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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 1094 OF 2017

IN

EXECUTION APPLICATION NO. 83 OF 2012

HDFC BANK LTD,
having its branch office at Lodha 1, Techno Campus, Building Alpha, 1st Floor, Kanjur Marg (East), Mumbai 400 042 **... Applicant (Orig. 2nd Respondent)**

IN THE MATTER OF

ADITYA BIRLA FINANCE LTD,
a NBFC, presently having its registered office at Indiana Rayan Compound, Veraval, Gujarat 362 266 and its corporate office at 1 India Bulls Centre, Tower I, 18th Floor, Jupiter Mill Compound, Senapati Bapat Marg, Elphinstone Road, Mumbai 400 013 **... Decree Holder/ (Orig. Claimant)**

~ VERSUS ~

VYOMESH J TRIVEDI,
Flat No. 502, "C" Wing, Kusum Bharti Apartments, Opposite Tata SSL,

Dattapada Road, Borivili (East),
Mumbai 400 066 AND Shop No. 21,
Shivsakti Complex, S.V. Road, Dahisar
(East), Mumbai 400 068

...Judgment Debtor/

Orig Respondent

AND

1. **MS. MONICA P CHANDIVALA**, adult Indian Inhabitant, having her address at 501/502, 5th floor, C Wing, Kusum Bharti Apartment, Opp. Tata SSL, Dattapada Road, Borivali (E), Mumbai 400 066
2. **MRS RINKU TRIVEDI**, Flat No. 502, "C" Wing, Kusum Bharti Apartments, Opposite Tata SSL, Dattapada Road, Borivili (East), Mumbai 400 066 AND Shop No. 21, Shivsakti Complex, S.V. Road, Dahisar (East), Mumbai 400 068
3. **SHERIFF OF BOMBAY**, High Court, Bombay, having its office at City Civil Court, Bombay

...Respondents

APPEARANCES

FOR THE PETITIONER	**Mr A Naphade**, *with Nikhil Mehta, i/b KMC Legal Venture*
FOR THE APPLICANT	**Mr Chetan Kapadia**, *with Shashank Fadia & Priyanka Fadia.*
FOR THE AUCTION PURCHASER	**Mr Amit Yadav**.

CORAM : G.S.Patel, J.

DATED : 26th September 2018.

JUDGMENT:

1. The Chamber Summons is filed by HDFC Bank Limited ("**HDFC Bank**"). To appreciate the frame of the reliefs sought, a brief description of array of parties is necessary. The Applicant in the Execution Application is Aditya Birla Finance Limited (**"ABFL"**). It holds an arbitral award against the 1st Respondent, Vyomesh J Trivedi (**"Trivedi"**). One Ms Rinku Trivedi ("**Rinku Trivedi**") is or was a co-borrower, and a Respondent to the Chamber Summons. Another party to the Chamber Summons is one Ms Monica P Chandivala (**"Ms Chandivala"**). She is the successful bidder at a sale by public auction of Flat Nos. C/501 and C/502 admeasuring respectively 484 sq ft and 434 sq ft built up on the 5th Floor of Kusum Bharti Apartments, Dattapada Road, Borivili (East), Mumbai 400 066 ("**the two flats**"). The final Respondent to the Chamber Summons is the Sheriff of Mumbai.

2. What HDFC Bank seeks is this:

> "(a) that this Hon'ble Court be pleased to order and direct that an amount of Rs. 65,25,000/- along with interest thereon as set out in the Particulars of Claim annexed at Exhibit "A" be paid over to the Applicants from the sale proceeds of the mortgaged suit premises *viz*. Flat No. C/501, admeasuring 484 sq. ft (built-up Area) on the 5th floor of Kusum Bharti Apartment, Opp. Tata SSL,

Dattapada Road, Borivali (East), Mumbai 400 066 and Flat No. C/502, admeasuring 430 sq. ft. (built-up Area) on the 5th Floor of Kusum Bharti Apartment, Opp. Tata SSL, Datta pada Road, Borivali (East), Mumbai 400 066;

(b) that in the ALTERNATIVE to prayer (a) this Hon'ble Court be pleased to set aside the sale in respect of mortgaged Flat No. C/501, admeasuring 484 sq. ft. (built-up Area) on the 5th floor of Kusum Bharti Apartment, Opp. Tata SSL, Dattapada Road, Borivali (East), Mumbai 400 066 and Flat No. C/502, admeasuring 430 sq. ft. (built-up Area) on the 5th Floor of Kusum Bharti Apartment, Opp. Tata SSL, Datta pada Road, Borivali (East), Mumbai 400 066;

(c) in the ALTERNATIVE to prayer (a) and (b), that this Hon'ble Court be pleased to order and declare that the sale in respect of mortgaged Flat No. C/501, admeasuring 484 sq. ft (built-up Area) on the 5th floor of Kusum Bharti Apartment, Opp. Tata SSL, Dattapada Road, Borivali (East), Mumbai 400 066 and Flat No. C/502, admeasuring 430 sq. ft. (built-up Area) on the 5th Floor of Kusum Bharti Apartment, Opp. Tata SSL, Datta pada Road, Borivali (East), Mumbai 400 066 is only in respect and Equity of Redemption since the immovable property has been mortgaged in favour of the Applicant;"

3. Briefly, the facts: Sometime in October 2010, Trivedi and Rinku Trivedi approached HDFC Bank for what was called a Dropline Overdraft Facility of Rs. 60 lakhs. HDFC sanctioned this on 4th November 2010. On 6th December 2010, Trivedi and Rinku Trivedi executed eight different documents in favour of HDFC. Seven of these were (i) a Dropline Overdraft Facility agreement; (ii) a Deed of Indemnity; (iii) a Demand Promissory Note; (iv) a Letter of Continuity; (v) a Letter of General Lien and Set off; (vi) an

Overdraft Agreement; and (vii) a Declaration of Post-dated cheques. The final document was an equitable mortgage of the two flats. Trivedi and Rinku Trivedi deposited the title deeds to these with HDFC Bank 'with intent to create security thereon', i.e. to secure the repayment of their Dropline Overdraft Facility loan outstanding by creating an equitable mortgage over those two flats in favour of HDFC Bank. In terms of Section 23 of the SARFAESI Act, HDFC Bank endorsed and noted this charge in the Central Registry constituted under that Act. These details are available online, as are all entries in that centralized registry.

4. In the meantime, ABFL initiated proceedings against Trivedi alone under the Arbitration Act to recover its own loan. ABFL took an award against Trivedi in the aggregate amount of Rs. 5,68,57,942.17 with interest of Rs. 23,83,360.31 and arbitration costs of Rs. 1,55,000/-. Further interest at 13% per annum was to run from 7th April 2011, and there was also interest *pendent lite* on the unpaid amount at 2% per month from 12th January 2011.

5. At the time of its award, ABFL was an unsecured creditor. HDFC Bank was a secured creditor. Both were owed money by Trivedi and Rinku Trivedi. By end-July 2013, Trivedi's account with HDFC Bank was classified as a NPA, or Non Performing Asset/Account, and almost immediately thereafter, on 6th August 2013 HDFC Bank moved under Section 13(2) of the SARFAESI Act. Later that year, on 2nd November 2013 HDFC Bank also pasted a possession notice on the doors of the two flats, mortgaged to it, as noted earlier, and also issued a notice for sale of property under Rule 8(6) of the SARFAESI Rules. This was followed on 11th

November 2013 by a notice under Section 13(4) of the SARFAESI Act, symbolic possession and the drawing of a panchanama on 22nd November 2014.

6. In the meantime, ABFL put its award into execution. It filed Execution Application No. 83 of 2012, and by 27th March 2014 had in its a warrant of sale and a proclamation of sale *inter alia* in respect of the two flats. On 16th July 2015, a public notice of the auction sale in execution was published in local newspapers. The auction was scheduled on 4th August 2015 in the Sheriff's Office. Ms Chandivala was the highest bidder at Rs 1.24 crores at that auction on 4th August 2015.

7. On 25th August 2015, HDFC objected to the sale and its confirmation saying that Trivedi and Rinku Trivedi had mortgaged both flats to it. It requested the Commissioner not to confirm the sale. This communication was forwarded to the Deputy Sheriff.

8. We come then to an order dated 31st August 2015 of Mrs Roshan S Dalvi J. This is at page 72 of the paper book at Exhibit "Q". It is a short order. I will reproduce it in full:

> "1. The auction sale has been confirmed. Part of the sale amount has been deposited with the Sheriff of Mumbai. The auction purchaser requires confirmation of the sale upon which the full amount will be deposited. The Sheriff shall proceed to confirm the sale. The auction purchaser shall deposit the full purchase price.
>
> 2. HDFC Bank has been mortgaged the title deeds of the suit property. HDFC Bank is the secured creditor. The

claim of the HDFC Bank is to the extent of Rs. 65,25,000/-. The total consideration of the sale is Rs. 1.24 crores. The Sheriff Mumbai shall pay off the claim of HDFC Bank to the extent of Rs. 65,25,000/- and pay the remainder to the claimant.

3. Sheriff of Mumbai shall add the names of the relatives of the auction purchaser in the sale certificate as desired by the auction purchaser.

4. HDFC Bank shall handover the original title deeds to the Sheriff of Mumbai who shall then handover the same to the auction purchaser.

5. Sheriff's Report is disposed off accordingly."

9. The order itself makes it clear that HDFC Bank made its application to Mrs RS Dalvi J unsupported by any formal written application at the time when she had taken up the Sheriff's Report. But what was it that HDFC said to the learned Judge? Only that it, i.e., HDFC Bank, was a secured creditor with a claim of Rs. 65.25 lakhs yet to be recovered; that it had priority, being a secured creditor with a documented and registered mortgage; and that a Decree Holder could not simply for that reason, that is to say, merely on account of being a Decree Holder, defeat the priority of a secured creditor. It was in these circumstances that Mrs RS Dalvi J directed the Sheriff to pay HDFC Bank an amount of Rs. 65.25 lakhs — its mortgage debt — and directed HDFC Bank to deposit the title deeds of the two flats mortgaged to it with the Sheriff. HDFC has done so.

10. ABFL appealed. There is then an order of 26th November 2015. This is at pages 74-75 of the record. Paragraph 3 of this appellate order, quite unusually worded, remanded the matter on the limited ground that there was no formal application before the learned single Judge, and for no other reason. In my view, there was at best a procedural irregularity in the order of the learned single Judge as HDFC Bank did not present a formal written application. It has now done so, and this is how the matter is placed before me now, on this remand.

11. To complete the narrative, there is no doubt that an amount of Rs. 65.25 lakhs was lying with the Sheriff. This has been invested and that investment has been renewed most recently on 17th January 2018 for one year to mature on 17th January 2019. The maturity amount is Rs. 78,02,255/-. I will return to the question of how the additional amount is to be divided at late stage.

12. I have heard Mr Naphade on behalf of ABFL and Mr Kapadia on behalf of HDFC at some length. It is Mr Naphade's submission that the sale having been achieved by ABFL it is firstly entitled to priority in that regard. Second, that the application by HDFC is barred by limitation under Article 127 and there is no possibility of condoning that delay under Article 121.[1] He submits that there is no

1 *Karur Vyasa Bank Lrd v Hirabai Baburai*, 2018 SCC OnLine Bom 740; *Bhatia Global v Asian Natural Resources*, 2016 SCC OnLine Bom 10696; *Ningauda Girimallappa Patil v Nabisahed*, AIR 1942 Bom 263; *Barnes Investments v Raj K Gupta*, (2001) 7 SCC 94; *Surendra Nath Goswami v Rajani Kanta Das*, AIR 1917 Cal 9(2); *Pradip Vaid v Universal Constructors*, AIR 2006 Del 4; *Subhash Chandra v Har Govind Singh*, AIR 1978 Pat 260; *Kancherla Lakshminarayana v Muttaparthi*, (2008) 14 SCC 258.

explanation at all for the time gap between the issuance of warrant of sale on 29th November 2012, the notice inviting objections on 6th December 2012, the newspaper advertisement on 14th April 2013 and HDFC moving only as late as 25th August 2015, and that too after a second sale notice was issued on 16th July 2015.

13. He also submits that no action was taken by HDFC under Section 14 of the SARFAESI Act although it could have done so.

14. It is also his submission that all that has been purchased is the equity of redemption and that it is open to the HDFC Bank to proceed against Ms Chandivala in appropriate proceedings.

15. The frame of this submission has, apart from anything else, earned Mr Kapadia's very considerable ire. He says that the entire approach is thoroughly inequitable. In fact, he goes as far as to suggest that to accept Mr Naphade's submission would be "patently illegal" — it would result in the judicial effacing and elimination, for no good reason, of a perfectly valid charge over the two flats HDFC Bank holds by way of an equitable mortgage. There is no doubt that HDFC had a valid mortgage of the two flats. It was noted as a charge in the statutorily mandated registry, one that is publicly accessible. Trivedi completely failed to disclose that there was a charge. ABFL itself took no steps to ascertain whether or not there was such a charge.

16. This actually also addresses the question of limitation. When HDFC Bank took the trouble to register the charge, that act was no less a notice, and a matter of putting the world to notice, of the existing of the charge than the ABFL-driven notices of the sale. It cannot be that HDFC Bank is required, or deemed, to have notice of the sale in execution, but ABFL has no responsibility to be held to have been put to notice of the very existence of the charge.

17. As to the argument that what was sold was the equity of redemption, I am inclined to agree with Mr Kapadia when he says that this submission has only to be stated to be rejected. What the Sheriff put to sale, and what all notices offered for sale, were the two flats themselves, not the equity of redemption of the mortgage over those two flats. It could not be otherwise because it would then mean that ABFL did know of the pre-existing mortgage and, therefore, in execution either (a) moved to sell only the equity of redemption, which is demonstrably untrue; or (b) moved for sale of the entire flats knowing of the charge, which it could not have done. There is no third possibility, and neither of these alternatives is to ABFL's benefit. Clearly, what Ms Chandivala bought was title to the flats and not equity of redemption.

18. This is actually a recurring problem in execution. I should have thought with registries online, it is now actually simpler for a decree holder than it once used to be to check that if there are pre-existing claims. I believe it is now necessary to direct the Original Side Registry in execution to amend its check list for execution applications under Order 21 Rule 11. The registry must include a column ascertaining whether the decree holder moving in execution has checked the available online databases and registries for registered charges, or has been able to ascertain independently that the property belongs to the judgment debtor and is capable of being put into execution. What is otherwise happening is this: attachments are levied willy-nilly of any property against which the judgment debtor's name is shown, be it a tenancy, a license or even a mere use of a registered office. Then the true owner has to spend time and money to try and get the attachment raised. Nobody has bothered to account for the incredible amount of loss caused to an innocent owner when a property is thus wrongly attached or the colossal waste of judicial time in setting aside such wrongful attachments.

19. In the present case, HDFC Bank certainly had a prior claim over the mortgaged flats. If the submission by Mr Naphade is to be accepted, it must be accepted in full. This would necessarily mean that every decree holder would, by putting his decree into execution, elevate himself to a position *above* that of a secured creditor. Holding security over an asset would cease to have all meaning. What, for instance, would happen if a secured debt is actually not repayable by the time an unsecured decree holder seeks to move in execution against that asset? The secured creditor would, on the inevitable result of accepting Mr Naphade's formulation, entirely lose the asset, and would be forced down to the level of a completely unsecured creditor for no fault of his own. Nothing in law or equity persuades me to accept the correctness of Mr Naphade's submission.

20. In my view, HDFC Bank's application will have to be allowed, but there must be some directions because the amount is no longer static at Rs. 65.25 lakhs. There is an accretion to it, as I have noted.

Further there is the question of a 1% of the Sheriff's poundage computed on the aggregate sale consideration.

21. After taking instructions, both sides have agreed that the accruals by way of interest earned on Rs. 65.25 lakhs will be shared equally between ABFL and HDFC Bank. This is a fair approach, and is appreciated. HDFC Bank will, in its books, mark its debt as fully satisfied on receipt of the amount of Rs. 65.25 lakhs plus 50% of the balance interest earned; that is, after a payout from the accumulated interest of the Sheriff's poundage of 1%. Since the deposit does not mature till 17th January 2019, and there will be a loss of interest of 1% for the entire period on premature encashment, parties are agreed that while the order may be made now, the disbursal will be made only on maturity after 17th January 2019.

22. In addition to the first deduction of Sheriff's poundage, there is also a claim for Rs. 1,01,590/- towards overdue maintenance charges in respect of the two flats for the period before Ms Chandivala was declared the successful bidder. The particulars of the amount with supporting documents will have to be placed before the Sheriff who will satisfy himself as to the correctness of that claim. If there is any dispute about this, the Deputy Sheriff will place a report for orders before the Court.

23. In short, first the Sheriff's poundage will be paid (from the interest earned); then the legitimate dues of the society prior to the sale in favour of Ms Chandivala will be paid; and then the interest earned will shared equally between ABFL and HDFC Bank.

24. ABFL is at liberty to pursue the remainder of its claim against Trivedi and Rinku Trivedi. It will mark its decree partly satisfied to the extent of the amount(s) it has received. It is clarified that ABFL is not required to appropriate any part of the amount it is has received in this execution towards satisfaction of the principal debt, but may, at its option, in consonance with routine commercial practice, first apply all amounts recovered towards satisfaction of the claim for interest and costs.

25. On receipt of its share of the balance interest amount, HDFC Bank will take the necessary steps to have any pending proceedings closed, withdrawn or marked as compromised on the strength of this order, and it will do so within four weeks of receipt of the balance interest amount. Mr Fadia states that this will be done.

26. Last, Mr Yadav for the auction purchaser, Ms Chandivala, is required to submit copies of all documents regarding the past maintenance dues (i.e. for the period before the sale of the two flats to her) to the Deputy Sheriff on or before 31st October 2018. If the documents are not submitted by that date, the claim by Ms Chandivala for payment of the past dues will stand rejected. The Deputy Sheriff will ensure that copies of all statements and documents furnished by Ms Chandivala are made available to the advocates for both ABFL as also the advocates for HDFC Bank. The Deputy Sheriff will pay out only the undisputed amount, and will place a report by 26th November 2018 in regard to the disputed amount, if any.

27. The title deeds to the two flats will remain with the Sheriff until the invested amount matures and the amounts are paid out in the manner set out above.

28. The Chamber Summons is disposed of in these terms. No costs.

(G.S. PATEL, J.)