

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

CHAMBER SUMMONS NO. 871 OF 2019
IN
SUMMONS FOR JUDGMENT NO. 49 OF 2017
IN
COMMERCIAL SUIT NO. 168 OF 2017

Rodium Realty Limited ...Applicant/
(Orig. Plaintiff)

In the matter between :

Rodium Realty Limited ...Plaintiff
Vs.
Dilip Jairam Mukkawar ...Defendant

Mr.Gauraj Shah i/b Tejas Dinesh Shah and Co. for
applicant/plaintiff.
Mr. Ramesh Jain for defendant.

CORAM : N. J. JAMADAR, J.
DATE : 25th NOVEMBER , 2021

P.C.:

1. This chamber summons is taken out by the applicant/plaintiff seeking a direction against the defendant under Order XXI, Rule 41(ii) of the Code of Civil Procedure, 1908 to file an affidavit and forthwith disclose on oath, all properties, assets, both movable and immovable, belonging to him, either personally or jointly, with any other person or party, with a further prayer that in case of disobedience of the order which may

be passed by this Court, the defendant be detained in civil prison.

2. The chamber summons arises in the backdrop of the following facts :

(a) The plaintiff had instituted a suit being Commercial Suit No.168 of 2017 against the defendant for a decree in the sum of Rs.7,32,55,000/- along with further interest @ 18% per annum on the sum of Rs.4,90,00,000/-.

(b) When a summons for judgment, being Summons for Judgment No. 49 of 2017, was taken out in the said suit, on 20th December 2017, the parties tendered the minutes of decree on admission. The suit, thus, came to be disposed of in terms of minutes of decree on admission (Exh.'X').

3. The relevant part of the minutes of the decree on admission read as under :

“2(a) In the event the Defendant by or before 31st December 2018 delivers to the Plaintiff the Slum Development Rights Certificate (DRC) with Utilization Certificate, commonly known as Transfer of Slum Development Rights (TDR) FSI of 1,300.00 sq. mts., valid for utilization thereof upon the properties situated in Mumbai Suburbs up to R Zone of the Mumbai Municipal Corporation Limits, free from all encumbrances, without making any demands of any nature whatsoever and howsoever.

2(b) In the event, the Defendant by or before 31st March 2019 refunds to the Plaintiff the sum of

Rs.2,26,00,000/- (Rupees Two Crore Twenty Six Lakhs) with interest thereon @ 18% per p.a. with effect from 1st January 2014 till payment.

The Decree in terms of Clause 1 to be marked duly satisfied.

3. In the event, Defendant commits default of clause 2(a) and 2(b) above, the Decree in terms of Clause 1 (one) above shall be executable forthwith."

4. The plaintiff has approached the Court with a case that the defendant has not complied with the terms of the decree on admission. The defendant has not paid the amount which became due and payable under clause (3) of the minutes of the decree on admission, extracted above, on account of the default committed by the defendant under clauses 2(a) or 2(b) of the said decree. The applicant/plaintiff, thus, addressed a notice to the defendant on 23rd March 2019, and called upon the defendant to satisfy the decree, in accordance with the minutes of the decree on admission. However, the defendant paid no heed. Hence, this chamber summons seeking direction to the defendant to disclose the assets so as to facilitate the plaintiff/applicant to move for execution of the said decree.

5. The chamber summons is resisted by the defendant by filing an affidavit in reply. The tenability of the chamber summons is

assailed. It is contended that the reliefs sought in the present chamber summons are misconceived and not tenable in law. The chamber summons is a device adopted by the plaintiff to bypass the procedure prescribed in the Code for execution of the decree. Since the minutes of decree on admission was passed on 20th December 2017, therefore, the plaintiff cannot lay execution without notice as envisaged under Order XXI, Rule 22 of the Code.

6. I have heard the learned counsel for the applicant/plaintiff and the learned counsel for the defendant.

7. Indisputably, the decree on admission came to be passed on 20th December 2017, in accordance with the minutes of the decree on admission. The said decree came to be passed in the suit for recovery of monetary claim. It is not the case that the defendant has complied with the terms of the decree on admission. The principal resistance, which is sought to be urged on behalf of the defendant, is the tenability of the chamber summons before the Court which has passed the decree.

8. The learned counsel for the plaintiff-applicant submits that

the issue sought to be agitated on behalf of the defendant is no longer *res-integra*. The learned counsel for the plaintiff-applicant invited the attention of the Court to the judgment and order dated 14th January 2019, passed by the learned Single Judge of this Court in the case of ***Bhupesh Sevantilal Shah Vs. M/s. Bhoomi Tractors Sales and Services & Ors.***¹, whereby the learned Single Judge repelled the contention on behalf of the defendant therein that a chamber summons seeking disclosure of the assets is not maintainable before the Court which passed a decree and the proper remedy was seek execution of the decree.

9. This Court held that the application for disclosure of the assets was a step in the aid of the execution of a decree and did not partake the character of the petition for execution and, therefore, such an application was tenable before the Court which passed the decree. The Court relied upon the judgment of a Division Bench of this Court in the case of ***United Phosphorous Ltd. Vs. A.K. Kanoria***², wherein it was observed, *inter-alia*, that an application seeking disclosure of the assets of the judgment debtor was strictly not an application for execution but it was an

1 Chamber Summons No.1098/2017 in S/12/2014 dt.14-01-2019

2 2003(1) Bom. C.R. 299

application in aid of the execution. Paragraphs 11 and 12 of the said judgment read as under :

“11. Shri Chande, the Learned Advocate for the defendant contended that an application under Order XXI, Rule 41 is an application in an execution petition; according to him. Execution commences on riling of written application (commonly called as Execution Application or Darkhast) under Sub-rule (2) of Rule 11 of Order XXI of the Code of Civil Procedure. Unless the execution petition is filed and numbered, contends Shri Chande, any application under order XXI cannot be filed. Shri Chande submits that after the judgment is delivered, the Court becomes functus officio and only after filing of an execution petition under Order XXI, Rule 11(2), the Court again assumes Jurisdiction. The petition under Order XXI, Rule 41, is to be made to the executing Court and not to the Court which passed the decree, because the Court passing the judgment decree becomes functus officio, the moment judgment and decree is passed.

12. In my opinion, application under Order XXI, Rule 41 is not an application in an execution. It is an application in aid of execution or a step towards the execution. Under Clause (j) of Rule 11(2) of Order XXI of the Code of Civil Procedure, the execution petition must specify the mode in which assistance of the Court is required for the execution of a decree. Clause (j) reads as follows :

(j) the mode in which the assistance of the Court is required whether -

(i) by the delivery of any property specifically decreed.

(ii) by the attachment, or by the attachment and sale, or by the sale without attachment, of any property.

(iii) by the arrest and retention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise, as the nature of the relief granted may require.

Examination of a judgment debtor under Sub-rule (1) of Rule 41 of Order XXI or direction to the judgment debtor to file an affidavit to be issued under Sub-rule (2) of Rule 41 or Order XXI is not one of the mode of execution of a decree provided in Clause (j) of Rule 11(2) of Order XXI, Rule 30. Disclosure of the assets is a preliminary step towards the execution of a decree. Rule Nos. 3 to 9 of Order XXI of the Code of Civil Procedure contemplate transfer of a decree by the Court which passed the decree to another Court for execution. The decree holder, who is

not aware of the assets of the judgment debtor, is often unable to decide in which Court he should file the execution petition or in which Court he should get the decree transferred unless he knows the particulars of the assets of the judgment debtor. Rule 41 of Order XXI enables the decree holder to get from the judgment debtor the information of the assets, which is within the special knowledge of the judgment debtor. Therefore, an application under Order XXI, Rule 41 is not an application for execution of the decree but, merely an aid to the decree holder to enable him to execute the decree by obtaining information which is within the special knowledge of the judgment debtor. If this be so, the application under Order XXI, Rule 41 would ordinary precede the filing of an execution petition, though it can also be filed in the pending execution petition itself. I am fortified in this view by the judgment of the Calcutta High Court in [Shew Kumar Company v. Grindlays Bank Limited](#) wherein the Division Bench observed in para-9 of its judgment:

"We accept the contention of the Respondent that an application for examination of a judgment debtor (under Order XXI, Rule 41) is strictly not an application for execution".

In the said case, the Division Bench further held even after the decree is transmitted for execution to another Court, the Court passing the decree retains jurisdiction in respect of the decree and can examine the judgment debtor, under Order XXI, Rule 41. It is not necessary in this case to consider whether the Court which passes the decree retains jurisdiction over the decree even after its transmission for execution to another Court, but I am of the opinion that the Court which passed the decree does not cease to have a jurisdiction to entertain an application under Order XXI, Rule 41 atleast till the decree is transmitted to another Court for execution.

10. The learned Single Judge also adverted to another judgment of this Court in the case of ***Cipla Limited Vs. Krishna Dushyant Rana***³, wherein an identical view was recorded.

11. In view of the aforesaid pronouncements, it is too late in the day to urge that a chamber summons seeking disclosure of the

³ CHS/735/2013 IN SS/475/2010 DT.31-08-2016

assets of the defendant is not maintainable before the Court which passed the decree.

12. The learned counsel for the defendant further submitted that the chamber summons is bereft of the particulars. It simply refers to the decree on admission and jumps to the prayers, without any justification therefor. I find this submission on behalf of the defendant unworthy of acceptance for the reason that the only fact which was required to be asserted is, non-satisfaction of the decree. In the case at hand, there is material on record to indicate that the plaintiff-applicant had issued a notice to the defendant on 23rd March 2019 and apprised that the decree remained un-executed and called upon the defendant to satisfy the decree. It is true that the plaintiff had not sought the particulars of the assets of the defendant. However, that does not seem to be of decisive significance.

13. The second contention on behalf of the defendant that in view of the time-lag, the decree cannot be directly put to execution and a notice under Order XXI, Rule 22 of the Code is required to be issued to the defendant can properly be agitated before the

Executing Court, in the event the execution is laid. The time-lag, however, does not seem to be an impediment in directing the defendant to disclose the assets on affidavit so as to facilitate the plaintiff-applicant to move for execution of the decree.

14. Hence, I am inclined to allow the chamber summons in terms of the prayer clause (a), for the present, restricted to directing the defendant-judgment debtor to file affidavit stating the particulars of all his assets (movable and immovable), including the value of each of the asset and status thereof and encumbrances thereon, if any, within a period of six weeks from today.

15. If the aforesaid order is not complied with, the plaintiff-applicant is at liberty to move for the later part of the relief sought under prayer clause (a).

16. The chamber summons accordingly stands disposed of.

(N. J. JAMADAR, J.)