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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
 ORIGINAL SIDE
 APPEAL NO.302 OF 2018
 IN
 CHAMBER SUMMONS NO.1426 OF 2017
 IN
 EXECUTION APPLICATION NO.1091 OF 2015
 IN
 C.S. (O.S.) NO.1979 OF 2011

Mr. Rajinder Mehta ... Appellant.
 V/s.
 Mr. Pranesh Gupta & Ors. ... Respondents.

WITH
 APPEAL NO.303 OF 2018
 IN
 CHAMBER SUMMON NO.751 OF 2017
 IN
 EXECUTION APPLICATION NO.1091 OF 2015
 IN
 C.S. (O.S.) NO.1979 OF 2011

Mr. Rajinder Mehta ... Appellant.
 V/s.
 Mr. Pranesh Gupta & Ors. ... Respondents.

Mr. Mayur Khandeparkar a/w Mr. Sumeet Bansod I/b. M/s. LJ Law for the Appellant in both matters.
 Mr. Kishor Jain a/w Ms. Priya Chheda I/b. Mr. Jayant Gaikwad for the Respondent Nos.1 and 2 in both matters.
 Mr. Vivek V. Phadke for the Respondent No.3 in both matters.
 Ms. Sayli Apte I/b. Mr. P.G. Lad for the Respondent No.4 in both matters.

CORAM : A.S.OKA AND M.S. SONAK, JJ.

DATE : 30th AUGUST 2018.

P.C. :

1 On the earlier date, the appeals were taken up for final disposal and submissions were heard. Today, the appeals are kept for dictation of the judgment. These two appeals arise out of execution of a money decree passed by the High Court of Judicature of New Delhi on 23rd May 2014. It appears that on transfer of the said decree to this Court on its Original Side for execution, an execution application was filed by the first and second respondents who are the decree holders. The third respondent is the judgment debtor. As indicated in the application for execution, the decree against the third respondent was in the sum of Rs.9,93,27,786.68/- with a future interest at 8% per annum. The third respondent by making an application for execution of the decree sought attachment of the immovable properties mentioned therein including a plot of land bearing Survey No.120 (part) of Versova Village, Taluka – Andheri, Mumbai Suburban District admeasuring 1593.25 square meters (for short “subject plot”).

2 The impugned order has been passed by the learned Single Judge on Chamber Summons No.1426 of 2016 as well as Chamber Summons No.751 of 2017 taken out by the present appellant who is not a party to the decree. With a view to appreciate the submissions made across the bar, a brief reference to the factual controversy will be necessary. As far as the subject plot is concerned, there is an Agreement of Lease executed by and between the third respondent - judgment debtor and the Maharashtra Housing Area and Development Authority (for short “MHADA”) which is a statutory Corporation established under the Maharashtra Housing and Area Development Act, 1976 (for short “the

said Act of 1976”). Indenture of Lease was executed on 5th May 2011 by and between the MHADA and the third respondent which was duly registered in the office of the Sub-Registrar of Assurances. The lease was granted under the said document for a period of 30 years from 9th July 1996 on terms and conditions set out therein. The present appellant who is admittedly a brother-in-law of the third respondent – judgment debtor is claiming on the basis of the Agreement for Assignment dated 4th April 2015 executed by the third respondent in his favour (for short “the Agreement for Assignment”). Admittedly, final document of assignment has not been executed in favour of the appellant on the basis of the Agreement for Assignment. There is a specific clause being clause 2k in the lease which enjoins the third respondent not to assign, sub-let, underlet or otherwise transfer in any manner including parting with the possession of the subject plot without previous written permission of MHADA. It is not in dispute that such permission has not been granted by MHADA.

3 Chamber Summons No.1426 of 2016 was filed by the present appellant invoking the provisions of Rule 58 of Order XXI of the Code of Civil Procedure, 1908 (for short “the said Code”). The Chamber Summons No.1426 of 2016 was taken out raising an objection to warrant of attachment dated 24th June 2015 issued by this Court in execution of the money decree. There are consequential prayers made in the Chamber Summons.

4 It appears that in terms of the order dated 7th June 2018 passed by the learned Single Judge in execution application, the

representatives of the Sheriff of Mumbai went to the subject plot for giving inspection of the property to the prospective buyers. On 29th June 2017, the Sheriff sought certain directions from the learned Single Judge. In the said order, the learned Single Judge noted that the representatives of Sheriff visited the subject plot for giving inspection of the same to the interested bidders. They found that 2 locks were put on the front portion of the gate and there was no one to open the gate. There was a name board thereon stating that the property was in possession of the present appellant and Siddhi Rent a Car Private Limited. By the order dated 29th June 2017, the learned Single Judge directed that the Sheriff shall put up a notice on the gate informing the appellant to open the locks on the next day morning at 11.00 am failing which the Sheriff will be constrained to break open the locks and put their lock and seal on the gate. Paragraph 5 of the said order reads thus :

- “5. Therefore, the Sheriff to put up a notice on the gate of the premises that the said Rajendra Mehta shall come and open the locks tomorrow morning at 11.00 A.M. failing which office of the Sheriff will be constrained to break open the locks and put their lock and seal on the gate.

The plaintiffs/judgment-creditors to inform the Advocate of Rajendra Mehta and the advocate for the judgment-debtor about this order and also forward a copy of the Sheriff's report.

If tomorrow at 11.00 A.M. the locks are not kept opened, the representatives from the office of the Sheriff of Mumbai are at liberty to break open the lock and give inspection of the premises and thereafter put their own lock and seal the premises. Should any police assistance is required, the concerned police station to render all

assistance and depute sufficient personnel to ensure that there is no breach of law and order.”

5 Chamber Summons No.751 of 2017 was taken out by pointing out that on the basis of the aforesaid order dated 29th June 2017, the Sheriff has put his lock on the gate and has sealed the same. The prayer is for directing the Sheriff to remove the lock and seal and hand over possession thereof to the appellant.

6 By the order impugned dated 24th June 2018, the learned Single Judge dismissed both the Chamber Summonses.

7 Appeal No.302 of 2018 takes an exception to the impugned order in relation to Chamber Summons No.1426 of 2016. Appeal No.303 of 2018 takes an exception to the impugned order in relation to Chamber Summons No.751 of 2017. In support of Appeal No.302 of 2018, the learned counsel appearing for the appellant firstly urged that the relationship between the appellant and the third respondent is irrelevant and the only question which needs to be considered is whether the appellant has a charge over the subject plot. He invoked clause (c) of sub-rule (3) of Rule 58 of Order XXI of the said Code. He invited our attention to sub-section (6) of Section 55 of the Transfer of Property Act, 1882 (for short “the said Act of 1882”). He submitted that the appellant has been put in possession of the subject plot under an agreement for sale and in view of clause (b) of sub-section (6) of Section 55 of the said Act of 1882, the appellant has a charge on the subject plot to the extent of third respondent's interest in the subject plot for the amount paid by the appellant under the agreement dated 4th April 2015. He submitted that

even if a conveyance is not executed in favour of the appellant on the basis of the said agreement, the said charge can be enforced by the appellant. He relied upon the decision of the Apex Court in the case of *Videocon Properties Ltd. Vs. Dr. Bhalchandra Laboratories and Ors.*¹. He relied upon various paragraphs to the said decision including paragraph 13 in support of his case.

8 He submitted that thus in view of the express provisions of the said Act of 1882 the appellant is entitled to have a charge on the subject plot. Inviting our attention to the impugned judgment and order, he urged that the argument based on clause (c) of sub-rule (3) of Rule 58 of order XXI which was specifically canvassed has been brushed aside by the learned Single Judge. He submitted that the appellant was not claiming mere interest but a charge on the subject property for the amount paid by him under the said agreement. He also invited our attention to what is stated in the affidavit in support as well as the recitals in the said agreement. He pointed out that the appellant settled the claim of JM Financial against the third respondent by making payment of a sum of Rs.9,50,00,000/-. He submitted that in view of Rule 58 of Order XXI, the objection raised by the appellant ought to have been adjudicated upon as if it is a suit.

9 As regards the impugned order passed on Chamber Summons No.751 of 2017, he submitted that order dated 29th June 2017 passed by the learned Single Judge did not enable the Sheriff to dispossess the appellant and that the said order was only for facilitating giving of an

1 (2004) 3 SCC 711

inspection of the subject plot to the prospective bidders. He submitted that there was no order passed for dispossession of the appellant and therefore, only on the basis of the order dated 29th June 2017, the subject plot cannot remain locked.

10 The learned counsel appearing for the decree-holder submitted that the subject agreement purports to be an agreement under which the judgment debtor has agreed to assign his leasehold rights conferred upon him by MHADA to the appellant. His submission is that Sections 54 and 55 of the said Act of 1882 will have no application. He also pointed out from the letter dated 16th April 2014 addressed by the judgment debtor to the appellant which records that custody of the 4 documents mentioned therein was handed over to the appellant. However, the said letter is conspicuously silent about the delivery of possession and no other document is placed on record to show that the appellant was put in possession. As regards Chamber Summons No.751 of 2018, the learned counsel appearing for the decree-holder submits that as admittedly there was no material to show that the appellant was placed in possession of the subject plot, chamber summons proceeds on the footing that the appellant has been dispossessed, it cannot be entertained. He placed on record the photographs which according to him militate against the claim of the appellant that he was in possession of the subject plot.

11 The learned counsel appearing for the appellant also placed on record a photograph. He submitted that Section 55 will have application as the said agreement is an agreement for sale of the rights of

the judgment debtor acquired from MHADA and therefore, the appellant has a charge over the subject plot to the extent of the amount paid by the appellant under the said agreement.

12 We have given careful consideration to the submissions. As stated earlier, the decree was passed on 23rd March 2014. In execution application, warrant of sale of the subject plot was issued on 9th September 2016. Prior to that, warrant of attachment was issued on 24th June 2015. The said agreement which bears the date of 4th April 2015 bears rubber stamp of the Competent Authority of the Stamp Office at Mumbai showing that it was issued on 30th March 2015. Thus, the said document has been executed by the third respondent – judgment debtor after passing of the decree which is the subject matter of execution. It cannot be disputed that the appellant is claiming through the judgment debtor.

13 The entire case of the appellant proceeds on the footing that the said agreement is a contract for sale as contemplated by Section 54 of the said Act of 1882 and therefore, in view of clause (b) of sub-section (6) of Section 55, the appellant is entitled to a charge on the subject plot against the judgment debtor and all persons claiming under him for the amount paid by him under the said agreement to the extent of third respondent's interest in the subject plot. Section 54 defines “Sale” as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. We have carefully perused the said agreement. The said agreement records that the third respondent is a lessee under the Indenture of Lease dated 5th May 2011 executed by MHADA. Clause 1 of

the agreement clearly shows that it is not an agreement for sale or contract of sale as contemplated by Section 54 but it is an agreement to assign leasehold rights of the judgment debtor in his favour. In clause 3, there is a specific provision in the said document that the third respondent – judgment debtor will execute a Deed of Assignment after complying various formalities mentioned therein including obtaining no objection certificate from MHADA for assignment or transfer of the lease. Therefore, by no stretch of imagination, the said agreement can be termed as a contract for sale of the subject plot or an agreement for sale of subject plot covered by Section 54 of the said Act of 1882. Therefore, the argument based on sub-section (6) of Section 55 of the said Act of 1882 has no application in the sense that Section 55 lays down the rights and liabilities of buyer and seller. As the said agreement cannot be termed as a contract of sale, obviously, the appellant does not become a buyer within the meaning of Section 55 of the said Act of 1882 and the third respondent – judgment debtor does not become a seller under the same provision. In the circumstances, the decision relied upon by the appellant in the case of *Videocon Properties Limited* will have no application. Even another decision of the learned Single Judge of the Calcutta High Court in the case of *Rabindra Nath Banerjee Vs. Harendra Kumar Chakravarty and Ors.*² will have no application as the Agreement for Assignment is not covered by contract of sale covered by Section 54.

14 Now turning to the impugned order, the learned Single Judge also noted that the subject plot was owned by MHADA. The learned Judge negated the contention about the charge or interest created in favour of

2 AIR 1956 Calcutta 462

the appellant. For the reasons recorded above, we are of the view that clause (c) of sub-rule (3) of Rule 58 of Order XXI cannot be invoked by the appellant as the appellant has not established that he has a charge over the subject property.

15 Now coming to the other appeal, we have already quoted the order dated 29th June 2017 passed by the learned Single Judge. The said order was passed by the learned Single Judge on the basis of a report submitted by the Sheriff of Mumbai. The order dated 29th June 2017 does not record any finding on the issue as to who was in possession on 30th June 2017 when the Sheriff locked the gate on the subject plot. However, we find from the order dated 29th June 2017 that the learned Single Judge directed breaking open of the lock and putting on seal on the gate only for the purpose of facilitating inspection of the plot and structure thereon by the prospective bidders. Obviously, after passing an order granting liberty to the Sheriff to break open the lock for giving inspection, the learned Single Judge ensured that after inspection is given to the bidder, the property is protected by directing the Sheriff to put lock and seal on the gate. The said order does not record any finding that the appellant deserves to be evicted.

16 It is not necessary for us to decide as to who was in possession on 29th and 30th June 2017 as a finding on such an issue cannot be rendered in this appeal for the first time. Suffice it to say that the lock and seal put by the Sheriff cannot continue for an indefinitely long time. We, therefore, propose to direct the Sheriff to remove the locks and seal

within the time fixed under this judgment and order with liberty to the parties to adopt appropriate proceedings in accordance with law.

17 It is true that an objection raised to the adjudication by invoking Rule 58 of Order XXI of the said Code is required to be decided in the same manner in which a suit is decided. In the present case, taking the said agreement pleaded by the appellant as correct, the appellant is not entitled to claim any right, title and interest in the subject plot or a charge over the subject plot. Therefore, we find nothing wrong in the ultimate order passed by the learned Single Judge on Chamber Summons No.1426 of 2016.

18 Accordingly, we pass the following order :-

ORDER

- (i) Appeal No.302 of 2018 is hereby dismissed. The impugned order dated 24th April 2016 passed on Chamber Summons No.1426 of 2016 stands confirmed;
- (ii) The impugned order to the extent to which it decides Chamber Summons No.751 of 2017 is modified by directing the Sheriff of Mumbai to remove the locks and seal put by him on the gate of the subject building on expiry of period of 15 days from the date on which this judgment and order is uploaded. As we are unable to record any finding as regards possession of the said plot and structures thereon on the day the same was locked and sealed by the Sheriff, we grant liberty to the parties to take out appropriate proceedings. We,

however, make it clear that we have made no adjudication on the question whether the appellant was in possession of the subject plot and structures thereon when the Sheriff locked and sealed the gate. All these questions are kept open to be decided in appropriate proceedings in accordance with law. There will be no order as to costs. Pending notices of motion, if any, stand disposed of.

(M.S. SONAK, J.)

(A.S.OKA, J.)