Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION ST NO. 31766 OF 2017

Hemali Suarabh Shah ...Petitioner
Versus
The Commissioner for Taking Accounts,
Designated Officer of this Hon'ble Court & Ors ...Respondents

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Mr Virendra Deshmukh, *with Nilesh Ojha & Vijay Kurle, i/b Reena S Rana, for the Petitioner.*
Mr SU Kamdar, Senior Advocate, *with Yashish Kamdar & Aditya Khandeparkar, i/b Naik Naik & Co., for Respondent No. 3.*

CORAM: G.S. PATEL, J
DATED: 4th December 2017

PC:-

1. Heard.

2. The dispute pertains to a very valuable immovable property in an upmarket locality in Mumbai. This is Flat No. 5, Suraj Millennium at Bhulabhai Desai Road or Warden Road. It is a duplex flat spread over floors 9 and 9A. The present Petitioner says that she and her father-in-law, Respondent No. 5, Pravinchandra Shah, are the joint owners of this flat. There is another co-owner, Pravinchandra's wife, the Petitioner's mother-in-law, Amitaben.

3. The Petitioner says that Pravinchandra took a loan in March 2013 of Rs. 8,02,72,490/- from the 3rd Respondent, Capital First Limited (**"CFL"**). It seems, as we shall see, that this was one of several such loans. The Petitioner says that she did not sign the loan papers, but this only tells a part of the story because on the loan documents her signature does appear. She says these signatures are forged and that she was not even in the country at the relevant time. Pravinchandra took a further loan of Rs. 5 crores in July 2014 from CFL. This flat was offered as security for repayment of the amounts due to CFL.

4. Pravinchandra defaulted. CFL appointed the 2nd Respondent, Mr Sunil Dighe, Advocate, as a sole arbitrator. He entered upon the reference to his arbitration in regard to the claim for the first loan of Rs 8,02,72,490/- on 7th October 2015 and, on a further appointment, in regard to the second loan of Rs 5 crores on 7th January 2016. The Petitioner was served but remained absent throughout the arbitral proceedings. Mr Dighe rendered awards in both the arbitral proceedings on 2nd May 2016 in favour of CFL.

5. On 5th October 2016, CFL moved this Court in Commercial Execution Application No. 60 of 2016 in respect of the Rs 5 crore claim and also in Commercial Execution Application No. 61 of 2016 in respect of the other claim of Rs. 8,02,72,490/-.

6. On 31st January 2017, this Court issued a warrant of attachment of immovable property under Order XI Rule 54 of the

Code of Civil Procedure 1908. The property in question was, of course, the flat itself.

7. From March 2017, a series of extremely peculiar events transpired. One Rameshchandra Hiralal Shah filed Chamber Summons No. 41 of 2017 in Commercial Execution Application No. 61 of 2016 objecting to execution saying that though he was a co-borrower, he remained unserved. A few days later, on 24th March 2017, two other alleged co-borrowers, Dineshchandra Hiralal Shah and Chetan Dineshchandra Shah filed Chamber Summons No. 44 of 2017 in Commercial Execution Application No. 60 of 2016 raising identical grounds.

8. On 27th July 2017 there entered on the scene one Sanya Properties Pvt Ltd and its guiding light one Harsh A Thakker also objecting to both Commercial Execution Applications, this time claiming tenancy of the flat in question.

9. On 28th September 2017, the 1st Respondent, this Court's Commissioner for Taking Accounts, decided all these objections. This is the order that is under challenge and it runs from pages 50 to 60 as part of Exhibit "B". I have considered the submissions on both sides and studied the order. It appears to me to be a most careful and well-considered order. It is comprehensive in every respect and the Commissioner for Taking Accounts has considered the rival contentions.

10. I will proceed directly to a more detailed analysis of the impugned order. Before the Commissioner for Taking Accounts, Mr KK Trivedi, was first of all, the claimant, CFL. Then Harsh Thakker was also represented as an objector or intervenor representing himself and Sanya Properties Pvt Ltd. State Bank of India, Stressed Assets Recovery Branch was also present. Saurabh Shah, the Petitioner Hemali's husband was also present and was represented by his Advocate.

11. Mr Trivedi noted that the warrant of sale dated 20th April 2017 was lodged by CFL on 25th April 2017 in regard to the Suraj Millennium flat. Advertisements were published in newspapers in English and in Gujarati and an affidavit proving publication was filed with Mr Trivedi's office. The Respondents were then served and an affidavit of service and a bailiff's report of pasting were also on record.

12. The record before Mr Trivedi showed there were two objections received, one by Sanya Properties Pvt Ltd and the other by Harsh Thakker. The 1st Respondent was Pravinchandra Shah, Respondent No. 5. Saurabh Shah, his son and Hemali's husband were co-borrowers. Other co-borrowers, Kamlesh and Rameshchandra, were also present. There were two other borrowers, Ideal Jewells (India) Pvt Ltd & S Rasiklal & Co.

13. As regards the first objector, Harsh Thakker, he said that he had come across the notice of 29th April 2017 pasted on the door. He said that he was a monthly statutory tenant of the premises at a rent of Rs. 30,000/-. I will note that there are apparently pending proceedings in the Court of Small Causes at Mumbai in regard to this claim. It seems that Harsh Thakker filed RAD Suit No. 702 of 2016 and obtained an order of 26th July 2016 restraining the landlord from dispossessing him. He produced a copy of that order. That order was passed *ex parte* in the sense that despite service on the present Respondent No. 5, Pravinchandra Shah, he remained absent. As we shall presently see Pravinchandra Shah's absence is more telling and fortuitous than it may seem.

14. The second objector before Mr Trivedi was Sanya Properties Pvt Ltd, through its Director Anil Thakker. Sanya Properties said that it had a claim or charge in respect of a loan of Rs. 5,67,42,380/- but until that time no steps had been taken for recovery of this amount.

15. I will, at this stage, only note that before Mr Trivedi at least, no copy of any tenancy agreement was either produced or relied on. The landlord-defendant to that declaratory suit was Pravinchandra himself, the 1st Respondent before Mr Trivedi and the 5th Respondent before me today. Mr Trivedi asked the Advocate for Harsh Thakker, the plaintiff in the declaratory suit to submit any other documents. She apparently said that whatever Harsh Thakker had was included with the plaint and said in terms that (i) the tenancy was created by oral agreement; and (ii) that all rent was always paid in cash. The response to this was that the objections from Harsh Thakker were all an afterthought. Harsh Thakker, the plaintiff in the tenancy declaratory suit, was none other than the son of Anil Thakker, director of the 2nd Respondent, Sanya Properties

Pvt Ltd. Pravinchandra's wife Amitaben was also a director of that company. Harsh Thakker himself was a director in Sanya Properties Pvt Ltd until September 2014.

16. It was also stated that CFL had a secured loan and had moved under the Securitization Act. There were in fact four loan agreements and these were set out. A demand notice was issued in the securitization proceedings on 20th September 2016. Further steps were taken. Symbolic possession of the flat was taken on 21st January 2017 and execution proceedings then followed.

17. I will pass over other objections and submissions that were raised before Mr Trivedi because these are not immediately material for my purposes. The foregoing narrative sufficiently sets out the relevant position of the parties and the principal points of discord. Interestingly, therefore, there is a complete intertwining and entanglement of Pravinchandra Shah, the Petitioner Hemali Shah, Sanya Properties Pvt Ltd and Harsh Thakker. It was for this reason that Mr Trivedi noted the submission before him that all these objections were collusive and cooked up only to defeat and delay execution.

18. There is one interesting facet of the matter and that is the fact that this flat originally belonged to one Quality Frozen Food Pvt Ltd. Quality Frozen Foods sold this flat to Anil and Namita Jaggia. The flat itself is 4,200 sq ft and includes a car parking space. Then, on 18th January 2010 Anil and Namita Jaggia sold their rights in this flat to Pravinchandra Shah, his wife Amitaben Shah and their daughter-in-law Hemali Shah. The society records also note this progression of title. Before Mr Trivedi it was pointed out that CFL's claim of 23rd March 2013 was prior in point of time to the claims of other creditors such as DHFL and the State Bank of India. The claim for tenancy was raised at a very belated stage in the proceedings. Mr Trivedi also noted that this so-called tenancy agreement was never shown to be by way of a registered written document, a necessity under the Act.

19. As regards Sanya Properties' claim of being a creditor, other than a statement that there was a loan nothing else was shown. No documents of the loan were provided. No documents were placed and it was not demonstrated that any application had been made to any appropriate forum for recovery of these proceedings.

20. There remains the question of State Bank of India, which sought to intervene. This aspect of the matter is quickly despatched because Mr Trivedi only said that the State Bank of India was free to obtain whatever orders it sought in appropriate proceedings but the present proceedings could not be held up on that ground.

21. In paragraph 37 at page 59 Mr Trivedi was careful to note that throughout the proceedings Saurabh Shah had remained present. He now donned another hat and said he representing another creditor, S Rasiklal & Co.

22. Mr Kamdar for CFL points out that all these so-called interventions and claims are last-ditch attempts to stall execution despite the fact that there was, first, no challenge to the arbitral awards; second, no contest in the arbitral proceedings; third, no civil suit filed has at any stage been filed impeaching the loan documents in question as being vitiated by fraud or forgery; and finally, that the so-called claims of these objectors have not received any final adjudication whatsoever, whereas the claim of CFL has attained finality.

23. The writ petition is, therefore, in my view, thoroughly misconceived. The only principle it seeks to invoke is that an order obtained by fraud and concealment is a nullity. In support of this, reliance is placed on the decision of the Supreme Court in *Union of India & Ors v Ramesh Gandhi*.[1] What the submission entirely overlooks is that this alleged fraud or forgery is not, in this case, unlike in the case before the Supreme Court, established or proved. It is not sufficient for a party to merely claim fraud or forgery by making these allegations in a writ petition. There would then arise the complication of having to decide seriously disputed questions of fact in a writ petition, which obviously cannot be done. The Supreme Court decision in *Ramesh Gandhi* proceeded on an entirely different footing. There, the question was of non-disclosure, and this was demonstrated beyond controversy, but this is no authority for the proposition that the factum of proving fraud and forgery is an exercise that can be done in a writ petition under Article 226 of the Constitution of India. That is squarely a subject matter of a civil dispute and it would be necessary for Hemali, if she is able, to establish this in a Court of competent jurisdiction. It is sufficient to note that Hemali in fact had an opportunity to do this in the arbitral

1 (2012) 1 SCC 476.

proceedings. Why she did not appear is something she alone can explain. Why she has filed no challenge to those arbitral awards is again something she alone can explain. There is also no application made at any time to the Debt Recovery Tribunal in respect of the securitization proceedings. Thus, there are at least three distinct avenues that Hemali could have pursued but which she has steadfastly not done. It is not open to her to raise these challenges at this stage in this writ petition. That would require this Court to proceed in a writ petition on the basis of mere surmise and conjecture, viz., that whatever Hemali now says is in fact true, only because it is she who says it, and notwithstanding that she has squandered every opportunity to establish it in multiple forums.

24. I see no ground for interference with the impugned order. There is no substance to this writ petition. It is rejected. There will be no order as to costs.

(G. S. PATEL, J)