereof, there could be no question of the bank retaining any symbolic possession in respect of the three properties. He claims that the arbitral award in his favour is a correct and legal award and he should not be deprived of the benefits thereof. He also alleges that, the officers of the applicant and the respondents have colluded with each other and the respondents are trying to wriggle out of the award, which was passed way back in the year 1997. According to him, in view of the award the respondents could not have secured financial transaction with the Bank by mortgaging the three properties.

13 Respondents no.1, 3 and 4 oppose the Chamber Summons by contending that prior to the year 1994 father of the respondents, Prabhudas Thakkar along with another brother since

deceased, Satyajeet Thakkar used to look after the business. In the short affidavit filed by them, they do not dispute the transaction of loan. They only dispute the transaction of equitable mortgage. They deny that the three properties have been mortgaged to the Bank.

14 Mr. Kamat, the learned advocate for the applicants submits that it is patently clear from the record that the so called arbitration proceedings at Hyderabad, and the award passed therein are nothing but sham and bogus proceedings. It was an exercise conducted in collusion by the claimant and the respondents to defraud the applicants and to defeat their claim. He submits that, closure scrutiny of the proceedings filed by the claimant would substantiate his argument. Ms. Dipti Panda for the claimant and Mr. Balsara for respondents no.1, 3 and 4 seek to refute the contention.

15 As already noted earlier respondents no.1, 3 and 4 do not dispute the financial assistance taken by them from the Bank as alleged in detail. The credit facilities had been given in the year 1997. Considering the extent of the credit facility given it is inconceivable that no security was obtained by the Bank towards repayment of the loan amount. Respondents no.1, 3 and 4 baldly deny that they created equitable mortgage in favour of Bank in

respect of the three properties. It is not their case that, no security whatsoever was given by them to the Bank for repayment of the loan or any security other than the three properties had been given. It is not in dispute that their loan accounts became "Non-performing Accounts" and that the Bank has initiated proceeding on DRT under SARFAESI Act. These respondents had filed writ petition to challenge the action of the applicants under the SARFAESI Act. The order on the writ petition was carried upto the Apex Court. There was not even so much of a whisper in the writ petition about the transaction with the claimant and the arbitral award.

16 Coming to the arbitration proceeding, there are several incredible and unusual aspects of it. The arbitral proceedings were between the claimant on one side and respondent no.1 and his brother Satyajit (since deceased) on the other. None of these two persons are the owners of any of the three properties. Though all the parties to the arbitral proceedings are residents of Mumbai the arbitration proceedings were conducted at Hyderabad. In the arbitral proceedings there was no statement of claim filed and no written statement. As per the award the claimant by his letter dtd. 2nd January, 1997 had requested the learned Arbitrator to adjudicate the dispute between him and the two respondents to the arbitral proceedings. It refers to a Memorandum of Understanding

(MOU), without even specifying the date, as the MOU in continuation of the MOU dtd. 5th June, 1996, under which the claimant advanced a sum of Rs.50,00,000/- to the two persons "for themselves and on behalf of their respective firms/companies etc." which was to be refunded within four months i.e. on or before 5th October, 1996. The learned Arbitrator claims to have personally verified that by Clause 13 of the undisclosed MOU all the parties had accepted him as a sole Arbitrator. Therefore he forwarded copies of all the proceedings to the two persons. There is no clue in the award as to what were the proceedings. He called upon the two person to file their reply within two weeks and to appear before him on 2nd February, 1997. The two respondents accordingly appeared and informed that they did not want to file any reply. They admitted the entire claim of the claimant and also that they carry on business in the names of respondents no.3 and 4. They admitted that the firm of respondent no.3 is the owner of the two premises at Mittal Chambers and the company at respondent no.4 is the owner of the property at Navi Mumbai. On the basis of the admission, the learned Arbitrator passed the following award.

> *"I hold that Mr. Rajesh P. Thakkar and Mr. Satyajit P. Thakkar in their individual capacity and as also Partner-Directors of their respective companies and firms jointly severally are liable to pay a sum of Rs.50,00,000/- to Mr.*

> *Pratap Somaiya along with interest at the rate of 18% p.a. with effect from Oct.1996 till payment and are ordered and directed to pay the said amount within a period of (8) years from the date of passing of this AWARD which shall be paid in instalments by dividing it in equal 8 instalments."*
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> *"It is further directed that in the absence of payment of the aforesaid amount within the stipulated time. Mr. Pratap Somaiya shall be entitled to take possession in respect of properties being Office No. 89 Mittal Chambers, Nariman Point, Bombay 21 and Godown No.9 Basement, Mittal Chambers, Bombay-21, (Nariman Point), and Factory situated at 10/11, MAFCO APM Yard, Washi, Turbhe, Navi Mumbai by executing this Award."*

The award further permits the claimant to sell the three properties.

17 In the last para of the award the Arbitrator records that since the two respondents to the arbitral proceedings desired to return to Mumbai on the same day, they had, with the assistance of an Advocate at Hyderabad known to the learned Arbitrator bought stamp-papers of the denomination of Rs.500/- to enable him to hand over original award to each side. Perusal of the original

award filed in the execution proceedings reveals that the stamp-paper of the award was issued not at Hyderabad but at Mumbai. The stamp thereon is in Marathi language. As per the stamp it was issued from Window No.15 of the Main Stamp Office, Mumbai. It has no.'20' mentioned in the stamp and was issued to one P. Thakkar. The date of the stamp-paper is 4th April, 1997. Although, respondents no.3 and 4 were neither parties to the arbitration agreement nor to the arbitral proceedings, the learned Arbitrator has passed orders in respect of the properties owned by respondents no.3 and 4. The award does not calculate and specify the amount payable thereunder to the claimant. Strangely, it grants period of 8 years to the respondents to make the payment in instalments by dividing the total amount payable in 8 equal instalments. Considering the extent of amount, it is absolutely unnatural that the learned Arbitrator would fix up period of 8 years for making the payment and the claimant would accept it without even a murmur. Mr. Kamat, submits that the period of 8 years mentioned in the award is solely for the purpose of covering up and explaining the delay of almost 10 years in filing the execution application.

18. There is nothing on record and also, it is not the case of either the claimant or the respondents, that any amount had been paid at any time by the respondents to the claimant towards

satisfaction of the award. Even then, the claimant remained quiet and content for more than 9 long years before approaching the Civil Court at Hyderabad with an execution application. It is to be noted here that, though the only properties against which the claimant could proceed under the award are situate in Mumbai, the application for execution was filed at Hyderabad and a Receiver got appointed from the Hyderabad Court. The claimant does not disclose the final outcome of the execution proceedings filed by him in Hyderabad Court. The execution application herein, is an independent application for recovery of sum of Rs.1,40,30,000/- constituting the principal amount of Rs.50,00,000/- and the interest therein at the rate of 18% p.a.

19. At the time, the claimant and the respondents filed consent terms in the execution application on 4th July, 2007 they were obviously aware of various orders passed by this Court relating to the properties in question. Reference to Writ Petition No. 1368 of 2003 filed by the respondents, has already been made earlier and the order dated 17th June, 2003 passed therein by the Division Bench of this Court directing the Bank to restore physical possession of the properties to the respondents and retaining symbolic possession of the properties. Since the symbolic possession of the properties was with the bank, the respondents and the claimant could not have agreed in the consent terms for

appointment of Court Receiver, High Court, Bombay as the Receiver of the three properties and obtained order of this Court on the consent terms. The claimant and the respondents, had clearly suppressed these material facts from the Court and obtained the consent order. This is patently playing fraud upon the Court. It would also be relevant to note that, the owners of the properties in respect of which the Receiver was appointed, i.e. respondents no.3 and 4, were not impleaded to the execution proceedings. Even then, neither respondent no.3 nor respondent no.4, for obvious reasons raised any objection.

20. The only irresistible conclusion that can be drawn from the above facts is that, the so called arbitration proceedings initiated by the claimant and surrendered to by the respondents were sham and bogus proceedings. In all probability, the documents relating thereto were prepared only after the attempt of the respondents in stalling the Bank from recovering its dues by proceeding against the three properties, failed. The properties having been duly mortgaged to the Bank by deposit of title-deeds, there was no question of appointment of Receiver in respect thereof and the orders of appointment of Receiver were obtained by the claimant and the respondents by playing fraud upon the Court. It is to be noted that, respondent no.1 had filed a written undertaking in this Court on 14th August, 2008 that, he shall not,

inter-alia, create any third party rights in respect of the three properties and shall handover vacant and peaceful possession of the premises to the Court, as and when, directed by the Court. Respondent no.1, therefore needs to submit to the undertaking and comply with the same by handing over vacant and peaceful possession of the three properties to the applicant.

21. Undoubtedly, the conduct of the claimant and the respondents in obtaining the order dated 4th April, 2007 of final disposal of Execution Application (Lodg) No. 57 of 2007 by deliberate suppression of material facts amounts to playing fraud upon the Court and abuse of process of law. The claimant and the respondents, therefore, are answerable to the Court for this conduct. Therefore, the notice is required to be issued to them calling upon them to show cause as to why action for contempt be not taken against them for such conduct.

22. In the above circumstances, the Chamber Summons is allowed in terms of prayer clause (a) with costs. The claimant and the respondents shall pay costs quantified at Rs.10,00,000/- to the applicant. The office to issue notice to the claimant and the respondents calling upon to show cause as to why action for contempt be not taken against them for playing fraud upon the Court and abusing the process of law while obtaining the order

dated 4th April, 1997. The notice is made returnable after 16 weeks.

(SMT. R.P. SONDURBALDOTA, J)