

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO.1132 OF 2014
IN
EXECUTION APPLICATION NO.156 OF 2015**

Shree Harivansh Securities Pvt. Ltd.Applicant/Decree Holder
Vs.

Nikko Stock Broker Pvt. Ltd. & Anr.Respondents

Mr. Samrat Sen, senior advocate a/w. Mr. R.L. Muliva, Ms. Priyanka Das, Ms. Benita Kapadia and Ms. Namrata Shah i/b. M/s. K. Ashar and Co. for claimant/applicant.

Mr. Girish B. Kedia for respondent no.1.

Mr. Kinshuk Banerjee a/w. Mr. Arnav Mohanty i/b. Wadia Ghandy and Co. for respondent no.2.

CORAM : K.R.SHRIRAM, J.

DATE : 7th JUNE, 2017

PC.:

CHAMBER SUMMONS NO.1132 OF 2014

1 Mr. Sen, senior counsel, on instructions states that liberty be given to withdraw this chamber summons with leave to take out fresh proceedings as advised against Bombay Stock Exchange.

2 Chamber summons dismissed as withdrawn with liberty as sought.

EXECUTION APPLICATION NO.156 OF 2015

1 At the outset, counsel for respondent no.1 submitted that notice under Order 21 Rule 22 of the Civil Code Procedure, 1908 has not been issued and therefore, the court should not hear the matter today. Mr. Sen, senior counsel appearing for applicant/decree holder submitted

that under Order 21 Rule 22 Sub Rule 2, the court has power to issue process of execution of a decree without issuing notice thereby prescribed, if, for reasons to be recorded, court considers that the issuance of such notice would cause unreasonable delay or would defeat the ends of justice. Mr. Sen submitted that judgment debtor has not only entered appearance through an Advocate and participating in these proceedings, but has also filed affidavit in reply to two chamber summons that were taken out by applicant. Mr. Sen submitted that judgment debtor is taking a hyper technical objection and the court should, therefore, dispense with issuance of notice.

2 Mr. Kedia submitted, relying upon the judgment of the Calcutta High Court in the matter of *Gurudas Biswas vs. Bhowanipore Zamindary Co. Ltd.*¹, that issuance of notice is mandatory and the court cannot dispense with the notice. Per contra, Mr. Sen relied upon another judgment of Calcutta High Court in the matter of *Chandra Nath Bagchi vs. Nabadwip Chandra Dutt and Ors.*² to submit that it was open to the court to dispense with notice. Mr. Sen submitted that Order 21 Rule 22 only requires that an opportunity should be given to the judgment-debtors against whom execution is taken out more than a year after the decree to show cause why execution should not proceed. Mr. Sen submitted that in this case, judgment debtor having entered appearance and participated and

1. AIR 1921 Calcutta 609

2. AIR 1931 Calcutta 476

having filed affidavit in reply to two chamber summons that were taken out by applicant has got an opportunity to show cause why the execution should not proceed. Mr. Sen submitted that therefore, the court should dispense with issuance of notice. Moreover, Mr. Sen submitted that the Award is dated 11th September, 2004. Almost 13 years have passed and these are nothing but attempts to delay execution. Mr. Sen also submitted that the execution application was not filed earlier because the directors of respondents, against whom also the Award was passed, had filed petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the said Act) in this court, which was allowed and later carried in appeal to Division Bench by applicant. Mr. Sen submitted that therefore, it took so many years and if a formal notice has to be issued, it would unreasonably delay and defeat the ends of justice.

3 In response, Mr. Kedia also submitted that even for this court to dispense with issuance of notice, the court should have jurisdiction and according to Mr. Kedia this court has no jurisdiction because respondent/judgment debtor is presently carrying on business at Taloja and all the assets are also in Taloja. Mr. Kedia submitted that this court, therefore, has no jurisdiction.

4 I have considered both the judgments of Calcutta High Court. *Gurudas Biswas* (Supra) on facts is different from the present case. In that case, judgment debtor had not entered appearance or participated or filed

any affidavit in the proceedings. In the case of *Chandra Nath Bagchi* (Supra) the court has held that if the judgment debtor had an opportunity to show cause and has participated in the proceedings, it will be unreasonable to direct issuance of notice, merely on technicality. I respectfully concur with this view. It will be useful to reproduce the following portion from the said judgment :

The case going back to the learned Judge, the judgment-debtors objected among other things in August 1921, that the sale-could not proceed because originally in; January 1927 no notice under Rule 22, Order 21, Civil P. C, had been issued and: they relied upon the decision of the Privy Council in the case of Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129, and upon other decisions in the same sense. The learned Judge gave effect to that objection. He said:

It is further pointed out that the judgment-debtor did appear on notice under Order 21, Rule 66 and objected to the valuation which was thereafter fixed. But this does not do away with the objection that there has been no notice under Rule 22.

4. Mr. Chippendale contends before us in like manner that, as it has been held that notice under Rule 22 is a condition' precedent and without it the Court has no jurisdiction, this objection can be taken at any time. The first question on this appeal is whether that contention is correct. In my judgment, it is not correct. It is quite unnecessary to push the abstract logic of the case of Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 to this ridiculous extreme. There was a case-somewhat similar to this before the High-Court of Patna, namely the case of Fakhurul Islam v. Bhubaneswari Kuer A.I.R. 1929 Pat. 79. In that case, execution had proceeded and an appeal was taken to the High Court on the ground of absence of notice tinder Rule 22 and the High Court set aside the execution proceedings. The case went back to the executing Court and, after further proceedings, a sale was directed. Thereupon an objection was taken that, even so, no notice yet had been served under Order 21, Rule 22 and still the sale was bad. Dealing with that kind of objection, the learned Judge, Kulwant Sahay, J., said:

All that Order 21, Rule 22 requires is that an opportunity should be given to the judgment-debtors against whom execution is taken out more than a year after the decree to show cause why execution should not proceed.

5. In my judgment, that is the substance land the meaning of the requirement. I {do not in any way seek to throw doubt upon the proposition that where such a notice has not issued and the party who entitled to notice does not in substance [get notice and is not given or does not take an opportunity to object to the execution of the decree, the sale which follows will be without jurisdiction in the sense that, even if the sale is to a stranger, the sale will not be binding or valid. The parties in the present case have been litigating actively with each other upon the question whether this execution should proceed and how it should proceed. I have pointed out that, at one stage of the case, the matter was by agreement referred to a gentleman to report as to the amount of the valuation to be inserted in the

proclamation of sale. In the appeal which came previously before this Court, there was an affirmation that the sale was to take place and the proclamation was to issue. It appears to me to be merely piling unreason upon technicality to hold upon the circumstances of this case that it is open to the judgment-debtors on these grounds to object to the jurisdiction of the Court because they have not got a formal notice to do something, namely to dispute the execution of the decree when in point of fact they were busy disputing about it in all the Courts for the best part of the last two years. I decline to push the doctrine so far as that and it seems to me that the execution should proceed.

5 In this case also respondent has been participating in all the proceedings before this court. Respondent having entered appearance in this execution proceedings and having also filed affidavit in reply to two chamber summons that were taken out by applicant and otherwise also litigating actively, in my view, the respondent has been given an opportunity to show cause why execution should not proceed. Principles of natural justice is therefore, met. Therefore, in a situation like this, no notice under Order 21 rule 22 (1) is required to be given. In view of the fact that the award itself is of the year 2004, if notice is directed to be issued, it would only unnecessarily and unreasonably delay the proceedings and thereby defeat the ends of justice. Hence, I do not wish to direct applicant to serve notice under Order 21 Rule 22 merely to satisfy a technicality. Therefore, notice under Order 21 Rule 22 is dispensed with.

6 Now coming to the second limb of Mr. Kedia's submission as to whether this court itself has jurisdiction to entertain this application even to dispense with issuance of notice, in my view this court has jurisdiction. Merely because defendant has shifted office after the award was published and before lodging of this execution application does not mean this court

will not have jurisdiction.

7 The facts and circumstances of the dispute are as under :

Applicant/decreed holder was a constituent of respondent, who was a broker in Bombay Stock Exchange. In the course of their dealings, it was the case of applicant/decreed holder that judgment debtor owed approximately Rs.4,41,81,399.52/- payment of which was defaulted. In view of the default, the arbitration under the rules and bye laws of the Bombay Stock Exchange was commenced and the Bombay Stock Exchange nominated Arbitrators. Respondents in the arbitration proceedings were the present respondent and the four directors of the respondent. The Arbitral Tribunal gave an award in favour of the applicant/decreed holder against all respondents. Two of the respondents, who were directors of the present respondent and against whom also the award was given, challenged the award under Section 34 of Arbitration and Conciliation Act, 1996 (the said Act) in this court. At the time when the arbitration proceedings were going on, admittedly respondent was carrying on business within the jurisdiction of this court. The Arbitral Tribunal also was constituted under the Bombay Stock Exchange bye laws and the arbitration proceedings were also held within the jurisdiction of this court. The award was also published within the jurisdiction of this court. The petition under Section 34 was filed by the directors of respondent in this court. Respondent was also respondent to the arbitration petition. Respondent never challenged the jurisdiction of

this court.

8 Under Section 36 of the said Act, the award is enforceable as if it were a decree of the court. The manner of enforcement is provided in the Code of Civil Procedure, 1908. The legal fiction that is created is for treating an arbitral award for all intents and purposes as a decree of the court.

9 Order 21 Rule 10 of the Code of Civil Procedure, 1908 provides that where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or if the decree has been sent to another court, then to such court for execution. In the present case, two of the parties against whom the award was given challenged the award under Section 34 of the said Act in this court. Respondent also participated in those proceedings and never objected to the jurisdiction of this court. As noted earlier, the validity of the award was decided all the way up to the Division Bench of this court. Thereupon the arbitral award become enforceable as if it were a decree of the court under Section 36. The expression “Court” cannot for the purpose of Section 36 be read at variance with the meaning of the expression under Section 34. Section 42 of the said Act provides, notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings

and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court. The effect of Section 42 is that where an application has been made under Part I in a court with respect to an arbitration agreement, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings. The legislature has affirmatively stated that such a court alone would have jurisdiction and has placed the matter beyond doubt by stipulating that no other court would have jurisdiction. I find support from the judgment of this court in the matter of *Eskay Engineers vs. Bharat Sanchar Nigam Limited*³ relied upon by Mr. Sen.

10 In this case, as stated above, when the arbitration proceedings commenced, respondent was within the jurisdiction of this court. The arbitration proceedings were held within the jurisdiction of this court. The award was published within the jurisdiction of this court. The challenge to the award by some of the parties was made in this court, in which respondents participated and never raised objection of jurisdiction. Therefore, as provided in Section 42 of the said Act, this is the court which alone will have jurisdiction over these proceedings. Just because respondent has shifted office outside the jurisdiction of this court after the arbitral award was given and before lodging of this execution application

3. 2009 (4) Arb. LR 369 (Bombay)

does not mean this court will not have jurisdiction.

11 So far as the assets of respondents outside jurisdiction of this court are concerned, at the appropriate time if applicant wish to have attachment orders issued against those assets, they may take such steps as advised.

12 Therefore, respondent/judgment debtor is directed to disclose within four weeks on oath particulars of its entire assets and properties both movable and immovable, tangible and intangible, including but not limited to bank accounts, shares, books of accounts, property and receivables etc., as provided under Order 21 Rule 41 of the Code of Civil Procedure, 1908. Respondent is also directed to enclose with the affidavit copies of its Annual Returns including balance sheet and profit and loss account for the last five financial years.

13 Matter to be listed after six weeks.

(K.R. SHRIRAM, J.)