

Sharayu Khot.

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

CHAMBER SUMMONS NO. 429 OF 2018

IN

EXECUTION APPLICATION NO. 481 OF 2011

Laddha Brothers Films Pvt.Ltd.

...Applicant

In the matter between

Laddha Brothers Films Pvt.Ltd.

...Claimant

Versus

Bhagyashree Enterprises & Entertainment Ltd.

...Respondent

And

Mani Mahal Premises CHS Ltd. & Ors.

...Formal/
Respondent

Mr. Abhinav Chandrachud, i/by Mr. A.K. Saxena, for the Applicant.

Mr. S. Nagvadaria, i/by Mr. Prem Gidwani, for the Respondent No. 1.

CORAM : R.I. CHAGLA J.

DATE : 6 March 2020

ORDER :

1. None appears for the newly added Respondent No. 11

M/s. Benofin Corporation despite service. This Court had by order

dated 14th February 2020 granted leave to amend the Chamber Summons by joining M/s. Benofin Corporation. An Affidavit of Service dated 24th February 2020 evidencing service on M/s. Benofin Corporation has been filed. Further, none appears for the Respondents other than Respondent No. 1, despite service. The Affidavit of Service dated 5th June 2018 is on record.

2. This Chamber Summons has been taken out in the Execution Application seeking an order from this Court fixing the reserve price for the sale of the ground floor non-residential tenanted premises (“*subject premises*”) occupied by the Respondent No. 1 as per warrant of Attachment dated 2nd April 2012 and attachment by the Sheriff of Mumbai on 10th January 2012.

3. The brief background of facts are as under:

- (i) An Award dated 16th March 2009 had been passed in favour of the Applicant/Judgment Creditor which was subject to challenge in a Section 34 Petition filed on 4th November 2009.

- (ii) The above Execution Application had been taken out during the Section 34 proceedings i.e. on 7th January 2010 and a warrant of attachment of the right, title and interest of Respondent No. 1 in the subject property was issued on 7th January 2011.

- (iii) This Court dismissed the Section 34 Petition on 23rd June 2011.

- (iv) The dismissal of the Section 34 Petition was challenged by the Respondent No. 1/Judgment Debtor in the Arbitration proceedings by filing a Section 37 Petition on 29th July 2011 which is currently pending. No stay of the Award has been granted by this Court in the Section 37 Petition.

- (v) The proclamation of sale pursuant to the warrant of attachment was issued by the Commissioner for Taking Accounts on 21st February 2014.

(vi) The present Chamber Summons was filed on 6th April 2018.

4. The learned Counsel for the Applicant has relied upon the judgment of the Supreme Court in ***Hindustan Construction Company Limited Vs. Union of India & Ors.***¹ to contend that the mere filing of the Petition under Section 34 of the Arbitration and Conciliation Act, 1996 would not amount to an automatic stay of the Award. It has been held by the Supreme Court that the amended Section 36 of the said Act is clarificatory in nature and that the unamended Section 36 does not stand in the way of the law as to grant of stay of a money decree under the provision of the Code of Civil Procedure, 1908. Accordingly, it is clear from the above decision of the Supreme Court that unless there is a grant of stay by the Court, the execution of the Award can be proceeded with. The Execution Application taken out by the Judgment Creditor had thus, been proceeded with during the Section 34 proceedings and a warrant of attachment was issued on 7th January 2011 and the proclamation of sale was issued on 21st February 2014.

1 ***2019 SCC Online SC 1520***

5. The learned Counsel for the Applicant has further placed reliance upon the order of this Court dated 22nd January 2014 (Coram : R.D. Dhanuka, J.) passed in Chamber Summons No. 867 of 2013 filed by M/s. Benofin Corporation to raise the attachment of the right, title and interest of Respondent No. 1 in the subject premises. He has submitted that the position was made clear in the said order where the decision of the Full Bench of this Court in ***Tangerine Electronic Systems Pvt.Ltd. Vs. Indian Chemicals and Ors.***² has been relied upon where it was contended that where the premises is a non residential premises, the business of the tenant/sub-tenant as a going concern therefrom along with its alleged rights in the subject premises can be sold in the execution of the decree. This Court in the order dated 22nd January 2014 had by relying upon the decision in ***Tangerine Electronic Systems Pvt.Ltd.*** (supra) held that it is not in dispute that the Respondent No. 1 is a sub-tenant of M/s. Benofin Corporation and is carrying on business in the subject premises for last several years and that the said business as a going concern along with all the assets of Respondent No. 1 with its rights in the subject premises can be sold in the execution of the decree. It was further made clear by this Court that the sale if any conducted by the Sheriff

2 ***AIR 2004 Bom.198***

of Mumbai shall be subject to the existing rights of the M/s. Benofin Corporation as a tenant of the Society.

6. The learned Counsel for the Applicant has further drawn this Court's attention to the order of this Court (Coram : G.S. Patel, J.) dated 26th March 2018 in the above Execution Application wherein this Court although referring to the prior order had not considered the undisputed findings in that order viz. that the Judgment Debtor/Respondent No. 1 is a sub-tenant of M/s. Benofin Corporation and carried on business in the subject premises for several years. He has submitted that this Court had in the subsequent order held that there is nothing before the Court to indicate that the Judgment Debtor is or was a sub-tenant of the Trust viz. M/s. Benofin Corporation. This Court in the subsequent order accordingly, held that there will be no sale of the ground floor premises without giving the other parties involved an opportunity of being heard.

7. The learned Counsel for the Applicant has further submitted that the Applicant is not seeking a sale of the subject premises. He has submitted that the Full Bench of this Court in ***Tangerine Electronic Systems Pvt.Ltd.*** (supra) has held that there can

be a sale of the rights of a tenant to remain in occupation of the non-residential premises which is a property and the tenant has disposing power over the interest of tenancy and such interest is attachable and saleable in execution of the decree against him. He has accordingly, sought for a moulding of the prayer in the Chamber Summons for sale of the interest of the sub-tenant/Respondent No. 1 in execution of the decree against it in terms of the decision of the Full bench of in *Tangerine Electronic Systems Pvt.Ltd.* (supra).

8. The learned Counsel for the Respondent No. 1 has opposed the Chamber Summons on the ground that this issue was considered by this Court i.e. the order of G.S. Patel, J. wherein it was expressly held that it is not possible to permit the sale of the subject premises on the basis that it is part of a going concern since there are many other conflicting rights, claims and demands in regard to the tenancy. He has further submitted that by virtue of the conflicting claims, the subject premises cannot be sold and that the contesting parties would require to be heard as to their claims and rights in the subject premises.

9. Considering the rival submissions, it appears that this

Court in the order dated 22nd January 2014 had placed reliance on the decision of the Full Bench of this Court in ***Tangerine Electronic Systems Pvt.Ltd.*** (supra). Paragraphs 4 and 5 of the said order read as under :-

- “4. Mr. Saxena, learned counsel appearing for the claimant invited my attention to the judgment of the Full Bench of this court in case of ***Tangerine Electronics Systems Pvt. Ltd., vs. Indian Chemicals and others AIR 2004 Bombay 198*** and in particular paragraphs 10, 15, 16, 33, 36, 38 and 40. It is submitted that since the premises which are subject matter of this chamber summons is a non-residential premises, business of the respondent as a going concern alongwith his alleged rights in the premises can be sold in the execution of the decree.
5. I am respectfully bound by the judgment of the Full Bench of this court in case of ***Tangerine Electronics Systems Pvt. Ltd.(supra)***. Since it is not in dispute that the respondent was a sub-tenant of the applicant and was carrying on business for last several years in the premises in execution of decree, said business alongwith all assets of the respondent alongwith his rights in the premises can be sold in the execution of decree. It is however made clear that the sale if any conducted by the Sheriff of

Mumbai shall be subject to the existing rights of the applicant as a tenant of the society.”

10. It is clear from the said order that this Court after considering the decision of the Full Bench in ***Tangerine Electronic Systems Pvt.Ltd.*** (supra) was of the view that the business of the Respondent No. 1 as a going concern along with its rights as sub-tenant in the subject premises can be sold in the execution of the decree. Thus, this Court was of the view that what is being sold, is the interest of the Respondent No. 1 as sub-tenant in the subject premises which includes its business as a going concern being conducted therefrom in execution of the decree.

11. The Full Bench of this Court in ***Tangerine Electronic Systems Pvt.Ltd.*** (supra) had in paragraphs 10 and 40 held as under:-

“10. In what we have discussed above, it cannot be seriously disputed that tenant's right to remain in occupation of the non-residential tenanted premises is a property. If it were not so, the interest of a lessee of the residential building to which the Rent Control Act was applicable would not have been

excluded by introducing Clause (kc) in proviso to Sub-section (1) of Section 60 Civil Procedure Code.”

“40. We, therefore, conclude that the tenant's right to remain in occupation of the non-residential premises governed by the Maharashtra Rent Control Act, 1999 is a property; such property is saleable and the tenant has disposing power over the interest of tenancy for his benefit and in view thereof, we hold that the interest of the tenant of non-residential premises to which the Maharashtra Rent Control Act, 1999 applies is attachable and saleable in execution of the decree against the tenant.”

12. It is thus, clear from the decision of the Full Bench of this Court in ***Tangerine Electronic Systems Pvt.Ltd.*** (supra) that the tenant's right to remain in occupation of the non-residential premises is a property which is saleable and the tenant has disposing power over the interest of the tenancy for his benefit.

13. Accordingly, the interest of the tenant/sub-tenant of the non-residential premises is attachable and saleable in

execution of the decree against the tenant/sub-tenant.

14. The subsequent order of this Court dated 26th March 2018 had considered that there were rival contentions of entities who claimed the ownership and tenancy of the subject premises. However, this Court in the order dated 22nd January 2014 clearly held that it was not in dispute that the Respondent No. 1 is a sub-tenant of M/s. Benofin Corporation and carried on business for last several years in the subject premises and that its said business along with all its assets as well as its rights in the subject premises can be sold in the execution of decree. Respondent No. 1 being the sub-tenant of the subject premises as well as the factum of Respondent No. 1 carrying on business for last several years from the subject premises is an undisputed position. It would therefore, be clear that the business of Respondent No. 1 as a going concern along with its assets as well as rights in the subject premises can be sold in execution of the decree.

15. The prayer sought for in the Chamber Summons which is for fixing the reserve price for sale of the subject premises requires to be confined to the sale of the interest of Respondent No. 1

as the sub-tenant of the subject premises. This would include the business of the Respondent No. 1 carried on in the subject premises, as well as the assets of the Respondent No. 1 along with its rights to the subject premises for which a fresh valuation will have to be carried out for the purpose of sale of such interest of Respondent No.1 as sub-tenant of the subject premises in the execution of the decree.

16. The following order is passed:-

: ORDER :

- (i) The Sheriff of Mumbai is directed to appoint within a period of two weeks from the date of this order M/s. Nadkarni & Associate as a valuer for carrying out the exercise of valuing the interest of Respondent No. 1 as sub-tenant of the subject premises;
- (ii) Upon M/s. Nadkarni & Associate consenting to its appointment, the said valuation exercise shall be carried out within a period of four weeks therefrom;

12/13

March 6, 2020

(iii) The Valuation Report along with the Sheriff's Report shall be placed before this Court on 30th April 2020.

(iv) The Chamber Summons is accordingly, disposed of in the above terms.

[R.I. CHAGLA J.]