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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 887 OF 2017
IN
EXECUTION APPLICATION NO. 20 OF 2010
IN
ARBITRATION PETITION NO. 483 OF 2006**

Itochu Corporation ...Petitioner
Versus
Sanjay Trade Corporation & Ors ...Respondents

**AND
CHAMBER SUMMONS NO. 885 OF 2017
IN
EXECUTION APPLICATION NO. 20 OF 2010
IN
ARBITRATION PETITION NO. 483 OF 2006**

**Mr V Dhond, Senior Advocate, with Archit Jayakar, & Rohan
Kelkar, i/b Jayakar & Partners for the Applicants/ Respondents.
Mr Rahul Narichania, Senior Advocate, with Pinak R Bhagwat &
Farhad Dalal, i/b Kochhur & Co., for the Judgment Creditor.
Mr A Postvala, i/b Wadia Ghandy & Co., for Respondent No 3.**

**CORAM: G.S. PATEL, J
DATED: 22nd January 2018**

PC:-

1. By an order dated 14th December 2017, I noted a statement made by Mr Dhond for the Respondents that an Affidavit of Disclosure would be kept ready in a sealed cover by the next date. Those Affidavits, under seal, are tendered today. The sealed packets are opened. I have seen the Affidavits. They are taken on record. Mr Dhond's Attorneys are directed to supply a copy of the two Affidavits by Respondents Nos. 1 and 2 to the Advocates for the Plaintiffs by the end of the day today.

2. Today, there are before me two Chamber Summonses. Chamber Summons No. 885 of 2017 is filed by the original claimant in an arbitration proceeding. Chamber Summons No. 887 of 2017 is filed by two of the three respondents in that arbitration, namely, Sanjay Trade Corporation and Umesh Prataprai Mehta.

3. The background to these disputes runs like this. On 15th September 2006, an arbitral panel made an award in favour of the claimant, Itochu Corporation ("**Iotchu**") against Sanjay Trade Corporation, Umesh Prataprai Mehta and Sanjay Prataprai Mehta.

4. On 18th December 2006, all three Respondents filed Arbitration Petition No. 19 of 2007 under Section 34 of the Arbitration & Conciliation Act 1996. On 12th November 2009, that Petition under Section 34 was dismissed. The Award became a decree of this court. Itochu then filed Execution Application No. 20 of 2010 in Arbitration Petition No. 483 of 2006 (which was a

Petition under Section 9 of the Act and was itself disposed of on 23rd January 2007) and sought enforcement of the Award.

5. On 8th March 2010 Sanjay Trade Corporation filed Appeal No. 172 of 2010 under Section 37 of the Arbitration Act against the order of 12th November 2004 dismissing the Section 34 challenge Petition. A few days later, on 12th March 2010, Sanjay Trade Corporation and Umesh Prataprai Mehta filed their own Section 37 Appeal No. 162 of 2010 against the 12th November 2009 order dismissing the Section 34 Petition.

6. By this time, on 19th January 2010, Itochu had obtained an order of attachment of several properties. That order of attachment continues till date.

7. Sanjay Trade Corporation and Umesh Mehta then filed Notice of Motion (L) No. 860 of 2010 in their Appeal No. 162 of 2010. On 2nd May 2017 a Division of this Court (AS Oka & AK Menon JJ) allowed that Notice of Motion to be withdrawn. That order noted that Sanjay Trade Corporation and Umesh Mehta desired to urge that the filing of their Section 37 appeal resulted in an automatic stay of Award in execution. The appellants believed they had no occasion to apply for stay and, hence, did not then seek it.

8. In its Chamber Summons No. 885 of 2017, Itochu urges that there is no question of a Section 37 Appeal triggering an automatic stay of execution of an award or of the award itself. Mr Narichania

on behalf of Itochu draws my attention to the fact that in an order of 9th July 2004 in *Iventa Fischer GmbH & Co v Polygenta Technologies Ltd*,¹ an matter unrelated to this one, a Division Bench of RM Lodha (as he then was) & JP Devadhar JJ said, while admitting an appeal under Section 37, that the petition under Section 34 would, as a result of that order of admission of the appeal, be deemed to be pending and, therefore, no express interim order (of stay) was required to be passed. Mr Dhond for Sanjay Trade Corporation and Umesh Mehta says therefore there was no occasion for them or, for that matter, for Sanjay Trade Corporation, to separately apply for a stay in their respective appeals, this being the position in law.

9. There was then order of 19th June 2012 of Mohit S Shah CJ & NM Jamdar J in *OP Roongta v ICICI Securities Ltd*,² another unrelated matter, in which after an elaborate discussion the Division Bench held that the provisions of Order 41 of the Code of Civil Procedure 1908 (“CPC”) were applicable to appeals under Section 37. The Division Bench specifically considered the contention that though a challenge petition under Section 34 was dismissed, simply because there was a pending Appeal under Section 37 this would resulted in a stay of the Award or its execution, and rejected it.

10. In the present matter, an application came to be made in execution by Itochu. This was Chamber Summons No. 2010 of 2009. At the hearing of that Chamber Summons on 27th September 2013, the Judgement Debtors sought leave to apply for a stay of the

1 Notice of Motion No. 1920 of 2004 in Appeal No. 409 of 2004 in Arbitration Petition No. 38 of 2004.

2 Appeal (L) No. 259 of 2012 in Arbitration Petition No. 188 of 2009.

decree. The question of whether a Section 37 Appeal results in an automatic stay was raised. RD Dhanuka J held that the later judgment in *OP Roongta* was binding. He adjourned the matter for three weeks.

11. There was then an order of 18th November 2013 in Notice of Motion (L) No. 2001 of 2013 in Appeal No. 172 of 2010 filed by Sanjay Mehta in which he sought stay of execution. The matter came up before a Division Bench of SJ Vazifdar J (as he then was) and I. The order of 18th November 2013 in that Notice of Motion records the same submission, i.e., whether admission of a Section 37 appeal is sufficient to operate as an automatic stay. Our order granted liberty to Sanjay Trade Corporation to pursue the objection in execution and clarified that it was for the executing Court to decide the question.

12. Thus, after an apparent conflict, the matter comes before me in execution. To my mind, the position in law today is clear. The decision of the Division Bench in *OP Roongta* holds the field. It binds me. It is not demonstrated that any decision of another Bench of coordinate strength has taken a conflicting view, or that the decision in *Roongta* is *per incuriam*. It is not possible for me to depart from the view taken, even had I been so included, and which I am not.

13. Mr Dhond makes a submission that the entirety of the Arbitration Act is a self-contained code and Code of Civil Procedure 1908 applies to no part of it. This submission is based on the

decision of the Supreme Court in *Mahanagar Telephone Nigam Ltd v Applied Electronics Ltd.*³ He says that the question has been referred to a larger bench of the Supreme Court and is yet pending there. The decision in *Mahanagar Telephone Nigam Ltd* was in the context of a revision application and applicability of the Code of Civil Procedure 1908 in that regard. Mr Dhond also draws my attention to a reported decision of this Court (Anoop V Mohta & AS Gadkari JJ) in *Rahul Bajaj v Mangal Keshav Securities Ltd*⁴ to suggest that in paragraphs 3, 11 and 16 of that judgment, the Division Bench accepted as axiomatic that the filing of a Section 37 Appeal against an order in a Section 34 Petition results in an automatic stay. Even if that is correct, and Mr Narichania disputes this, the fact is that the decision in *Rahul Bajaj* was of 15th July 2016 and it did not consider the decision of the Division Bench in *Roongta* delivered on 19th June 2012. It might have been different had the Court considering *Rahul Bajaj* differed from the *Roongta* view. It is true that this is a later decision, but I believe that the Division Bench hearing *Rahul Bajaj* was, first, bound by the previous Division Bench decision in *Roongta*; and, second, if it disagreed, would necessarily have had to return a finding to that effect and then have the matter or issue placed before the Hon'ble the Chief Justice for reference to a larger bench if thought fit. The *Rahul Bajaj* court could not legitimately have taken a view diametrically contrary to *Roongta*; that would render it *per incuriam*. Therefore, one must conclude that the *Rahul Bajaj* court did not take such a view (because it could not have so done), and its judgment cannot be read as Mr Dhond suggests. *Roongta* continues to be binding precedent.

3 (2017) 2 SCC 37.

4 2016 SCC OnLine Bom 5016.

14. In any case, if the submission is the no part of the CPC applies to any part of the Arbitration Act, then this is a submission that I believe to be too overbroad to commend acceptance. An immediate example should suffice. The Arbitration Act itself provides for enforcement of an award as a decree of the Court. The Arbitration Act has no provisions at all for execution parallel to Order XXI of the CPC. This makes it abundantly clear that there are, at the very least, certain portions of the Arbitration Act that are of necessity guided and controlled by the provisions of the CPC. This is therefore no answer to the Division Bench decision in *Roongta* which considered the applicability of Order 41.

15. Having regard to these circumstances, I am unable to accept the submission made by Sanjay Trade Corporation and Umesh Mehta in Chamber Summons No. 887 of 2017. Mr Dhond seeks leave to withdraw the Chamber Summons but he also seeks a clarification that it will be open to Sanjay Trade Corporation and Umesh Mehta to seek a stay in a substantive Notice of Motion in their Appeal No. 162 of 2010. I do not believe any express leave of this kind is necessary. That is an application that must be made to the Appeal Court seized of Appeal No. 162 of 2010. So far all that has been repelled by another Division Bench (in *Roongta*) is the question of whether there is an automatic stay. The Appeals Court has not ever said on merits that any of the Respondents are not entitled to a stay. The first aspect of the matter is clear. There is no automatic stay. Whether there *should* be a stay on merits is something that the Respondents must urge before the Appeals Court. As a Court in execution, I am only required to return the

finding that I have, viz., that there is no automatic stay of the award or its execution on admission or filing of a Section 37 appeal.

16. What this also means is that there is as of today no operative order staying the award, which is now a decree, or its execution. To that extent, Mr Narichania is completely correct that there is no reason to hold back on execution merely because Respondents now think it necessary to file an application for stay. That application, when filed, will be met, he says, on its merits. In the meantime, he is entitled to proceed in execution. I believe he is correct in this view of the matter.

17. Itochu's Chamber Summons No. 885 of 2017 has several prayers. Prayer (a) with its sub-prayers asks for a disclosure. Prayer (b) seeks an order of attachment. Prayers (c) and (d) seek punitive reliefs in default; and prayer (e) then seeks an injunction.

18. As to disclosure, I have already directed that copies of disclosure affidavits taken on record today be supplied to the Advocates for Itochu. I also noted that there is already an existing order of attachment of several immovable properties as of 19th January 2010 that has continued. That attachment will continue. Itochu is at liberty to make a separate application for attachment of other properties. Mr Narichania seeks leave to amend the present Chamber Summons to seek reliefs to put these attached properties to sale. The properties in question are: (i) 407, Adamji Building, 4th Floor, Narsi Natha Street, Mumbai 400 009; (ii) 518/A Zaveri Niketan, RP Masani Road, Near Five Gardens, Mumbai 400 019;

(iii) 519, Kaveri Neeta, Block No. D-1, 4th Floor, HR Mahajari Road, Mumbai 400 019; and (iv) 519, Kaveri Neeta, Block No. D-2, 4th Floor, HR Mahajari Road, Mumbai 400 019. Amendment to be carried out without need of reverification within two weeks from today.

19. At this stage, I will not grant the order of attachment of the additional properties but will reserve liberty to Itochu to apply again once it has had a chance to consider the disclosure affidavits filed today. I will, however, grant the injunction in terms of prayer (e) and this will extend to the properties mentioned in the two Affidavits. There is no need for a separate injunction in respect of four immovable properties mentioned above as these are already subject to an attachment.

20. The result is that Chamber Summons No. 887 of 2017 now stands dismissed as withdrawn. The foregoing order is made on Chamber Summons No. 885 of 2017 with liberty to the Applicant/Claimant to apply.

(G. S. PATEL, J)