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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

EXECUTION APPLICATION NO. 1091 OF 2015

IN

C.S. (O.S.) NO. 1979 OF 2011

WITH

SHERIFF'S REPORT NO. 21 OF 2017

Pranesh Gupta and M/s. Gupta Brother (India) through its partner …Petitioners

Versus

Jagdish Bansilal Khurana …Respondent

AND

CHAMBER SUMMONS NO. 402 OF 2016

IN

EXECUTION APPLICATION NO. 1091 OF 2015

IN

C.S. (O.S.) NO. 1979 OF 2011

Pranesh Gupta and M/s. Gupta Brother (India) through its partner …Petitioners

Versus

Jagdish Bansilal Khurana …Respondent

And

JM Financial Asset Reconstruction Pvt Ltd ...Applicant

AND

CHAMBER SUMMONS NO. 1426 OF 2016

IN

EXECUTION APPLICATION NO. 1091 OF 2015

IN

C.S. (O.S.) NO. 1979 OF 2011

AND

CHAMBER SUMMONS NO. 751 OF 2017

IN

EXECUTION APPLICATION NO. 1091 OF 2015

IN

C.S. (O.S.) NO. 1979 OF 2011

Pranesh Gupta and M/s. Gupta Brother (India) through its partner …Petitioners

Versus

Jagdish Bansilal Khurana …Respondent

And

Rajinder Mehta ...Applicant

Mr Kishore Jain, *with Priyal Chheda, i/b Jayant Sahadev Gaikwad, for the Petitioners.*
Ms Ankita Singhania, *i/b Vivek Phadke, for the Judgment Debtor.*
Mr Rohaan Cama, *with Sapna Rachure, i/b TN Tripathi & Co., for the Applicant in CHS/402/2016.*
Mr Mayur Khandeparkar, *with Jainish Jain, i/b LJ Law for the Applicant in CHS/1426/2016 & CHS/751/ 2017.*
Mr SD Chitgopekar, *Deputy Sheriff, present.*
Mr KD Rane, *Master, Office of the Court Receiver, present.*

CORAM: G.S. PATEL, J
DATED: 24th April 2018

PC:-

1. I have before me three Chamber Summonses, all filed in execution of a decree transferred to this Court for execution from Delhi. The decree was against Jagdish Bansilal Khurana (**"Khurana"**) in the amount of approximately Rs. 9.93 crores.

2. Moving in execution, the Decree Holder sought an attachment of the following properties: (i) Flat No. A-1801, Sweet Home Coop Hsg Soc Ltd., SVP Nagar, Andheri (West), Mumbai 400 053 ("**Flat No. 1801**"); (ii) Flat No. 1702-A, Sweet Home Coop Hsg Soc Ltd., SVP Nagar, Andheri (West), Mumbai 400 053; (iii) Poorti Rent a Car and Logistics Pvt Ltd., Shop No. 62, Ground Floor and Basement, RNA Shopping Arcade Society Ltd., Lokhandwala Complex, Andheri (West), Mumbai 400 053; and (iv) property described as Khurana Plot, behind Dhan Laxmi Building, SVP Road, Andheri (West), Mumbai 400 053 ("**the Khurana plot**").

3. At this stage, we are concerned only with one of the two flats in the Sweet Home CHSL. The Decree Holder has previously agreed that he is not proceeding against Unit No. 1702-A in Sweet Home. The attachment in that regard has already been vacated. This leaves Flat No. 1801 and the Khurana Plot.

4. Flat No. 1801 in Sweet Home is the subject matter of Chamber Summons No. 402 of 2016 filed by JM Financial Asset Reconstruction Company Pvt Ltd (**"JMFARC"**).

5. Mr Cama on behalf of JMFARC says that it had granted several credit facilities to Khurana and taken an equitable mortgage of Flat No. 1801, and in default obtained a Recovery Certificate of 8th April 2014. This was on a consent order where the claims of JMFARC, though much larger, were agreed to be compromised in the amount of Rs. 9.5 crores, it being agreed that in default the decretal amounts would become due with contractual interest. These amounts were due under three OAs that JMFARC had filed in the Debt Recovery Tribunal.

6. Mr Jain for the Decree Holder contests the claim to priority by JMFARC. He says that his attachment being prior in point of time, the sale should be effected by this Court. Mr Cama on behalf of JMFARC points out, correctly in my view, that this is not permissible. JMFARC is clearly covered by the provisions of the SARFAESI Act as also the RDDBI Act. It has instituted proceedings for recovery in the Debt Recovery Tribunal, the Court which is not only the one of competent jurisdiction but is the one of exclusive jurisdiction. The effect of accepting Mr Jain's argument, in Mr Cama's submission, one I am inclined to accept, is that there will then be a process where the exclusive jurisdiction of the DRT is suddenly taken away in the midst of recovery proceedings and assumed by this Court. This cannot and should not be done.

7. Mr Jain expresses the anxiety that JMFARC has shown no very great enthusiasm for effecting the sale and has not taken any effective steps since 2011. Mr Cama has instructions to state that the necessary application will be made within 45 days to put Flat No. 1801 to sell through the DRT. He also agrees that from this point on JMFARC will keep the Decree Holder apprised and informed by informing Mr Jain's attorneys in writing of the applications made, the orders passed and, once the sale is effected, the amounts realized from the sale. It is clarified that what is required is information, not advance notice. So ordered.

8. I am inclined to make a limited further additional order on this Chamber Summons which is to say that should there be any surplus after the sale at the instance of JMFARC, then an appropriate application must be made by JMFARC to the DRT for urgent reliefs to have the surplus proceeds after appropriation transferred to this Court. The DRT is requested to consider and decide that application, when made, on a priority basis. If and when any funds are so transferred to this Court, they are to remain in this Court to the credit of the present Execution Application. Thus, the surplus, if any, after appropriation and all costs of sale when received by the Prothonotary and Senior Master of this Court will be invested in a fixed deposit with any nationalized bank initially for a period of six months and thereafter renew it periodically until further orders of the Court. There will be no withdrawal without leave of the Court. Liberty to the Decree Holder to apply for withdrawal.

9. The result of this is that there will be an order in Chamber Summons No. 402 of 2016 in terms of prayer clause (a) but restricted to Flat No. 1801, Sweet Home CHSL, for the reasons already mentioned above and subject to the conditions set out above. Chamber Summons No. 402 of 2016 is disposed of accordingly. No costs.

10. The other two Chamber Summons Nos. 1426 of 2016 and 751 of 2017 are filed by one Rajinder Mehta ("**Mehta**"), the brother-in-law of the Judgment Debtor. Both these Chamber Summonses relate to, and only to, the Khurana Plot property. This is a MHADA plot and requires MHADA permission for any transfer. MHADA has bee joined to these proceedings on an order made in a disposed of Chamber Summons No. 199 of 2017 (order dated 7th June 2017).

11. Mehta's claim runs like this: He says that he entered into an agreement with Khurana on 4th April 2015. The document is at page 21 of a compilation that is tendered by Mr Khandeparkar who appears for Mehta. The agreement is in respect of this very land, and according to Mr Khandeparkar, it records that payments have been made and Mr Mehta has been put in possession. The agreement requires certain permissions to be obtained and acts to be done before the transaction could be finalized.

12. Mr Jain points out that this agreement is on the face of it not credible. It is on a stamp paper that was obtained for making an Affidavit. It shows Mehta as having an address in New Delhi and not in Mumbai and it is unlikely that he would therefore ever have been put in physical possession of this plot. In his submission this was a document contrived only to save the property from execution and this, Mr Jain says, is *ex facie* apparent from this agreement which is both unstamped and unregistered. Mr Khandeparkar submits that the document does not require registration because in itself it creates no rights.

13. But that is a problem. If the document creates no rights and there is no other document then what Mr Khandeparkar is forced to fall back on is this: that since Mehta allegedly made some payments to Khurana, therefore, Mehta has a lien or a charge on the property. I believe this is far too broadly stated to commend itself. There is no such general principle in law.

14. As to the question of possession, the entire case seems to be founded on the basis of a statement made before KR Shriram J on 29th June 2017 (order copy is at page 11 of Chamber Summons No. 751 of 2017). The Sheriff reported Mehta's name to be on the property board. The Court directed the Sheriff to put up a notice that Mehta was to remain present and open the gate at 11.00 a.m., failing which the Sheriff will break open the lock. There is then a report at page 19, dated 4th July 2017. The Sheriff in this report notes that on 30th June 2017 and 1st July 2017 the premises were inspected by interested bidders. The gate was opened by a representative by Mehta at 11.00 a.m. At 1.00 p.m. the Sheriff put his own locks and seal on the premises. On the basis of this, Mr Khandeparkar would have it that Mehta is in settled possession and has been dispossessed by the Sheriff.

15. I am not inclined to accept this submission. That possession, if at all, must be shown to be settled and juridical, i.e. one such as the law recognizes, and it must have some lawful foundation. The agreement itself, as we have seen, is not one that provides the necessary foundation.

16. Consequently, Mehta's prayer in Chamber Summons No. 751 of 2017 to have the Sheriff's lock and seal removed on the Khurana Plot property is not one that can be accepted. Chamber Summons No. 751 of 2017 is dismissed. No costs.

17. This leaves Mehta's other Chamber Summons No. 1426 of 2016 and in this the Mehta seeks that the warrant of attachment in respect of the Khurana Plot be raised.

18. Mehta himself has taken no steps in all this time to have his so-called claim adjudicated in any court. He has done absolutely nothing. He has merely proceeded on the footing that his claim will be fully adjudicated and a decree in his favour obtained under Section 47 of the Code of Civil Procedure 19908 or under Order XXI Rule 58. What Mr Khandeparkar needs to establish Mehta's case is a decree. But the 1976 amendments to Section 2(2) and Section 47 of the Code of Civil Procedure, 1908 make that impossible in execution. Even if Mehta's claim is 'decided' in execution, it will not result in a decree as defined under the amended CPC. Without a decree in hand, Mehta can claim no right, title and interest in the Khurana plot.

19. Mr Khandeparkar submits that if the attachment has to continue, it must be made subject to "other interests" within the meaning of Order 21 Rule 58(3)(c) and that I must, therefore, find that Mehta has such "other interests". It is difficult to accept this submission on the facts as they are placed.

20. Chamber Summons No. 1426 of 2016 is also dismissed. No costs.

21. MHADA says before the Court that it has no objection to the property being put to sale. The Sheriff will proceed to draw up the terms and conditions of the sale of Khurana Plot. The Deputy Sheriff has proposed a meeting on 2nd May 2018 to settle the terms and conditions and has given me a schedule for the sale of Khurana Plot. This is approved. This schedule will be communicated to the Decree Holder as also the Judgment Debtor.

22. Liberty to the Deputy Sheriff to proceed *ex parte* if the Judgment Debtor chooses to remain absent.

23. The Khurana Plot is in possession of the Court Receiver. Liberty to the Court Receiver and Sheriff to coordinate to ensure that the property is put to sale. The Court Receiver will deliver possession as directed by the Court.

24. Ms Singhania on behalf of the Judgment Debtor states that she proposes to move the Delhi High Court for setting aside the *ex parte* decree. This order obviously does not address that question.

(G. S. PATEL, J)