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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 1167 OF 2016
IN
EXECUTION APPLICATION NO.38 OF 2006

Bhupco Alloys Ltd. ….Applicant
In the matter of
Mittal Tower Premises Co-operative Society Ltd. ….Disputant
V/s.
Smt.Manjulaben I Shrimankar & Ors. ....Opponents
Bhupco Alloys Ltd. ….Respondent

AND
CHAMBER SUMMONS NO. 1162 OF 2016
IN
EXECUTION APPLICATION NO.38 OF 2006

Spice Islands Apparels Ltd. ….Applicant
In the matter of
Mittal Tower Premises Co-operative Society Ltd. ….Disputant
V/s.
Smt.Manjulaben I. Shrimankar & Ors. ....Opponents

Mr.Kamal Khata i/b. MLS Vani & Associates for Applicant-Spice Islands Apparels Ltd.
Mr.Nikhil Wadikar with Mr.Pradip Zende i/b. Nandu Pawar for Applicant in EXA.
Mr.Harsh Moorjani with Ms.Isha Bafna i/b. Jayakar & Partners for Respondent Nos.1 & 2.
Mr.P. K. Nardele, O.S.D., Court Receiver present.

CORAM : G.S. KULKARNI, J.

DATE : 11th FEBRUARY, 2020

P.C.:

These are two chamber summons filed by the third parties namely Bhupco Alloys Ltd. and Spice Islands Apparels Ltd. The prayers as made in the chamber summons are in the nature of a relief to obstruct execution of the decree, being executed by the Mittal Tower Premises Co-operative

Society Ltd. (for short '**the Society**'). The applicants pray that the Society be restrained from selling the premises bearing No.125/A, Unit No.1 and Unit No.2, 12th Floor, A-Wing, Mittal Tower Premises Co-operative Society Limited, Plot No.210, Nariman Point, Mumbai – 400 021 (for short '**the premises**') for realisation of the award dues under the warrant of attachment dated 30th March 2016, issued in the present execution proceedings.

2. Common arguments are advanced by Mr.Khata, learned Counsel for the applicants on both these chamber summons. The execution proceedings are instituted by the Society which holds an award/decree against the opponents/respondents Manjulaben I. Shrimankar and others (for short 'the **Shrimankars**') passed by the Co-operative Court at Mumbai being award dated 28 October 2004 in Case no.CC/I/379 OF 1999 for an amount of Rs.3,26,165/ with interest at 22% per annum till adjudication of dispute and thereafter till full and final satisfaction, is now required to be recovered from the Shrimankars by the society. Its almost sixteen years that the award is passed by the Co-operative Court. The amount to be realised today by the Society is substantial.

3. It has so happened that Shrimankars granted user rights in respect of the premises in favour of the applicants (third parties) under agreements dated 27 June 1996. By virtue of which the applicants came in possession

of the premises. A bare perusal of the agreements would show that it is not strictly a usual leave and licence agreement, the parties have also not styled it as a leave and licence agreement. The agreement permitted use of several office facilities to the applicant "during the course of the day." There was a deposit which was received by Shrimankars independently from these applicants which is an amount of Rs.45 Lakhs in regard to the applicant in chamber summons No.1162 of 2016 - (**Spice Islands Apparels Ltd.)** and an amount of Rs.30 Lakhs in respect of the applicant in chamber summons No.1167 of 2016 - (**Bhupco Alloys Ltd.)**

4. Mr.Khata, learned Counsel for the applicants has drawn my attention to the various clauses of the said agreements and more pertinently clause No.4(j) which according to him permitted the applicants to continue in occupation of the said premises till the security deposit is refunded by Shrimankars. Mr.Khata would submit that although by efflux of time as per clause 4(a) of the said agreement, the term of the agreement has expired in June 1999, he submits that as Shrimankars did not refund the security deposit, hence his clients have continued to be in occupation of the said premises and would be entitled to continue in occupation till the amount of the security deposit is refunded. It is thus submitted that the Society cannot proceed to execute the warrant of attachment for sale of the premises unless the security deposit is repaid and received by the applicants. He submits that till such time the said amounts are received the applicants have a legal right to occupy the said premises.

5. In the meantime and during the subsistence of this agreement entered by Shrimankar's with the applicants, that is before its expiry in June 1999, disputes had arisen interse between the Shrimankars resulting in a partition suit being instituted (suit No.4183 of 1998) in this Court which was later on transferred to the Bombay City Civil Court (re-numbered as S.C. Suit No.8348 of 1998.) In the said suit an interim order came to be passed on 14 July 2008 whereby the Court Receiver, High Court, Bombay was appointed as a Receiver in respect of the said premises. The applicants were appointed as agents of the Court Receiver. The said suit between Shrimankars was decreed on 1 December 2016. However the Court Receiver so appointed, nonetheless has continued, when he ought to have been discharged.

6. Mr.Khata is not correct in contending that this Court needs to accept the applicants contention that the applicants are entitled to remain in occupation by virtue of Clause 4(j) of the said agreement and that the said clause would in fact need not only a recognition but enforcement in the present proceedings. The effect of this contention is that the premises would remain in the present position (status quo), namely that the applicants should be continued in occupation till the amount of the security deposit is received by the applicants which Shrimankar's for some reason have not refunded and/or are not willing to refund, either for their own benefit or for some other reason or for the benefit of the applicants,

which cannot be ascertained. Even assuming that there is a collusion between the applicants and the Shrimankars to defeat the decree obtained by the Society or otherwise, the same cannot be ascertained in these proceedings. However, the consequence of the stand taken by the applicant looked from any angle is that it is intended to defeat the decree without the applicants having any substantive rights qua the premises. In my opinion, the limited rights being asserted by the applicants referring to Clause 4(j) cannot defeat the Society's rights to realise the decreetal dues under a lawful decree.

7. There is another reason as to why the applicants cannot now take recourse to Clause 4(j) of the agreement they had entered with the Shrimankars, and assert any rights to prevent sale of the premises in execution of the award/decree obtained by the society against Shrimankars. This for the reason that the applicants are now not in occupation and possession of the said premises under the original agreement entered by them with Shrimankars, but under a fresh agreement entered by them with the Court Receiver, High Court, Bombay (Dated: 21 April 2011) who came to be appointed as a Receiver of the said premises by an order dated 14 July 2008 passed in the partition suit between the Shrimankars as instituted by respondent no.3 (Rekha Shrimankar). Perusal of the agreement dated 21 April 2011 between the Court Receiver and the applicants would clearly show that the applicants

have relinquished their rights under the agreement they entered with the Shrimankars, which would include the rights under clause 4(j) to continue to be in possession till the security deposit is refunded. This is clear from the following clauses of the agreement entered by the applicants with the Court Receiver:-

> "5. I agree that in the event of the Company committing a breach of any one or more of the terms and conditions set out herein or by jeopardizing the right, title or interest of the Court Receiver, the Court Receiver will be entitled to re-enter the Premises and re-take the possession of the same in which case this contract will immediately come to an end in that the Court Receiver might suffer by reason of such termination and the Company shall not claim any rebate or deduction or refund on that account.
>
> ……
>
> 8. I agree to return to the Court Receiver all the movables of which the inventory is made in the same conditions as existed at the time of entry except for usual wear and tear and I agree to make good any loss or damage in respect of the said movables.
>
> …….
>
> 11. I shall handover possession of the Premiss to the Court Receiver as and when demanded by him/her as the Court Receiver reserves his/her right to terminate the agreement any time subject to Order from the Hon'ble High Court.
>
> 12. I shall give an undertaking to the Court through my Advocates by filing an affidavit to the effect that Company shall handover possession of the Premises to the Court Receiver whenever called upon by him/her to do so without assigning any reason therefor even prior to the completion of agreement period and I shall record such an undertaking in the Court through my advocates. I shall also mention in the said undertaking that the Company shall not part with the possession of the suit Premises or any part thereof or encumber the same in any manner whatsoever.
>
> 13. This agreement will be deemed to have come into force from _________ and/ is for 11 months or till the Court Receiver is discharged by any order of the Court or whenever called upon by the Court Receiver to handover possession, this agreement being deemed to have been withdrawn or revoked or terminated for all purpose in all respect by the Court Receiver. In case the agreement is terminated for default, then the Company shall reimburse to the Court Receiver for such loss or damage."

8. This apart in a subsequent agreement dated 13 November 2019 entered by the applicants with the Court Receiver the above position stands re-affirmed. The following are the relevant clauses of the said agreement:-

> "4. I agree that in the event of me committing breach of any one or more of terms and conditions set out herein or by jeopardizing the right, title and interest of the Court Receiver by any act of omission on my part, the Court Receiver will entitle to re-enter and cease the contract which will immediately come to an end and in that event the Court Receiver might suffer loss by reason of such termination and I shall not claim any rebate or reduction or refund on that account.
> .. .. … ..
> 5. I shall give an undertaking to the Court through my Advocate by filing an Affidavit to the effect that I shall hand over the possession of the said premises to the Court Receiver whenever called upon by him to do so. I shall also mention in the said undertaking that I shall not part with possession of the said premises or any part thereof or encumber the same in any manner whatsoever to any third party without the permission of the Court Receiver."

Further in pursuance of the above agreement dated 13 November 2019, an "**Undertaking**" dated 14 November 2019 has been furnished by the applicants. The relevant portion of the said undertaking reads thus:-

> "I also agree and undertake to handover the said premises in a reasonable condition to the Court Receiver as and when the same is called upon to do so by the Court Receiver, with the order of the Court, without any delay."

9. It is thus clearly seen that Clause 4(j) of the agreement entered between the applicant and the Shrimankars clearly stand superseded by the subsequent agreement(s) entered by the Court Receiver with the applicant Shrimankars. Surely the applicants who with open eyes have entered into these subsequent agreements with the Court Receiver, cannot

contend that the terms and conditions of the said agreement ought to be discarded. An opportunity was available to the applicants to assert their rights on the basis of the agreement they had entered with Shrimankars before they could enter into the agreement with the Court Receiver, however the applicants chose to trade a path to remain agents of the Court Receiver on specific terms without a whisper to recognise any of their rights under the original agreements with the Shrimankars. This is also clear from the fact that the agreement as entered by the Court Receiver with the applicants in no manner recognizes any of the rights of the applicants under the agreement which they entered with Shrimankars. In fact there is no reference to the agreement with the Shrimankars in the applicants agreement with the Court Receiver. Hence, it is not permissible for the applicants to contend anything contrary to the position the applicants have taken under the agreement entered with the Court Receiver.

10. Mr.Khata, learned Counsel for the applicants has referred to a decision of the Division Bench of this Court in **Sumikin Bussan (Hong Kong) International Limited v. Manharlal Trikamdas Mody**[1] to contend that in a similar situation the Court had recognized the rights of the licensee to remain in possession of the premises in question till the amounts of security deposit were paid. In my opinion, there cannot be any dispute in regard to the proposition of law the judgment lays down in the facts of the

1 2006 SCC Online Bom 506

said case. However in the present facts, this judgment would be totally inapplicable more particularly in the above intervening circumstances, as also for the reasons that the Shrimankars have not come with a case that the applicants are legally entitled to the amounts which are ascertained by them. It is only an assertion to the entitlement to the amounts by the applicant and not admitted by Shrimankars to be due and payable in law. In the facts of the said case before the Division Bench, it clearly appears that licensor had not disputed the entitlement of the licensee for refund of security of deposit. The present facts are completely different. This decision hence would not assist the applicants.

11. In my opinion, the applicants' right if at all is only limited to receive the monetary claim (refund of security deposit), if any, if it is so crystalized in appropriate proceedings. By virtue of this agreement even if it is taken as a leave and licence agreement, the applicants, in the circumstances as they prevail would not have any corporeal rights to obstruct the decree which is subject matter of the execution proceedings. It would be difficult to conceive that the Society's award/decree remains a mere paper decree impossible of execution.

12. It is also quite apparent that the applicants in the present scenario can never be refunded their security deposit in the absence of Shrimankars not coming forward to refund the same. If the applicant's plea that they

should be permitted to remain in occupation/possession is accepted and possibly in perpetuity till the security deposit is paid, as Shrimankars have not refunded the security deposit, then surely the applicants agreement with the Court Receiver is required to be discarded. The law would not permit such a stalemate, that on one hand render the Society's decree a futility and on the other hand, grant in this proceeding a kind of specific performance of the agreement entered by the applicants with the Shrimankars so as to continue the applicants in possession.

13. Mr.Khata would contend that the decree/award passed by the Co-operative Court is inexecutable inasmuch as the Court Receiver was not impleaded as a party to the suit filed by the society. This contention also cannot be accepted, for the reason that the society's proceedings against Shrimankar's came to be decreed by the award, subject matter of execution which is dated 28 October 2004 and the Court Receiver was appointed in the Shrimankars suit by an order dated 14 July 2008. The present execution application is filed on 3 March 2006. The question of Court Receiver being a party before the Co-operative Court proceedings instituted by the Society is thus wholly untenable. In the present facts the decision of the Supreme Court in "**Everest Coal Company (P) Ltd. Vs. State of Bihar**[2] would also not assist the applicants.

14. Be that as it may, the issue today before the Court in this application is limited, namely that the society is claiming its dues under an award

2 (1978) 1 SCC 12

which is passed by the Co-operative Court which is subject matter of execution and secondly, the applicants purportedly have a monetary claim of security deposit against Shrimankars. Thus the situation is that there are rival monetary claims firstly that of the society which is crystalised under a decree/award of the Co-operative Court and secondly the claim of the applicants which is only an assertion and certainly not crystalised under any decree passed by the Court. The position on record is that the applicants in the above circumstances are only interested to espouse their rights under clause 4(j) of the agreement namely to continue in possession of the premises. The assertion of the applicants is to have refund of their dues, in regard for which they had written a letter to Shrimankars as pointed out by Mr.Khata being a letter dated 12 August 1999 (Exhibit-F to the reply affidavit filed by Kaushik Shrimankar in chamber summons No.1162 of 2017). It appears that the Shrimankars desired to repay the security deposit, however, the applicants refused to vacate the premises as clear from the letter of the Shrimankars dated 23 April 2009 as placed on record by the applicants which reads thus:-

> "23 April 2009
>
> To,
> M/s.Bhupco Alloys Ltd.
> 125A, Mittal Tower,
> Nariman Pt.,
> Mumbai-400021.
>
> Kind Attn. Mr.Umesh Katre.
> ---
> Re: Agreement dated 27th June 1996 entered into between us.
> Dear Sir,

We refer to the agreement as entered into between us on 27th June 1996.

As you are aware despite the said Agreement having expired, you are in the possession of the premises being Unit No.2 situated at 125-A, Mittal Tower, Nariman Point, Mumbai-400021.

You are not vacating the above premises despite of our ability to refund the security deposit which has given rise to the dispute.

As per clause 10 of the said Agreement, such disputes would have to be referred to arbitration as provided therein.

We are accordingly appointing Mr.Justice B.N.Srikrishna (Retd.) as the Sole Arbitrator and have to request you to kindly concur in his appointment. If, however, you do not agree to Mr.Justice B.N.Srikrishna being appointed as the Sole Arbitrator, you may treat this letter as our appointment of Mr.Justice B.N.Srikrishna as an Arbitrator and have to call upon you to appointment an Arbitrator so that the two Arbitrators can appoint the Presiding Arbitrator whereupon the Arbitral Tribunal would be constituted and the disputes between us and can be referred to adjudicated upon by the Tribunal.

Yours faithfully,
For M/s.SPACE & TIME BUSINESS CENTRE

sd/-
KAUSHIK SHRIMANKER."

15. The reply to the above letter by the letter of applicant's Advocate leaves no manner of doubt on the applicant's approach in the context of their legal rights. The said reply reads thus:-

"Date 29 April 2009 By Speed Post A.D./Courier

To,
Mr.Kaushik Shrimanker,
Space & Time Business Centre,
2,Mani Mansion,
63, Peddar Road,
Mumbai 400026.

Dear Sir,

This has the reference to your letter dated 23 April, 2009 addressed to my client Bhupco Alloys Ltd. received by them on 24 April,2009 with instructions to address you as under:-

1. That you are aware that a suit being Suit no.4183 of 1998 is filed by Rekha Shrimankar against Ishwarlal J.Shrimankar (deceased) & Ors. in the Bombay High Court for a declaration that Rekha Shrimankar is entitled to 1/3rd undivided share right title and interest in the property described in Exhibit 'A' to the plaint.

2. The Hon'ble Bombay High Court vide order dated 23 September,1998 was pleased to pass an ad-interim order in Notice of Motion No.1619 of 1998.

3. The Hon'ble High Court vide order dated 12 March 2007 was pleased to make Notice of Motion no.316 of 2006 absolute in terms of the ad-interim order dated 23 September,1998.

4. Rekha Kumar Shrimankar took out Ntoice of Motion being Notice of Motion no.1619 of 2008. The Hon'ble Court vide order dated 14 July 2008 was pleased to appoint a Court Receiver in respect of the suit property and my client along with Spice Islands Apparels Ltd. are appointed as agents of the Court Receiver without security or royalty.

5. Please note that you cannot disturb the possession of the Court Receiver, by invoking arbitration, you are directly interfering with the possession of the Court Receiver, please note that this act of yours amounts to contempt of court.

6. In the circumstances aforesaid, I hereby call upon you to withdraw the notice invoking arbitration within 7 days from the date of receipt of the letter, failing which my client shall be compelled to adopt contempt proceedings against you at your entire risk as to costs and consequences.

Yours truly,
sd/-
Advocate for Bhupco Alloys Ltd.

CC: Mr.Justice B.N.Srikrishna (Retd.)
C/o.Shruv & Co.,
Natwar Chambers.
94, Nagindas Master Road, Fort,
Mumbai-400001."

16. Admittedly claim of the applicants for security deposit is neither asserted nor crystalised in any proceedings, in a manner known to law. In

fact perusal of the said agreement between the Shrimankars and the applicants would clearly indicate that in case, any disputes were to arise in respect of any claim, the parties had agreed for reference of the disputes to arbitration as clear from clause 10 of the said agreement. However it appears that the applicants prevented an arbitration and were satisfied with limited rights which had accrued to them under the agreement entered with the Court Receiver only to continue with their occupation as agents of the Court Receiver. It thus cannot be said to be any real right, on the said property, was available to the applicants so as to entitle them to occupy the said premises.

17. On 8 February 2017 both these chamber summons were heard and while issuing notice to Ms. Rekha Kumar Shrimankar (respondent No.3 and plaintiff in the partition suit) an order came to be passed. The relevant extract of the order dated 8 February 2017 reads thus:-

> "4. Mr Sugdare has instructions to say his clients, the Shrimankars, do not have the money to repay Bhupco the security deposit or to clear the Society's dues. He suggests, instead, that the office be sold. That way, he says, the dues of both Bhupco and the Society can be cleared.
> 6. The suggestion for a sale of the office merits consideration. In the division of sale proceeds, there can be no question of adjudicating a claim by the Shrimankars against Bhupco. For that, the Shrimankars must file an appropriate civil proceeding, if permissible in law and within time.
> 7. On behalf of the Society, Mr Shah says that a buyer can be found in a very short time.
> 8. The difficulty is that Rekha's suit against the Shrimankars has been decreed. No such sale is possible without notice to her. Mr.Shah will give notice to the 3rd Respondent.
> 9. List the matter on 22nd February 2017. If the Society can identify a buyer, the details including the name and price offered must be placed before the Court in a sealed cover.
> 10. In the meantime, Mr Shah for the Society agrees not to proceed with the attachment."

18. The above order has continued to operate for almost three years. The applicants had no grievance for sale the premises as clearly observed by the Court. The Srimankars also had no objection for the sale of the premises. It is thus clear that from the observations as made by the Court in the above order that the stalemate can be resolved, if the premises in question are sold so that the money can be realized not only for the satisfaction of the decreetal dues of the society but it can also be utilized to be paid to the applicants, on the applicants succeeding in establishing their lawful claim which they have against Shrimankars in respect of the security deposit, and when such amounts are crystalised. As to what are the total amounts which would be due and payable to the applicants as on today is only a guess work and a mere assertion on the part of the applicants. Shrimankars are not taking a position admitting to any legal entitlement of the applicants to a crystalised amount to be paid to the applicants. Thus there are rival contentions on the legal entitlement of the applicant to receive the refund of security deposit amount, as by passage of time, things have substantially changed between the applicants and Shrimankars. This would be a matter of adjudication in appropriate proceedings between Shrimankars and the applicants including as to what amount would be actually payable to the applicants.

19. Accordingly it would be appropriate that the applicant is left to adopt appropriate proceedings to establish their exact monetary claims

against Shrimankars as it would not be the jurisdiction of this Court to adjudicate in the present execution proceedings any amounts which are entitled to the applicants as asserted by them under the agreements in entered by them with Shrimankars.

20. As observed by this Court, the decree/award is required to be executed. The process of law which was set into motion by the Society and ultimately the Society succeeding in obtaining a decree of the Competent Court cannot be set at naught. The award is required to be taken to its logical conclusion in execution. The warrant of attachment which was issued by this Court on 30 March 2016 would be required to be executed. This however in the peculiar situation recognising the right of the applicants if any to receive the amounts, as noted above, as possibly the value of the premises is such that it can satisfy the monetary claims of the society as also that of the applicants. Hence the prayers as are made in the chamber summons cannot be granted. Appropriate steps to execute the warrant of attachment are required to be taken as expeditiously as possible and in any case within a period of twelve weeks from today.

21. Needless to observe that if any surplus amount remains after the amount is appropriated towards the claim of the society in the present execution proceedings, the said amount can be retained in this Court and be kept in a fixed deposit in a nationalised bank. Any appropriate party,

either it be Shrimankars or the applicants if they are so entitled can claim the said amount as noted above, they are free to do so.

22. As the Court has now directed that the premises are required to be sold in execution of the warrant of attachment, as the applicants have continued to be in possession for substantial time/period, it would be in the interest of justice to grant some time to the applicants to vacate the premises and hand over the premises to the Court Receiver despite the disposal of the suit. The applicants shall accordingly hand over the possession of the premises to the Court Receiver within six weeks for further steps to be taken to sell the premises..

23. I have also heard Court Receiver who is present in the Court. He states that although suit No.8348 of 1998 is decreed by the City Civil Court on 1 December 2016, a formal application would be filed for discharge of the Court Receiver.

24. In the above circumstances I dispose of the above chamber summons in terms of the following order:-

ORDER

(i) The prayers in the chamber summons for setting aside the warrant of attachment dated 30 March 2016 in respect of the premises in question stand rejected.

(ii) The Court Receiver, High Court, Bombay stands appointed as receiver in respect of the office premises bearing No.125/A, Unit No.2, 12th Floor, A-Wing, Mittal Tower Premises Co-operative Society Ltd., Plot No.210, Nariman Point, Mumbai-400021.

(iii) It would be open to the Court Receiver to take a formal discharge in Suit no.8348/1998 disposed of by the City Civil Court on 1 December 2016.

(iv) The Court Receiver shall take further appropriate steps to sell the office premises bearing No.125/A, Unit No.2, 12th Floor, A-Wing, Mittal Tower Premises Co-operative Society Ltd., Plot No.210, Nariman Point, Mumbai-400021.

(v) To enable the Court Receiver to sell the premises, the applicant shall hand over the premises to the Court Receiver within a period of six weeks from the copy of the present order being available.

(vi) In the event the applicants fail to hand over the possession of the premises within six weeks as directed, the Court Receiver is permitted to take forcible possession of the premises and if necessary, by using police aid.

(vii) By following usual procedure the Court Receiver shall sell the premises. The amounts which would be received from the sale of the premises be utilised for satisfaction of the award as obtained by the society against the Shrimankars.

(viii) The balance amount shall remain deposited with the Court Receiver in a fixed deposit and which shall be made available to either applicants or Shrimankars as the case may be, and in the event the applicants’ claim against the Shrimankars is crystallized.

(ix) In the meantime, the applicants and Shrimankars are not prevented for having any settlement in regard to the claims as made by the applicants against Shrimankars.

(x) Disposed of in the above terms. No costs.

Parties to act on authenticated copy of the order.

[G.S. KULKARNI, J.]

Prajakta S. Vartak

Digitally signed by Prajakta S. Vartak
Date: 2020.02.26 18:02:12 +0530