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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 802 OF 2017

IN

CHAMBER SUMMONS NO. 947 OF 2012

IN

ARBITRATION PETITION NO. 624 OF 2012

Mohammed Afzal Mohammed Aslam	...Applicant
In the matter between	
Deepak S/o Laxman Nanche	...Petitioner
Versus	
Mohammed Afzal Mohammed Aslam & Anr	...Respondents
And	
Court Receiver, High Court, Bombay	...Respondent

WITH

CHAMBER SUMMONS NO. 92 OF 2017

IN

ARBITRATION PETITION NO. 624 OF 2012

Mohammed Afzal Mohammed Aslam	...Applicant
In the matter between	
Deepak S/o Laxman Nanche	...Petitioner
Versus	
Mohammed Afzal Mohammed Aslam & Anr	...Respondents
And	
Court Receiver, High Court, Bombay	...Respondent

WITH

CHAMBER SUMMONS NO. 236 OF 2017

IN

ARBITRATION PETITION NO. 624 OF 2012

Deepak S/o Laxman Nanche ...Applicant
In the matter between
Deepak S/o Laxman Nanche ...Petitioner
Versus
Mohammed Afzal Mohammed Aslam & Anr ...Respondents
And
Sanjay Nana Ambre & Anr ...Respondents

Mr Sushil Upadhyay, *i/b AM Saraogi, for the Petitioner & Applicant in CHS/236/2017.*
Mr Rohaan Cama, *with Ms Sapana Raichure, i/b TN Tripathi & Co, for Respondents Nos. 1 & Applicant in NMS/802/2017 & CHS/92/2017.*
Ms T Selvi Laxman, *for Indian Bank.*
Mr DN Kher, *Court Receiver present.*
Mr Ritesh Singh, *Senior Manager, Indian Bank, Stressed Asset Management Branch.*

CORAM: G.S. PATEL, J.
DATED: 11th February 2020

PC:-

1. This order will dispose of the present Notice of Motion No. 802 of 2017.

2. The principal contestants to this proceeding one Deepak Laxman Nanche. The Respondents are one Mohammed Afzal

Mohammed Aslam and Nana Gopal Ambre. These three were the partners of M/s Hollywood Associates. Ambre has passed on.

3. The other party to the Motion is the Court Receiver.

4. Also before the Court is the Indian Bank. It has filed an Affidavit in Reply — with what leave, I cannot tell. Ms Laxman, Advocate, represents the Bank. In Court, on behalf of the Indian Bank from the Stressed Asset Management Branch is the Senior Manager one Mr Ritesh Singh.

5. There are also two Chamber Summons Nos. 236 of 2017 and 92 of 2017. Mr Cama for the Applicant, Afzal, and Mr Upadhyay for the original Petitioner, Nanche, agree that an order on the Motion will sufficiently dispose of both Chambers Summons. There is clearly an overlap in the reliefs.

6. The matter requires some explanation. At the forefront I note that the partners of the firm are already in arbitration before a sole Arbitrator appointed by this Court in this Arbitration Petition. Those arbitration proceedings are not the subject matter of the Motion at all.

7. The sole prayer in the Motion (leaving aside the prayer for condoning the delay, which is hereby granted) is this.

> "(a) THAT the order dated 29th November 2012 passed in Chamber Summons No. 947 of 2012 in Arbitration Petition No. 624 of 2012 may kindly be rectified and

> corrected to the limited extent that the statement recorded therein that … *godown which belongs to partnership firm..* may kindly be deleted."

8. A copy of the order in question of 29th November 2012 is at Exhibit "A" to the Affidavit in Support at page 20.

9. There is an immediately prior order of 2nd May 2012 in the Arbitration Petition. In that order, the Court noted the existence of an Arbitration Agreement in the Partnership Deed dated 4th March 2009. There was an observation that there was a huge liability even at that time of the firm to Indian Bank. There was some dispute about whether or not the firm owned immovable properties and liberty was reserved to the Respondents to file an appropriate Application under Section 9 in regard to the immovables. The firm had movable properties which were mostly in the nature of some camera equipment, photography gear and so on. These were admittedly the assets of the firm. In its order of 2nd May 2012, noting that the liability then to the Indian Bank was to the tune of more than Rs. 2 crores, the Court appointed a Receiver of the movables as described above. Once that Receiver was appointed, there arose the question of appointing one of the sides as an agent of the Receiver and of royalty. At that time the Petitioner sought to be appointed as an agent and offered to pay Rs. 9 lakhs per month as royalty if allowed to run the business of the firm with all its equipment. This was opposed by the Respondents who said that they had a two-thirds share in the partnership business. Considering the rival submissions, the learned Single Judge allowed the Respondents to match the money bid placed by the Petitioner. The Respondents were unable to do so. The Court therefore appointed the Receiver of the movables and directed the payment of a minimum royalty of Rs. 9 lakhs per month with the Petitioner, Nanche, appointed as the agent. This order was to continue pending any further order by the arbitral tribunal under Section 17 of the Arbitration and Conciliation Act 1996. In the operative portion of paragraph 14(i) there was a mention of a JCB machine or vehicle then said to be lying in the custody of the Petitioner, Nanche. The Receiver was appointed of this vehicle as well. The royalty fixed of Rs. 9 lakhs per month seems to have covered the movables and the JCB. There was some controversy that there was more than one JCB but the Court only reserved liberty to the parties to make an appropriate application in that regard. It was specified that Rs. 9 lakhs royalty was the minimum reserve bid and that the Respondents were entitled to apply to be appointed as agents of the Receiver if they put in a higher bid. The Petitioner was to deposit with the Court Receiver a pay order in favour of the Indian Bank in the amount Rs. 9 lakhs. Nanche was to bear the costs of the Court Receiver. The Arbitration Petition was disposed of in these terms.

10. This order of 2nd May 2012 was followed by a subsequent order of 31st July 2012. On this date, the parties agreed that there were in fact two JCB machines. One was with the Respondents. The other was with the Petitioner. The Petitioner had sold the machine that was in his possession for Rs. 14 lakhs but without the consent of the Respondents. There was a dispute regarding the valuation or the price at which Nanche sold that JCB. As a result of this, the learned Single Judge partly modified the previous order where liberty was reserved to make an appropriate application in regard to the second

JCB — the Court Receiver was (naturally) directed to not to take possession of the JCB that had been sold by Nanche.

11. There is then the order of 29th November 2012 which is the subject matter of this Motion. It is a short order and is best reproduced in full.

> "1. The learned Advocate for Respondents on instructions, states that the Respondents shall comply with the order passed by this Court dated 02-05-2012 and shall handover the keys of the godown **which belongs to partnership firm in which the movables are stored**, to the Court Receiver to enable the Receiver to seal the said godown and retain the keys of the same in his custody.
>
> 2. The Court Receiver **shall therefore take immediate possession of the said godown** in which the movables have been stored and after ascertaining that all the movables as per the inventory already taken are lying therein, seal the said godown and retain the keys with him. This order will not prejudice the rights and contentions of none of the Bank and the Bank shall be at liberty to move this Court in case any reliefs are required from this Court.
>
> 3. The Court Receiver after sealing the premises shall submit his report to this Court and seek further directions from this Court.
>
> 4. In view thereof, both the above Chamber Summons are disposed of. The Court Receiver's Report No. 483 of 2012 also stand disposed of."

(*Emphasis added*)

12. As will be noticed, up to now the orders only addressed themselves to the movables and the JCB. It turns out that these movables were stored in a 'godown'. But this is not, apparently, an industrial unit, is residential flat of about 780 sq ft. This is described as G-1, Ground Floor, "C" wing, Dhiraj Heritage Residency, Opposite Shastri Nagar, Link Road, Santacruz (West), Mumbai. It seems that in the flat itself the movables was stored in about 500 sq ft.

13. In the order of 29th November 2012, in paragraph 1 the learned Single Judge noted the statement made by Respondents that they would deliver to the Court Receiver the keys of "*the godown which belongs to the partnership firm in which the movables are stored*". This was to be done "*to enable the Receiver to seal the godown*". He was to retain the keys. Paragraph 2, extracted above, then shows that the Court Receiver was to take immediate possession of this godown.

14. As between Nanche on the one hand and Afzal on the other, this is really the area of dispute, i.e. whether the immovable property is an asset of the partnership firm or not. Mr Cama for Afzal says it is not an asset of the partnership firm. It never was. It was always Afzal's own property. Mr Cama maintains that the only reference to the immovable property in relation to the firm is this order of 29th November 2012 and that is clearly an error. He does not dispute that it was Afzal who offered the immovable property as security to the Indian Bank to secure the repayment of a loan or credit facility taken by partnership firm. But the title, he maintains, remained that of Afzal himself and was never brought in to the hotch-pot of the partnership. This position is not accepted by Nanche, the Petitioner, the other partner. Mr Upadhyay for Nanche states on instructions that the immovable property was always an asset of the firm and was always treated by the partners as an asset of the firm.

15. Pausing for a moment, this is not a dispute that I am called upon to decide at all. As far as the prayer in the Motion is concerned, therefore it is sufficient merely to say that notwithstanding the wording of the 29th November 2012 order, it will be open for the parties in arbitration to raise a claim as to whether or not the immovable property is an asset of the firm, i.e. to request the learned sole Arbitrator to determine whether the asset is an asset of the partnership firm or belongs to Afzal. This is not a question of determination or declaration of title in favour of one or the other party but simply a question of determining whether the immovable property is or is not an asset of the firm. I am making this clear because if there is any claim/adverse claim to be made in regard to the title to the property that will of course have to be taken to a Court of competent jurisdiction in an appropriate title action. The determination before the arbitration in a partnership dispute will only be an assessment of whether the immovable property is an asset of the firm.

16. Mr Cama states that Afzal, the Respondent in the arbitration, seeks liberty to file an appropriate Application under Section 17 of the Arbitration and Conciliation Act 1996. He has liberty to do so.

Any such application will be decided on its merits uninfluenced either by this order or statement in the 29th November 2012 order. All contentions are expressly kept open.

17. This would ordinarily have been sufficient to dispose of the Notice of Motion (and consequently the two Chamber Summonses). However the complication arises not because of anything either Nanche or Afzal have done but because of a claim now interposed by Indian Bank. It has filed an Affidavit dated 19th December 2017 through Ms Tamil Selvi Laxman. She has on instructions also given to me a copy of a letter dated 6th February 2020 from the Indian Bank to the Court Receiver.

18. The manner in which the Indian Bank has gone about things is most unsatisfactory. There is no dispute that the immovable property is in fact secured to the Indian Bank. The Indian Bank also has security over the movables and the JCB in question. Thus, three different assets all secured to the Indian Bank. First, there are the movables that were in part of the flat. The second is the one remaining JCB that was in the possession of the Respondent, Afzal, and the third is the immovable property.

19. To complete the factual narrative, I note that on 15th December 2012 the Court Receiver visited the flat, took an inventory and sealed about 500 sq ft of that flat. Afzal claims to be residing in the remaining portion. That is the subsequent request made Mr Cama to which I will presently turn.

20. Now Indian Bank is entitled to take proceedings under a dedicated statute, namely, the SARFAESI Act. It is also entitled to recover from the Court Receiver such royalty as the Court Receiver may receive from either Afzal or Nanche. The Receiver tells me that the remaining JCB was with the Petitioner Nanche from 26th March 2013 to 5th February 2015. Nanche is in Court. He has attempted over the course of this hearing to first deny ever being in possession, then admitting to having been in possession, then denying ever being an agent of the Court Receiver, then accepted that he was an agent of the Court Receiver, then denied execution of an agency agreement, and then contended that no royalty was ever fixed, and this is shown to be entirely incorrect as we shall presently see. None of this inspires any confidence at all. It is inconceivable, looking at the trajectory of this matter, that the Petitioner Nanche could have been in possession of the remaining JCB as an agent of the Receiver (and there is no other capacity in which he could have had possession of that JCB) without some royalty being fixed. This is especially so since there was a contest from the Respondents. This also overlooks the fact that on ***26th March 2015*** the royalty was actually fixed at Rs. 54,000/- per month. Whether Nance accepts this or not is not my concern. He had possession of the JCB from 26th March 2013 to 5th February 2015.

21. Then there is an order of 4th February 2015 by which the Court Receiver was to determine the royalty payable and it is pursuant to this that the Court Receiver did so.

22. Thereafter there is an order of 18th March 2016 (KR Shriram J) which dealt with the JCB machine. By this time, the Petitioner was no longer interested in it. The Respondents Nos. 1 and 2 accepted the agency of the JCB at a monthly royalty of Rs. 54,000/-. This amount was payable to the Indian Bank Asset Recovery Management Branch until its claim due of Rs. 1.57 crores was satisfied. This is important because the initial claim was about Rs. 2 crores.

23. The Court Receiver was directed to deliver the possession of JCB to Respondents Nos. 1 and 2 on 2nd April 2016 on as is where is basis. He did so on 1st April 2016.

24. According to the Receiver, an amount of Rs. 12,08,443/- for the period from 26th March 2013 to 5th February 2015 is due from the Petitioner, Nanche, as arrears of royalty. The amount due from the Respondents is Rs 22,14,000/- for the period 1st April 2016 to 29th February 2020, i.e. by the end of the present month.

25. There are few more circumstances that I must note. The JCB is still with Afzal. He says he cannot use it because there are some problems with the taxation or licenses. Mr Cama states that he is prepared to immediately deliver possession to the Court Receiver. That statement is noted and accepted and I will make a provision in that regard later in this order.

26. In the meantime, the movables in the flat were sold and an amount of Rs. 1,55,90,502/- was in fact deposited. As between these parties and Indian Bank in a TSA No. 678 of 2016 in DRT-II Mumbai, there came to be passed an order on 8th August 2017 by which Afzal and Nanche gave their no objection to Indian Bank appropriating this entire amount of Rs. 1,55,90,502/-. It is clear that the Indian Bank has done so (or ought to have done so).

27. This leaves the question of the JCB and the immovable property and what is to be done with each. There are no movables inside the flat. This much is now clear.

28. I come now to Indian Bank's letter of 6th February 2020 to the Court Receiver. Frankly, about this letter the less said the better. But it is a short letter and I think it is best to set out the same in full:

> "To
>
> The Court Receiver
> Bombay High Court
> Mumbai
>
> Dear Sir,
>
> Sub: Arbitration No. 295 of 2016 & Arbitration Petition No. 624/2012-RR No. 73/17/2012/E/II : Deepak Nanche vs Mohd Afzal Mohd Aslam
>
> Ref: Our letter dated 06.11.2019 for pending payments of JCB machine.

With reference to the above, in compliance of the order of the Hon'ble High Court, we have to receive the royalty for the JCB machine. **However we have not received any royalty for past 40 months and the total amount now stand at Rs. 21.0 lakhs**.

Even after several letter no repayment has been made to us which is a clear violation of the order of the Hon'ble High Court. We request you to take immediate steps in this regard.

We also request you to hand over the physical possession of the Santacruz office under your lock and key.

Please take note that the Hon'ble High Court passed no directions to seal the Santacruz premises. It was done by Court Receiver because the camera and other equipments were in that office. Whereas, our Bank had already initiated recovery process under SARFAESI Act and taken symbolic possession of the property.

Further we have also obtained order from CMM Court for the physical possession of the said property. The copy of CMM order is being enclosed.

We have not been able to execute the order of CMM Court because the Santacruz property continues to be in possession of Court Receiver in spite of the fact that the camera and other equipments are sold under auction.

In view of the above Bank is entitled to get the possession of this Santacruz premises and the pending royalty payment from the Borrowers/Parties to Arbitration.

We request appropriate action from the office of Court Receiver for closing this long pending NPA account and recovering public money.

Thanking you,

Yours faithfully,
sd/-
Asstt. General Manager"

(*Emphasis added*)

29. It is astonishing that the Indian Bank in its Stressed Asset Management Branch does not know what is the exact amount due from its debtors on any given date. Mr Ritesh Singh cannot tell me, and he has no instructions. That is bad enough.

30. What is worse is that this letter then goes on to say that the Indian Bank has received no royalty for the past 40 months. That might be true, but the question is what steps the Indian Bank took for three and half years and why it remained in this great slumber all that time. Apparently, it wrote some letters to the Court Receiver but the Court Receiver quite rightly asked the Indian Bank to obtain an order of the Court. Why the Indian Bank did not do so is unexplained and in fact this letter makes no mention of that correspondence at all. Then there is a statement that after several letters no repayment has been made to the Bank which is in violation of the order of the High Court. That statement is meaningless. A more pertinent query is why the Indian Bank did not approach this Court for 40 months.

31. Then there is a demand to deliver physical possession of the Santacruz "office", and then comes the most astonishing comment that there was never any direction to seal the Santacruz premises. This was done only because, according to the Indian Bank, the movables were in that office. What this statement entirely overlooks is the order of 29th November 2012. It is not for the Indian Bank to sit in appeal over orders of this Court nor to make comments of this kind which are entirely inaccurate and can be falsified by orders of the Court.

32. As to the Bank's claim that it has proceeded to initiate proceedings under SARFAESI and obtained an order for physical possession one needs only to turn back to a DRT order of 4th May 2017. It is at page 116 of a separate compilation that Mr Cama tenders where the Indian Bank through its Counsel made a statement that no date had been fixed for taking physical possession of the immovable property. That statement was noted. Interim or ad-interim reliefs were declined on that basis and the Bank in addition was directed to give one week's prior notice to the Afzal or his Advocate after fixing the possession date. The Indian Bank has done nothing of the kind. It is in violation of its undertaking to the DRT and it is in violation of the direction of the DRT itself.

33. Today there is a claim projected by Ms Laxman that there is an amount of Rs. 70 or Rs 80 lakhs yet due to the Bank. For a Bank to make this kind of an unclear and imprecise statement is unacceptable.

34. In fact, so far as the Indian Bank is concerned, the only thing that is clear is that absolutely nothing is clear. Is the amount of Rs.21 lakhs it claims in its letter to the Court Receiver an exact amount? We do not know, and we are not told. What is the account balance after appropriating Rs. 1,55,90,502/-? We do not know and we are not told. Is the amount Ms Laxman claims, of Rs. 70 or 80 lakhs, the amount due after appropriating Rs. 1,55,90,502/-? Is the royalty amount in addition to Rs. 70-80 lakhs? We do not know, and we are not told.

35. I cannot, therefore, go on the basis of a single thing Indian Bank says.

36. As regards the JCB, Afzal will deliver possession by Friday, 21st February 2020 to the Court Receiver. The officers of the Indian Bank will remain present along with the Court Receiver at the site where the JCB is located at Post Paratwada, District Amravati, Maharashtra and the Indian Bank will take possession of the JCB immediately. It will then proceed to appropriate it to its dues by putting it to sale. That sale will be in accordance with law and since this is now in this court as well, Afzal, Nanche and the Court Receiver will be informed of the sale amount. The sale is not to be private treaty except without leave of this Court. The sale of the JCB is to be advertised.

37. Afzal will make the necessary arrangements to take the Court Receiver to Amravati.

38. I am refusing the oral request made across the Bar by Ms Laxman for the Bank to direct the Court Receiver to hand over possession of the flat to the Bank. There is no application from the Indian Bank to do this. There is no Motion. There is no prayer. I cannot grant any such relief on plea in an affidavit, and that too an affidavit filed without leave of the court by a party not joined to these proceedings. For four years and more, the Bank has filed no application. It has only filed an Affidavit in Afzal's Motion. It does not have the correct statement of the amounts yet due to it. It continues to make a claim for arrears of royalty. It is unclear to me as to what extent the amount of royalty, if collected will satisfy the Bank's claim.

39. For the present, therefore, I am making no order in regard to the royalty. The Receiver will make a final report in that regard. A copy of that report will be served both on Nanche and Afzal. The Court Receiver will serve a copy of that report on Ms Laxman for the Indian Bank. The Indian Bank will be made a party to that report. I will hear all parties on that report and will then make an appropriate order in regard to the royalty.

40. Similarly, I will only give the Indian Bank at this stage liberty to file an appropriate Interim Application in regard to the release of the flat. In that application, Nanche, Afzal and the Court Receiver are to be made parties. The Indian Bank IA is to be filed and served on or before 28th February 2020. Liberty to Ms Laxman to mention the interim application once it is filed and served for an early listing. On behalf of Nanche and Afzal respectively, Mr Upadhyay and Ms TN Tripathi & Co state that they will accept service of the IA to be filed by the Indian Bank.

41. Until an order is made on that Motion filed by the Indian Bank, I will permit, on a without prejudice basis, Afzal to reside in the flat as an Agent of the Court Receiver (and in no other capacity) along with his immediate family members. Mr Cama submits that since Afzal needs a residence for himself and his family he may be appointed as an agent of the Receiver of the entire flat/immovable property described above. I will grant this request but this is clearly on a without prejudice basis and Afzal's occupation is only as an Agent of the Receiver.

42. In the fresh report that the Receiver is to file in regard to the arrears of royalty for agency of the JCB, the Receiver will include a separate set of prayers in regard to the royalty (if any) to be recovered from Afzal for his occupation of the flat. The reason for this direction is that up to the date of this order Afzal has been in occupation of only part of the flat, i.e. about 280 sq ft. Therefore, there will have to be a pro-rata adjustment of the royalty, if any for his past occupation as well. All contentions are kept open including Mr Cama's submission that for the period prior to today Afzal's occupation of 280 sq ft premises should be without any royalty liability at all.

43. The communication to the Court Receiver from the Indian Bank and dated 6th February 2020 is taken on record and marked "X" for identification with today's date.

44. The Court Receiver will, on the date when the next new report is placed, also place all pending previous reports.

45. In the meantime Afzal will not part with possession, encumber, alienate or create third party right of the flat/immovable property.

46. The Notice of Motion is disposed of along with the two Chamber Summonses.

47. No costs.

(G. S. PATEL, J)

Note: This order is modified by an order dated 27th February 2020 passed on a praecipe. Corrections are shown in bold and italics.