

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

**NOTICE OF MOTION NO.2009 OF 2015
CHAMBER SUMMONS NO.1510 OF 2015
EXECUTION APPLICATION NO.809 OF 2014
ARBITRATION AWARD 842/2009 DATED 2.2.2009**

WITH

CHAMBER SUMMONS NO.292 OF 2014

Mitsui Osk Lines Ltd. (Japan)Plaintiffs

V/s.

Orient Ship Agency Pvt. Ltd. & Ors.Defendants

Mr.Gaurang Mehta a/w Ms.Poorva Garg i/by M/s.Mulla & Mulla for award holder/claimant and for applicants in Chamber summons No.292/2014.

Ms.Pooja Kshirsagar a/w Ms.S.Brajnehat i/by Kartikeya & Associates for defendant nos.1 & 2.

Dr.Birendra Saraf a/w Mr.R.B.Talekar for applicants in Notice of Motion No.2009/2015.

Ms.Radha Bhandari i/by M.V.Kini & Co. for addl. defendant no.6.

CORAM : K.R.SHRIRAM,J

DATE : 10.6.2016

P.C.:-

1 At the outset, the counsel appearing for the applicants seeks leave to amend the prayer clause. Leave granted. Amendment to be carried out forthwith.

2 The judgment-creditors had taken out a Chamber summons bearing (L) No.1381 of 2015 for attaching the rights which according to them the judgment-debtors have in a commercial

tenanted premises of which the present applicant is one of the owners. Chamber summons admittedly was served but none appeared or filed the reply for the present applicants/landlords. Chamber summons came to be allowed by an order dated 7.9.2015 by recording that the landlords have been served but they have not appeared pursuant to service and no affidavit in reply has been filed. In effect it was an ex-parte order. The applicant therefore, has taken out this Notice of Motion praying for re-call of the said order and for re-hearing the Chamber Summons (L) No.1381 of 2015.

3 The counsel for the judgment creditors Mr.Mehta strongly opposed and at the outset submitted that this Notice of Motion is not maintainable. According to Mr.Mehta if the landlord feels that the property, which is the right that the judgment-debtor allegedly had in the commercial tenanted premises was wrongly attached, they should take out a Chamber summons in the form of a suit and not apply like this for recalling an ex-parte order."

4 Dr.Saraf submitted that under Order 21 Rule 105 read with Rule 106, the applicant is entitled to take out this application and the court was within its rights to recall the ex-parte order passed. He also submitted that the court in any event has powers under Section 151 of the Code of Civil Procedure.

5 Rule 105 of Order XXI sub rule-3 of the Code of Civil

Procedure reads as under :-

“105 Hearing of application -

(1).....

(2).....

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit.”

Sub rule 1 of Rule 106 of order 21 reads as under :-

“106. Setting aside orders passed ex parte, etc.

(1) The applicant, against whom an order is made under sub-rule (2) of rule 105 or the opposite party against whom an order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.”

6 Indisputably the order passed on 7.9.2015 is an *ex-parte* order. The applicant has explained in affidavit in support as to why they did not remain present and why they did not file a reply. Moreover, it is the case of the applicant that the right which the judgment creditor has sought to attach viz. tenancy rights never existed because the landlords have an eviction decree against the judgment debtor from the court of Small Causes, Mumbai.

7 Mr.Mehta stated that they applied for attachment of this rights based on the disclosure made by the judgment-debtor.

8 In my view, to avoid multiplicity of proceedings, it would be better if the *ex-parte* order passed on 7.9.2015 is recalled and the Chamber summons (L) No.1381 of 2015 now numbered as Chamber Summons No.1510 of 2015 is reheard.

9 In the circumstances, the order dated 7.9.2015 is recalled. Since the order dated 7.9.2015 itself is recalled, no consequential steps taken pursuant to the said order can be in force. The clock has to be put back to 6.9.2015.

Notice of Motion stands disposed accordingly.

10 The applicants to pay sum of Rs.25,000/- as cost to the judgment-creditors within four weeks from today. This amount to be paid by way of cheque drawn in favour of the Advocate on record for the judgment-creditors.

11 The affidavit in reply to the Chamber summons No.1510 of 2015 to be filed and copy served within two weeks from today. Rejoinder if any, to be filed within 2 weeks thereafter.

Chamber summons No.1510 of 2015 be listed for hearing on 20.7.2016.

(K.R.SHRIRAM,J)