Jsn

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

CHAMBER SUMMONS NO. 850 OF 2015
IN
EXECUTION APPLICATION NO. 907 OF 2014
IN
ACP NO. 5459 OF 2013

M/S. Pegasus Assets Reconstruction Pvt. Ltd. … Applicant
In the matter between
M/s. Kotak Mahindra Bank Ltd. … Plaintiff / Claimant
Versus
Ketan Gokuldas Badiani … Respondent

Mr. Anil D'souza, for the Applicant.
Ms. Juhi Bhogale, I/b. O.M. Gujar for the Claimant.

CORAM: RIYAZ I. CHAGLA J.
DATE: 12TH SEPTEMBER, 2018.

PC:-

1. Heard the learned counsel for the Claimant and the learned counsel for the Applicant. This Chamber Summons has been taken out by the Applicant for recall of the warrant of attachment issued pursuant to order dated 25th August, 2014 in Execution Application No. 907 of 2014 for execution of award dated 26th February, 2013. At the outset, the learned counsel for the Applicant submits that the Applicant is not pressing prayer clause (a) of the Chamber Summons. He states that this prayer has been erroneously included in this Chamber Summons. Hence, this Court is only concerned with prayer clause (b). The learned counsel for the Claimant seeks time to take instructions. I have

considered her request. From the documents which will be adverted herein below it is apparent that this property could never been attached in the above execution proceedings. Hence I reject the application for adjournment.

2. The learned counsel for the Applicant has taken this Court through the various documents on record. It is apparent from these documents that the property which is attached viz. D-303, PLT No.A 14, Bhoomi Krishna CHS Ltd, Mahavir NGR, Village Road, Kandivali West, Mumbai 400 067 ("subject property") was owned by Smt. Jaswanti Gokulbhai Badiani and Smt. Khyati K. Badiani. Their names appear in the share certificate issued by the Bhoomi Krishna CHS Ltd. on 5th April, 2003. The said Society is owning the building in which the subject property is situated. The learned counsel for the Applicant has also drawn this Court's attention to a possession notice under the SARFAESI Act, 2002 which notice was issued by the IndusInd Bank on 5th September, 2012 for symbolic possession of the subject property issued to the borrower M/s. Royal Belts and guarantors Mr. Ketan G. Badiani, Ms. Jaswanti G. Badiani and Ms. Khyati Badiani and wherein it is mentioned that the said borrower and guarantors were owing the said IndusInd Bank a sum of Rs.84.86 lakhs. Having failed to pay the amount, the notice was issued to the borrowers, guarantors

and public in general that the Applicant had taken symbolic possession of the property under Section 13(4) of the SARFAESI Act, 2002 and Rule 8(1) of the SARFAESI Rules 2002. The details of the mortgage property comprising the subject property is set out. The Applicant was thereafter assigned the loan by Assignment Agreement dated 28th December, 2012 entered into with IndusInd Bank. The Applicant had made an application under Section 14 of the SARFAESI Act, 2002 before the Chief Metropolitan Magistrate, Esplanade Mumbai *inter alia* for the physical possession of the subject property. This application had been filed in January, 2013. Thereafter, an order dated 10th September, 2014 had been passed by the Court allowing the application and appointed the Assistant Registrar to take possession of the secured assets which includes the subject property. A possession notice has been published in the Free Press Journal on 24th December, 2014 whereby the borrower and public in general have been cautioned not to deal with the subject property and any dealings with the subject property will be subject to charge of the Applicant. It is mentioned that physical possession of the subject property had been handed over to the Applicant on 24th December, 2014.

3. The learned counsel for the Applicant submits the that

subject property had already been subject to a charge in favour of the predecessor of the Applicant prior to the award being passed on 26th February, 2013. The financial assets including the debt of the said borrower and charge of the subject property was also assigned to the Applicant on 28th December, 2012 i.e. prior to the Award being passed. He submits that the attachment warrant could not have been issued when the property was already subject to charge in favour of the Applicant. The subject property is also not owned by the Respondent debtor. He accordingly submits that this Court be pleased to recall the warrant of attachment.

4. I have considered the submissions. From the documents on record it is apparent that the warrant of attachment could not have been issued attaching the subject property which was already subject to a charge in favour of the Applicant and that the predecessor of the Applicant had taken symbolic possession of the subject property before the passing of the said Award. Further, an application was thereafter preferred by the Applicant before the Chief Metropolitan Magistrate and pursuant thereto order had been passed for taking physical possession of the subject property. The possession notice has also been issued notifying the borrower and the public in general not to deal with

the subject property which was subject to charge in favour of the Applicant and physical possession of the subject property had been taken. The Respondent debtor is also not the owner of the subject property. From these documents it is apparent that the subject property could not have been attached in favour of the Claimant and it is necessary for this Court to recall the warrant of attachment issued pursuant to an order dated 25th August, 2014 in the above Execution Application No. 907 of 2014 for execution of the said award dated 26th February, 2013.

5. Accordingly, I pass the following order:-

(i) The warrant of attachment issued pursuant to order dated 25th August, 2004 in the above Execution Application No. 907 of 2014 for execution of the Award dated 26th February, 2013 is recalled;

(ii) The Chamber Summons is accordingly made absolute in terms of prayer clause (b) with no order as to costs.

(RIYAZ I. CHAGLA J.)