

Tauseef

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

**CHAMBER SUMMONS NO.770 OF 2019
IN
EXECUTION APPLICATION NO.1268 OF 2011**

Kotak Mahindra Bank Ltd. ...Applicant / Claimant
V/S.
Mr. Vivek Gaurishankar Bachchan & Anr. ...Respondents

Mr. Vishal Kanade a/w. Ms. Juhi Bhogle & Ms. Akshata Teli i/b. M.B. Kale
for Applicant Claimant
Mr. Prerak A. Sharma for Respondent (Third Party).
Mr. Yusuf Parmar, Third Party present in Court.

CORAM : G.S. KULKARNI, J.
DATE : 14th NOVEMBER 2019.

P.C. :

1. Heard Mr. Kanade learned counsel for the Applicant / Claimant on this Chamber Summons and learned Counsel for Respondent No.3 - Mr. Yusuf Parmar who is a third party to the principal proceedings which are between the applicant (judgment creditor) and Respondent No.1 and 2 – (Judgment Debtors) as Mr. Parmar is presently occupying the premises being Flat No.1304 admeasuring 1264 Sq. ft. build up area, 13th Floor in the building known as Maharaja Retreat, Survey No.261 (part), C.T.S. No.620 (part), Malad (East), situated at Malad.

2. It is not in dispute that an award was passed on 19 April 2010 by the arbitral tribunal adjudicating the disputes between the judgment creditor and the judgment debtors. As per the award the judgment debtors were jointly and severally directed to pay the applicant / claimant i.e. City Financial Consumer Finance India Limited (CCFIL), a sum of Rs.51,67,667/- with further interest with 24% per annum on the said amount from 20 April 2010 till the payment and / or realisation. As the award was not honoured, the applicant / claimant filed the above Execution Application on 18 October 2011. The rights of the original claimant CCFIL (original claimant) were assigned in favour of the Kotak Mahindra Bank Ltd. by a deed of assignment deed dated 18 July 2012 and accordingly, the applicant was brought on record on 02 November 2017. The total amount payable by the Judgment Debtors to the applicant / judgment creditors as on 05 April 2019 is about 1.5 Crores.

3. It is also not in dispute that in pursuance of the orders passed in the execution proceedings, the Sheriff's office attached the mortgage property by executing warrant of attachment on 22 December 2011 when respondent No.3 Mr. Yusuf Parmar was found in possession of the premises. Learned Counsel for Respondent No.3 - Mr. Yusuf Parmar has also not disputed that his client is in possession of the premises. Thereafter, Respondent No.3 filed Chamber Summons bearing No.399 of

2012 seeking permission to be impleaded as a party Respondent to the execution proceedings and for setting aside of the warrant of attachment. This Chamber Summons came to be dismissed by an order dated 15 June 2012 passed by this Court. Respondent No.3 also filed Appeal No.66 of 2013 challenging the said order dated 15 June 2012, which also came to be disposed of by an Order dated 24 June 2013. Thereafter, the applicant has moved this Court praying that the Registry be directed to issue warrant of sale. An inventory was directed by this Court by an Order dated 12 February 2018. By a further order dated 02 July 2018 passed by this Court, it was recorded that the Sheriff had prepared an inventory report which indicated that Mr. Naushad Yusuf Parmar son of Respondent No.3 was residing in the said suit property mortgaged to the applicant and hence the warrant of attachment of the movables was not executed in respect of the said property / flat. It would be appropriate to note the order dated 02 July 2018 which reads as under:

“1. Pursuant to the order of 26th February 2018, the Sheriff has prepared an inventory report. The report indicates that one Naushad Yusuf Parmar is residing in the suit property mortgaged to the Applicant. The warrant of attachment of movable property was not executed in respect of the movables in that flat because Parmar was found residing there.

*2. Mr Yusuf Parmar is present in Court. He says that he has purchased the property, i.e. flat no. 1304, 13th Floor, Maharaja Retreat Tower, Film City Road, Kanyapada, Gokuldharm, Goregaon (East), Mumbai 400 063 in 2010 from the Judgment Debtor. He says that he has documentation to evidence this purchase, but not with him in Court today. He seeks time to engage an Advocate. **I have pointed out to him that he made such an application by Chamber Summons No. 399 of 2012, taking identical grounds, and that this was dismissed by RS Dalvi J on 15th June 2012. His remedy lies against the Judgment Debtor and he cannot obstruct execution in this fashion. I am informed that a subsequent Motion also filed by the***

same party has been similarly dismissed.

3. Only because Mr Parmar does not have an Advocate present in Court today, I will give him time until 23rd July 2018. On that day in Court he must return with his Advocate duly instructed.”
(emphasis supplied)

4. Thereafter, on 08 April 2019 this Court (G.S. Patel J.) passed the following order:

“1. I have seen the order of 6th February 2019 of KR Shriram J in the execution application. I have also seen the Affidavit filed pursuant to that order on behalf of the Applicant, Kotak Mahindra Bank. The Affidavit is dated 27th February 2019. I am satisfied that there was an inadvertent error on Kotak’s part in not accurately reflecting credit for the amounts received.

2. Mr Tulzapurkar for the Claimant tenders an updated statement of accounts in respect of the original debtors loan. The amount due as of 5th April 2019 is Rs.1,50,57,490/- but that includes overdue interest at the rate of 24% per annum. The statement also shows credits for the various deposits made. It matters little whether these deposits were made by the third party purchaser of the flat in question or by the original owner. The statement tendered today by Mr Tulzapurkar is taken on record and marked ‘T1’ for identification with today’s date.

3. Mr Khandeparkar represents the purchaser, Yusuf Parmar who is in possession of this Flat No. 1304, 13th floor, Maharaja Retreat Tower, Film City Road, Kanyapada Gokuldharm, Goregaon (East), Mumbai 400 063. On instructions he fairly agrees that having regard to all these circumstances and given that there was security created over the flat, Mr Parmar could not have validly acquired title while that security continued. Mr Khandeparkar requests time to discuss possible settlement options with Mr Tulzapurkar’s attorneys. I will grant that accommodation.

4. In the meantime, the flat in question will stand attached in execution and the Deputy Sheriff will issue the necessary warrant of attachment. However the Deputy Sheriff

will not take any steps in execution of the warrant of attachment, i.e. for sale of the flat until further orders of the Court. Mr Tulzapurkar's statement on instructions that the Applicant will not move the Sheriff is also noted and accepted.

5. List the execution application high on board on 22nd April 2019."

(emphasis supplied)

5. On the above backdrop the applicant is before the Court now praying that the Order dated 08 April 2019 passed by this Court be modified to the extent it prohibited the Deputy Sheriff from taking further steps in execution of the warrant attachment as directed in para 4 of the said order and that the Sheriff be further directed to proceed with the sale of the immovable mortgage property namely the said Flat. Respondent No.1 and 2 although served are not appearing. Office report also confirms that Respondent No.1 and 2 are served. However, none appears for Respondent No.1 and 2.

6. Learned counsel for the applicant states that it is quite clear from the order dated 08 April 2019 passed by this Court (G.S. Patel J.) that the third party Mr. Yusuf Parmar could not have acquired any title to the premises in question, which were mortgaged in favour of the applicant / claimant. It is submitted that the hearing of the execution proceedings was adjourned simplicitor for the parties to explore the settlement options.

7. It is also not in dispute that flat in question was already attached as far as back by an order dated 22 December 2011 and the attachment in execution was continued and the Deputy Sheriff was directed to issue necessary warrant of attachment, however, with a further direction that the Deputy Sheriff shall not take any steps in execution of warrant of attachment for sale of Flat until further orders of this Court.

8. Learned Counsel for Respondent No.3 submits that his client is unable to arrive to any settlement with the applicant as informed to the Court on 08 April 2019. In the aforesaid circumstances, when Respondent No.3 has no legal rights in respect of the said premises flat, as rightly pointed out by the learned counsel for the applicant, further orders would be required to be passed so as to proceed to execute the award. Mr. Kanade learned Counsel for the Applicant prays that the Applicant has also initiated proceedings against Respondent Nos.1 and 2 - judgment debtors, under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') and are in the process of obtaining order to take possession of the said premises under SARFAESI Act. Accordingly, he submits that it would be in interest of justice that orders in terms of prayer Clause (d) be granted in favour of the applicant. In these circumstances, in my opinion, it would be in the interest of justice that reliefs as prayed for in prayer Clauses (a), (c)

and (d) of the Chamber Summons are granted which are as follows:

“(a). That this Honourable Court may be pleased to modify / alter the order dated 8 April 2019, passed by this Honourable Court to the extent that it prohibits Deputy Sheriff from taking any steps in the Execution of the warrant of attachment i.e. sale of the mortgage flat mentioned in Annexure – 1 of this Chamber Summons, until further orders of the Court.

(c). That the Court Receiver, High Court Bombay be appointed as Receiver under order XL Rule (1) of Civil Procedure Code, 1908, in respect of mortgaged property mentioned in Annexure – 1 of this Chamber Summons, with powers to take physical possession of the mortgage property from the Respondent/s / third party Respondent and / or whomsoever found in possession, by using reasonable force and with police assistance from the concerned police station and break opening the mortgaged flat if found locked.

(d). In the alternative, this Honourable Court be pleased to direct the Court Receiver High Court Bombay, after taking the physical possession of the mortgage property mentioned in Annexure 1 of this Chamber Summons, to handover the physical possession of the mortgaged property taken to the Authorised officer of the applicant after which the Court Receiver to stand discharged and the Applicant original Decree Holder, be allowed to sell the same by private treaty or Public Auction and adjust the outstanding dues from the sale proceeds.”

9. The Chamber Summons is accordingly made absolute in the above terms, however, reserving the rights of the petitioners to take out appropriate proceedings for further reliefs including the other reliefs as prayed for in the present Chamber Summons. All contentions in that regard are expressly kept open.

(G.S. KULKARNI, J.)

corrected as per speaking to minutes of the order dated 27/11/2019.