

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

WRIT PETITION NO. 9961 OF 2015

Kashmirilal Pramodkumar Agrawal,
a firm through proprietor Kashmirilal s/o
Harisingh Agrawal (Gupta) .. Petitioner
versus
Nanakram Jagannath, a firm through
proprietor Jagannath s/o Nanakram Pallod .. Respondent

Mr. Sharad V. Natu, Advocate for petitioner
Mr. S. V. Deshmukh, Advocate for respondent

CORAM : SUNIL P. DESHMUKH, J.
6TH OCTOBER, 2015

ORDER:

1. After hearing learned counsel for the parties, it appears that various contentions are being advanced in support of and against the order on Exhibit-69 as also on Exhibit-73 in special darkhast no. 10 of 1997, passed by executing court (3rd Joint Civil Judge, (S.D.), Jalna, on 14-09-2015 and 28-09-2015 respectively which are impugned in this petition.

2. Mr. Natu, learned counsel for petitioner-original judgment debtor submits that the impugned order is unsustainable for not following the requirements under Order XXI, rules 37 to 40 of the Code of Civil Procedure, 1908. He submits, no opportunity had ever been made available to petitioner, nor it can be said that notice under rule 37 (1) had been issued and petitioner had not been

given opportunity to explain as to under what circumstances decree could not be satisfied. He submits though impugned order refers to presence of the petitioner before the court but he could not procure legal expertise to defend his case albeit, he submits that petitioner would pay the amount to the decree holder at ₹ 5,000/- per month.

3. It is being submitted by Mr. Natu that though the property worth rupees two crore is owned by petitioner, there are several encumbrances over the same, in the sense that the same has been charged and attached for the recovery of the amounts under the orders of different tribunals and courts and as such, it is difficult for the petitioner to comply with the demand under the present execution. All this petitioner could have explained, had an opportunity been provided to him when the matter was before the trial court. However, in the absence of such opportunity, the observations as are appearing under paragraphs number 5 and 6 of impugned order on Exhibit-69 are incompatible with circumstances. Mr. Natu submits, if opportunity is given, petitioner would be able to explain his case properly to the court.

4. Mr. Natu submits that under order on further application Exhibit-73, the trial court has continued detention of the petitioner for a further period of fifteen days. He submits that the observations about non deposit of the decretal amount as have appeared in order on Exhibit-69 have appeared once again in order

on Exhibit-73, however, the court has not appreciated the circumstances under which such deposit could not be made. Mr. Natu, under the circumstances, submits that the petitioner deserves to be given an opportunity to lead evidence and show cause against Exhibits-69 and 73.

5. Learned counsel for respondent, however, sights the matter from different angle altogether. He submits, the decree is of 1996 and execution is being proceeded with since 1997 and the petitioner had not bothered to appear in any of the proceedings and had avoided service of proceedings in execution and under the circumstances, Exhibits-69 and 73 were filed. During hearing of Exhibit-69, petitioner had a chance to give security, however, he did not avail of that opportunity. Under the circumstances, no fault can be found with the orders impugned.

6. After hearing learned counsel for parties and considering various contentions being advanced by them and having regard to the purport underlying Order XXI, rules 37 to 40 of the Code of Civil Procedure, the petitioner deserves a proper opportunity to explain his case to the court and he has not been able to procure even assistance of a lawyer to defend his case on the date on which impugned order on Exhibit-69 had been passed and further he could not bring before court, the position, facts and circumstances and he had been taken in custody and arrested.

7. Learned counsel for respondent, however, in the affidavit in reply has referred to that the petitioner has two other shops from which the decretal amount can be satisfied. These contentions as well will have to be appreciated, as also, petitioner will have to be heard in respect of said contentions.

8. In view of the same, I am of the opinion that the impugned order does not appear to have been passed after adherence to Order XXI, rules 37 to 40 of the Code of Civil Procedure and the matter may be looked into accordingly. However, during these proceedings, detention of the petitioner in civil prison may not be necessary but, presence of the petitioner will have to be secured.

9. In the circumstances, impugned orders on Exhibits-69 and 73 in special darkhast no. 10 of 1997, passed by executing court (3rd Joint Civil Judge, (S.D.), Jalna), on 14-09-2015 and 28-09-2015 respectively stand set aside. Exhibits-69 and 73 stand restored to file and be heard afresh by the executing court by giving an opportunity as contemplated under the relevant rules to the parties.

10. The petitioner shall file an undertaking before this court as well as before the executing court that he will attend to the court proceedings diligently on every date and will not leave precincts of Jalna city without giving information about his movement to the executing court and that he will attend court proceedings on all the

dates save under exceptional circumstances. In the event of failure to stand by the undertaking to be given, the petitioner would be liable to be arrested. Simultaneously, petitioner's sons who are also residing along with him would also file similar undertaking and would expose to similar liability if the petitioner jumps the undertaking. This position should remain in operation till disposal of Exhibit-69. Undertakings by petitioner and his sons before this court as well as executing court are to be filed within a period of three days from the date of release of the petitioner from civil prison.

11. With aforesaid, writ petition stands disposed of.

12. Parties to act on authenticated copy of the order.

SUNIL P. DESHMUKH, J.

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