

IN THE HIGH COURT OF DELHI AT NEW DELHI

EX.P. 337/2014 with EA Nos. 697-98 of 2014 and 199-200 of 2015

**THE STATE TRADING CORPORATION OF
INDIA LTD**

..... Decree Holder

Through: Mr. D. Roy Choudhuri, Senior
Advocate with Mr. R.K. Anand, Mr. Madhu
Sudan Bhayana, Mr. R.N. Yadav, Ms. Payal
Juneja and Mr. Chetan Anand, Advocates.

versus

**GLOBAL STEEL HOLDINGS LIMITED
& ORS**

..... Judgement Debtors

Through: Mr. Rajiv Nayar, Senior Advocate
with Mr. Rajneesh Chopra, Mr. Gautam Mirza,
Mr. Gaurav Mitra, Mr. Gaurav Mahajan and Mr.
Saurabh Seth, Advocates for JD-1 & 2.
Mr. Sandeep Sethi and Mr. Amit Sibal, Senior
Advocates with Mr. Rajneesh Chopra,
Mr. Gautam Mirza, Mr. Gaurav Mitra,
Mr. Gaurav Mahajan and Mr. Saurabh Seth,
Advocates for JD-3.

CORAM: JUSTICE S. MURALIDHAR

ORDER
09.03.2015

Introduction

1. On 30th August 2014 State Trading Corporation of India Limited ('STC'), the Decree Holder ('DH'), filed the present execution petition for execution of the Settlement Agreement ('SA') dated 15th November 2011 as modified by Further Settlement Agreement ('FSA') dated 17th May 2012 under Section 73 of the Arbitration and Conciliation Act, 1996 ('Act') which were final and binding on the parties and were to be treated as an Award under Section 74 read with Section 30 of the Act.

2. The Judgment Debtors ('JDs') as stated in the memo of parties are as under:

1. M/S GLOBAL STEEL HOLDINGS LTD.(GSHL)

Registered Office, 1st Floor,
Murdoch House, North Shore Road,
Ramsay, Isle of Man
Channel Islands, IM8 3DY

Also at:-

3, Auckland Terrace,
Parliament Street,
Ramsay, Isle of Man,
IM81AF.

And Also at:-

43, Grosvenor Street, London W1K 3HL

2. M/S GLOBALSTEEL PHILIPPINES

(SPV-AMC) INC. (GSPI)
12/F SGV IBLDG,
3750,AYALAAVE.
Makati City 126, Philippines.

Also at:-

Unit 2703, 27th Floor,
88, Corporate Centre,
Sedeno Corner,
Valero Street, Salcedo Village,
Makati City 1227
Mania [Philippines]

And Also at:-

Suarez Illigan City - 9200,
Philippines.

3. MR. PRAMOD MITTAL

S/o. Shri Mohanlal Mittal,
Chairman
M/S GLOBAL STEEL HOLDINGS LTD.(GSHL)
And M/S GLOBAL STEELPHILIPPINES
(SPV-AMC) INC. (GSPI)
Suarez Illigan City - 9200,

Philippines.

Also at:-
Renaissance Court,
3-5 Woods Mews,
Mayfair, London,
UK-W1K7DN

And Also at:-
M/S BALASORE ALLOYS LTD.,
71, Park Street,
Park Plaza,
Kolkata - 7000016.

Contents of the execution petition

3. In Column 5 of the execution petition it is stated that a sum of US\$ 72,421,582 had been received by the DH. It is then stated in Column 6 that earlier an execution petition under Diary No. 198662/2012 was filed on 13th December 2012 against the JDs. Since objections were raised by the Registry, the petition was taken back and not re-filed. In Column 7 it is stated that after adjustment of the amount already received, the DH was entitled to receive from the JDs as on 15th August 2014 US\$ (USD) 363,561,183.85 equivalent to Rs. 1678,91,83,790 (average exchange rate of 1 USD = Rs. 46.1798, calculated as per the base date of payment by STC to Bank) which was inclusive of interest @ 13.50% per annum. In Column 9, the names of three JDs are set out as entities/persons against whom the execution is sought in the present petition.

4. In Column 10 of the execution petition which specifies the DH to indicate “in what manner Courts assistance is sought”, it is stated as under:

“By issuing warrants of attachment, sale of attached properties, by issuing garnishee orders, and by taking over control of all assets of the Judgment Debtors in India and by issuing certificates to foreign countries declaring the amounts of

money not realized in India so that decree can be executed by attached and sale of assets of the Judgment Debtors lying abroad, namely, Philippines, U.K. Bosnia and Nigeria and also by issuing warrant of arrest and detaining the Judgment Debtors in respect of the unrealized amount at the cost and expenses of the Applicant.”

5. The DH has in the execution petition sought execution of the SA and the FSA, as well as the personal guarantee given by Mr. Pramod Mittal, Chairman of GSHL and GSPI, to STC. It is also prayed that orders should be passed for “attaching and selling all the shares and other assets” of JDs 1 and 2 as mentioned in Annexure P-1, P-2 and P-3. *Inter alia* it is prayed that assets of the JDs lying in Philippines, United Kingdom, Bosnia and Nigeria should be attached and sold.

Applications filed by the DH along with the petition

6. Along with the execution petition the following applications were filed by the DH:

(a) Execution Application No. 697 of 2014 under Order XXI Rule 11 (2) of the Code of Civil Procedure 1908 (‘CPC’) read with Section 151 CPC praying that all the shares and other assets of the JDs 1 as mentioned in Annexure P-1, P-2 and P-3 should be attached and sold; the interest of the JDs 1 and 2 in the Award dated 9th May 2012 registered in the Singapore International Arbitration Centre (‘SIAC’) should be attached; warrant of arrest be issued to detain in civil prison the Directors and Principal Officers of the JDs 1 and 2 and JD No. 3 till realization of the entire dues.

(b) Execution Application No. 698 of 2014 under Order XXI Rule 46/46A/46B CPC read with Section 151 CPC praying that the shareholdings/shares standing in the name of the JDs in the companies as referred in Annexure P-5 annexed with the execution

petition should be attached; the garnishees (names of companies as referred in Annexure P-5) be directed not to make over to the JDs any payment of dividends arising out of the shares and movables; the garnishee companies to be directed not to entertain any application from the JDs for transfer of shares to third party and restrained from transferring shares in the name of the third parties.

7. What is relevant as far as the present petition is concerned is the list of investments of JD No. 1, i.e., GSHL in other companies which includes Balasore Alloys Limited ('BAL') and GSPI which is registered in Philippines. On 29th August 2014 the DH also filed Annexure P-5 setting out the schedule of investments in equity shares and preference shares in India of GSHL as on 14th November 2011.

8. During the course of hearing Mr. R.K. Anand, learned counsel for the DH, handed over a list of properties of the JDs which sets out the particulars of equity shares and preferential shares held by GSHL in Ispat Industries Limited (now known as JSW Ispat Limited) which has a corporate office in Chanakyapuri, New Delhi, BAL having a corporate office in New Delhi and Barclays Bank RCI Bonds which has a branch office in New Delhi.

9. A preliminary objection was raised by the JDs at the hearing on 5th March 2015 that the present execution petition is not maintainable before this Court since no properties of the JDs are within the jurisdiction of this Court. Further the JDs themselves were not carrying on business or ordinarily residing within the territorial jurisdiction of this Court. Mr. Anand on 5th March 2015 sought time to examine the position and address arguments.

More applications by the DH

10. Subsequent to the hearing on 5th March 2015 the DH filed the following applications:

(a) Execution Application No. 199 of 2015 under Order XXI Rules 37, 38, 40 of CPC read with Section 51 (C) CPC seeking directions that the Directors and the Chairman of JDs 1 and 2 and JD No. 3 be arrested and detained till the execution of the Award, specially JD No. 3, who had personally committed to pay the amount referred to in the Award.

(b) Execution Application No. 200 of 2015 under Order XXI Rule 41 CPC read with Section 151 CPC praying that JD No 3 be directed to be orally examined to ascertain what debts are owed to the JDs; to ascertain the details of properties and assets of the JDs in various group companies as well as properties available not only in Delhi but other parts of India and abroad for satisfying the decree.

11. In E.A. 199 of 2015 it has *inter alia* been averred that proceedings were initiated against the JDs under Section 138 of the Negotiable Instruments Act, 1881 ('NI Act') before the learned Metropolitan Magistrate ('MM') New Delhi against the Directors, Chairman and principal officers of JDs 1 and 2 as well as JD No. 3. The attempt by the JDs to seek exemption from personal appearance in those proceedings failed with this Court by its order dated 19th February 2015 in Criminal Miscellaneous Application No. 2707 of 2014 requiring them to appear before the concerned Court of the MM.

12. During the course of the hearing Mr. Anand pointed out that the JDs are now required to appear before the learned MM on 12th March 2015

and when they appear on that day before the learned MM, they would be within the jurisdiction of this Court, at which time pursuant to orders of this Court in the present execution petition they could be arrested.

13. In EA No. 200 of 2015, in para 18, it has been averred that “The Respondents are having sufficient property not only in Delhi but in other part of India and abroad, which the Respondents have deliberately not disclosed at the time of signing of Settlement Agreement”.

Submissions of counsel for the DH

14. The submissions of Mr. R.K. Anand, learned counsel for the STC, are as under:

(i) In its decision in ***Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd. 2009 (3) Arb LR 524 (Del)*** this Court drew a distinction between the word “Court” occurring in Section 36 and 49 of the Act. The Court noted that the word “Court” in Section 36 was only used “to describe the manner of enforcement, i.e., as a decree of the Court”.

(ii) Therefore, for the purposes of Section 36 of the Act, the Award did not itself become a decree but the process of its enforcement had to be such that it should be treated to be a decree. In other words, the DH could invoke the jurisdiction of this Court if any of the JDs happened to be found in or if any of their properties were located in its territory. In this context reliance was placed on the decision of the Supreme Court in ***Paramjeet Singh Patheja v. ICDS Limited (2006) 13 SCC 322***.

(iii) Referring to the decision in ***Krishna Prasad v. Bidya Nanda AIR 1918 Patna 427*** and ***Arratoon and Co. v. Mimraj Puranmull***

AIR (34) 1947 Calcutta 262 it was submitted that if the DH has information that any of the JDs is likely in the near future to come within the jurisdiction of this Court, the DH could apply for issuance of warrants of arrests of the JDs.

(iii) Referring to the decision in **A.K. Subramania Chettiar v. Ponnuswami Chettiar AIR 1957 Madras 777**, it was urged that the Court has a discretion under Order XXI Rule 21 CPC to simultaneously proceed against the person and the properties of the JDs. The decision of the Supreme Court in **Jolly George Varghese v. The Bank of Cochin (1980) 2 SCC 360** was distinguishable inasmuch as it did not hold that the executing Court can straightway direct the arrest of JDs who may be found within the jurisdiction of the Court.

(iv) Relying on the decisions of the division Bench of the Calcutta High Court in **D.V.M. Construction v. Srei Infrastructure Finance Limited AIR 2009 Calcutta 227**, this Court in **Cholamandalam Investment & Finance Co. Ltd. v. CEC Ltd. 1995 (34) DRJ 379** and **Chokha Nand Madan v. Asian Exhibitors 1989 Raj.L.R. 511** it was submitted that for the purposes of Order XXI Rule 41 CPC, it would be open to this Court to require JD No. 3 to appear before it to depose whether any of the properties of the JDs were located within the jurisdiction of the Court.

(v) In terms of the Agreement dated 10th September 2008 between STC and GSHL and an 'Equitable Pledge Deed' dated 10th September 2008 executed by GSHL pledging in favour of STC its shares in GSPI (copies of which were handed over in Court), share certificates of the shares held by GSHL in GSPI were physically

available with the DH in Delhi. Therefore, this Court would have the jurisdiction to order the attachment and sale of those shares.

Submissions of counsel for the JDs

15. Countering the above submissions it is submitted by Mr. Rajiv Nayar, learned Senior counsel for JDs 1 and 2, that none of the assets of the JDs, moveable or immoveable, were located within the jurisdiction of this Court. Even in terms of the memo of parties filed by the DH with the execution petition, JDs 1 and 2 had their registered and other offices abroad and JD No. 3 was at three addresses two of which were abroad and the third at Kolkatta. Mr. Nayar, pointed out that nowhere in the original execution petition had the DH disclosed that any of the assets of the JDs were within the territorial jurisdiction of this Court. The statement made subsequently in Execution Application No. 200 of 2015 was vague and clearly an afterthought without any supporting material and particularly after the hearing on 5th March 2015 when a specific objection was raised as to the jurisdiction of the Court to entertain the petition.

16. Referring to the decision dated 28th February 2012 of this Court in ***Religare Finvest Limited v. Ranjit Singh Chouhan*** (Execution Petition No. 67 of 2012), Mr. Nayar submitted that since the Award itself was executable as a decree, "the Court of the place where the property/money against which the decree is sought to be enforced is situated would have inherent jurisdiction to entertain the execution." Mr. Nayar also referred to the decision of the Supreme Court in ***Mohit Bhargava v. Bharat Bhushan Bhargava AIR 2007 SC 1717*** to urge that if the DH sought to proceed against a property situated outside the jurisdiction of the Court which passed the decree, he had to get the decree transferred to the appropriate court for execution on moving the executing court in that behalf. In the context of an Award under the Act, such transfer was

unnecessary since the Award itself was a decree. It could be enforced as such in a Court within whose jurisdiction the JDs or any of their properties were located. Reliance was placed on the decision in ***Mechano Paper Machines Limited v. NEPC Papers and Boards Limited* AIR 2012 Cal 26** to urge that under Section 39 (4) CPC, a civil Court that passed a decree was debarred from executing it against a person residing or carrying on business or having properties situated outside the jurisdiction of such Court.

17. Mr. Nayar submitted that although the share certificates in respect of the shares held by GSHL in GSPI are physically available in Delhi with the DH, that by no means conferred jurisdiction on this Court to pass orders for attaching those shares. Mr. Nayar pointed out that none of the shares held by the JDs were in companies having their registered offices in Delhi. Therefore, only on the basis that those companies in which shares are held by any of the JDs have their corporate or branch offices (and not registered offices) in Delhi would not confer jurisdiction on this Court to pass orders attaching those shares.

18. Mr. Nayar pointed out that the assertion in Execution Application No. 200 of 2015 that the Petitioner had sufficient properties located in Delhi was supported by an affidavit of the authorized officer of the DH with the verification not being in terms of Order XIX Rule 3 CPC. In this context he placed reliance on the decision of the Supreme Court in ***R.P. Moidutty v. P.T. Kunju Mohammed* AIR 2000 SC 388**.

19. Referring to the decision of the Supreme Court in ***Jolly George Varghese v. The Bank of Cochin*** (supra) Mr. Nayar pointed out that unless the executing Court having jurisdiction was satisfied that the JDs were unable to satisfy the decree or were deliberately avoiding execution,

it would not resort to the coercive process of issuing warrants of arrest or detention in civil prison.

Is the Award executable as a decree?

20. In the first place this Court would like to examine the legal position regarding the nature of the Award under the Act for the purposes of enforcement. In the present case, both the SA and the FSA were arrived at before Conciliators and they have been treated as an Award in terms of Section 73 of the Act. Both the SA and FSA were entered into at New Delhi.

21. Under Section 36 of the Act the Award shall be enforced under the CPC “in the same manner as if it were a decree of the Court.” Mr. Anand referred to Section 49 which deals with “Enforcement of foreign awards”, and drew attention to the fact that Section 49 states “the award shall be deemed to be a decree of that Court” whereas Section 36 stated that the Award “shall be enforced ...in the same manner as if it were a decree of that Court.” However, the Court does not see why any reference at all should be made to Section 49 since the Award of which enforcement is sought is plainly a domestic Award. The present petition is under Section 36 of the Act seeking its enforcement. Section 36 by a deeming fiction requires the Court to proceed to enforce the Award under the CPC by treating it to be a decree of the Court. Therefore, the Act is unambiguous that for the purposes of enforcement, the Award is in fact a decree. It is straightaway enforceable as such. This is a major departure from the legal position under the Arbitration Act 1940 which required the award to be made rule of a Court and a decree to be then drawn up in terms thereof.

Jurisdiction of the Court

22. The question as to which would be the Court which has jurisdiction to enforce an Award under the Act was examined in ***Daelim Industrial Co. Ltd.*** (supra) where the Court was dealing with an execution petition seeking enforcement of a foreign award which was pronounced in Calcutta and challenged in the District Court at Golaghat, Assam. The award was subsequently partly upheld by the High Court of Guwahati. An execution petition was filed before this Court since the JD's assets were located here. The JD urged before the Court that it was the Court at Golaghat which had entertained the application under Section 34 of the Act which had to be first approached for a transfer of the decree from that Court to this Court. The said objection was negated by this Court by holding that the territorial jurisdiction for the purpose of enforcement of the Award was determined by the location of the JD or its property. It was held that the Court which disposes of an application under Section 34 of the Act is not required and in fact does not pass any decree in terms of the Award and the Award itself was executable as a decree. It could be enforced in the Court within whose jurisdiction the properties against which the decree is sought to be enforced is located or the JD is located.

23. The Madras High Court also took a similar view in ***Kotak Mahindra Bank Ltd v. Sivakama Sundari S. Narayana S.B. Murthy (2011) 6 CTC 11*** where it observed as under:

“25. In the absence of any provision in the 1996 Act, requiring a Court to pass a decree in terms of the Award (except in terms of Section 34) and in the absence of any provision in the 1996 Act making the Arbitral Tribunal a Court which passed the decree and in the absence of any provision anywhere making the Court within whose jurisdiction an award was passed as the Court which passed the decree, it is not open for any executing Court (i) either to demand transmission from any other Court; (ii) or to order transmission to any other Court.”

24. This Court has in ***Religare Finvest Limited v. Ranjit Singh Chouhan*** (supra), held that since the Award itself is a decree, there is no question of transferring the decree to the Court within which the property/money is located. It was clarified that it will be open to the DH to straightway approach the competent Court for enforcement of the Award in accordance with law.

25. The issue in ***Paramjeet Singh Patheja*** (supra) was whether an arbitral award was a decree for the purposes of Section 9 (2) of the Presidency Towns Insolvency Act 1909 and not for the purposes of Section 36 of the Act. That decision is therefore not relevant to the issue at hand. In ***Mechano Paper Machines Limited v. NEPC Papers and Boards Limited*** (supra) and ***Mohit Bhargava v. Bharat Bhushan Bhargava*** (supra) the Court was dealing with the question of transfer of a decree passed in a civil suit. There was no occasion to consider the position regarding enforcement of an Award under the Act. In any event the ratio of both the decisions was to the effect that enforcement of a decree could take place only before a Court within whose jurisdiction the JDs or their properties is located.

26. In the present case admittedly none of the JDs is located within the jurisdiction of this Court. As the memo of parties itself shows the location of the registered offices of JDs 1 and 2 is outside India. The three addresses given for JD No. 3 are outside Delhi - two are abroad and the third is in Kolkata.

Location of shares

27. As regards the properties of the JDs, the DH has proceeded on a misconception that the mere fact that the companies in which the JDs hold shares have their corporate offices in Delhi would somehow confer

jurisdiction on this Court to proceed to direct attachment and sale of such shares. The DH is under a further misconception that merely because it is in possession (in Delhi) of the share certificates evidencing the shareholding of GSHL in GSPI, Philippines this Court would have jurisdiction to order the attachment and sale of those shares.

28. While shares in a company are intangible property, share certificates by themselves are not. They are only the evidence of shareholding. Under Section 84 of the Companies Act, 1956, “a certificate, under the common seal of the company, specifying any shares held by any member, shall be *prima facie* evidence of the title of the member to such shares.” In ***R Vishwanathan v R.S. Abdul Wajid*, AIR 1963 SC 1** the Supreme Court explained that the situs of the shares of a company was its registered office. The Supreme Court referred to the decisions in ***Brassard v. Smith (1925) A.C. 372*** and in ***Erie Beach Co. v. Attorney General for Ontario (1930) A.C. 1961*** wherein it was held that “the situs of the shares which are movables may normally be the place where they can be effectively dealt with.” In other words, the place where the register is required by law to be kept determines the locality of the shares. In ***C.A. Pacific Finance Ltd., Re, (2000) 1 BCLC 494*** it was held that “it is well established that shares are simply bundles of intangible rights against the company which had issued them. Share certificates are not valuable property in themselves – they are just evidence of the true property, which are the proportionate interests of the shareholders in the ownership of the company.” The decisions in ***Motorola Inc v. Modi Wellvest 116 (2005) DLT 524*** and ***Nokia Solutions and Networks v. Union of India*** [decision dated 27th January 2015 in W.P. (Civil) No. 7011 of 2012] are to the same effect.

29. Therefore, merely because the DH has in its possession in Delhi the share certificates issued by GSPI to evidence the holding of its shares by GSHL cannot confer jurisdiction on this Court to pass orders in respect of those shares. Further, GSPI is incorporated in Philippines. In terms of the law explained in the above decisions the situs of GSPI's shares are in Philippines. GSPI's shares cannot be "effectively dealt with" here. Likewise the mere fact that the corporate or branch office of the companies whose shares held by the JDs are within the jurisdiction of this Court (while their registered offices are outside Delhi) would not confer jurisdiction on this Court to pass orders for attachment and sale of those shares. The situs of those shares are at the registered offices of the concerned companies.

30. As of date, other than the above shares, it is not shown that there is any other property, movable or immovable, of the JDs located within jurisdiction of this Court. The statement made in para 18 of EA No. 200 of 2015 is indeed a vague one. The affidavit in support thereof indeed is not in accordance with the requirement of Order XIX Rule 3 CPC, as explained in the decision of the Supreme Court in ***R.P. Moidutty v. P.T. Kunju Mohammed*** (supra). In any event, it appears to be an afterthought, and introduced only to overcome the objection pointed out by the JDs at the hearing on 5th March 2015. Without any supporting material, even *prima facie*, it would not be safe for the Court to proceed to exercise jurisdiction on the basis of such an unverified averment. Consequently, this Court is not persuaded to hold that it has the jurisdiction to entertain the present execution petition insofar as it seeks enforcement of the Award by proceeding against the properties of the JDs.

Arrest and detention of the JDs

31. The Court now proceeds to deal with the other contention of Mr. Anand that this Court should straightway proceed to issue warrants of arrest against the Chief Executives or Principal Officers of JDs 1 and 2 and JD 3 since they are expected to appear in the Court of the learned MM New Delhi in the proceedings under Section 138 of the NI Act on 12th March 2015.

32. At the outset, the Court would like to observe that the decisions in ***Krishna Prasad v. Bidya Nanda*** (supra) and ***Arratoon and Co. v. Mimraj Puranmull*** (supra) were rendered in the pre-independence pre-constitutional era. Even the decision of the Madras High Court in ***A.K. Subramania Chettiar*** (supra) which appears to suggest that it would be open to the DH to seek enforcement of Award either against the property or the person or against both simultaneously was rendered without reference to the provisions of the Constitution.

33. A significant shift in the legal position was brought about by the decision of the Supreme Court in ***Jolly George Varghese*** (supra). The executing Court can no longer straightway order the arrest and detention of a JD in a civil prison under Section 51 (c) read with Order XXI Rules 37 to 40 CPC in terms of the law explained in ***Jolly George Varghese*** (supra). In the said decision, the Supreme Court referred to the Fifty-fourth Report of the Law Commission which, *inter alia*, stated:

“Imprisonment is not to be ordered merely because like Shylock, the creditor says:

‘I crave the law, the penalty and forfeit of my bond’

The law does recognize the principle that “Mercy is reasonable in the time of affliction, as clouds of rain in the time of drought”.

34. Justice Krishna Iyer writing for the Court in *Jolly George Varghese* (supra) drew on both Article 21 of the Constitution and Article 11 of the International Covenant on Civil and Political Rights ('Covenant') to remove the inherent "unreasonableness and "unfairness" in the procedure contemplated by Section 51 (c) CPC. In para 9 it was observed as under:

“We concur with the Law Commission in its construction of Section 51 CPC. It follows that quondam affluence and current indigence without intervening dishonesty or bad faith in liquidating his liability can be consistent with Article 11 of the Covenant, because then no detention is permissible under Section 51 CPC.”

35. In para 11 of the same decision it was observed as under:

“11. The words which hurt are “or has had since the date of the decree, the means to pay the amount of the decree”. This implies, superficially read, that if at any time after the passing of an old decree the judgment debtor had come by some resources and had not discharged the decree, he could be detained in prison even though at that later point of time he was found to be penniless. This is not a sound position apart from being inhuman going by the standards of Article 11 (of the Covenant) and Article 21 (of the Constitution). The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recalcitrant disposition in the past or alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here consideration of the debtor’s other pressing needs and straitened circumstances will play prominently. We would have, by this construction, sauced law with justice, harmonised Section 51 with the Covenant and the Constitution.”

36. That the Court in *Jolly George Varghese* (supra) stopped short of pronouncing on the constitutional validity of the proviso to Section 51 read with Order XXI Rule 37 CPC is evident from the following observations in para 12:

“12. The question may squarely arise some day as to whether the proviso to Section 51 read with Order 21 Rule 37 is in excess of the Constitutional mandate in Article 21 and bad in part. In the present

case since we are remitting the matter for reconsideration, the stage has not yet arisen for us to go into the vires, that is why we are desisting from that essay.”

37. The coercive process of arrest and detention of a JD ought not to be resorted to by an executing Court in the very first instance even before ascertaining whether the decree can be satisfied by the JD. Such an order would be inherently unfair, unreasonable and contrary to the law explained in **Jolly George Varghese** (supra). In any event, such an order can, if at all, be passed only by a Court that otherwise has jurisdiction to entertain the execution petition in respect of any of the properties of the JDs located within its jurisdiction or against the JDs if any of them is ordinarily resident there. As far as this Court is concerned, neither of the above requirements is satisfied. The mere fact that the JDs are likely to appear before the Court of the MM in New Delhi at a future date, although none of them is ordinarily resident within its jurisdiction, would not confer jurisdiction on this Court to straightaway order their arrest and detention in these proceedings.

Examination of JD 3

38. As far as the prayers sought under Order XXI Rule 41 CPC, the question of requiring JD No.3 to appear and make a statement whether the JDs’ properties are within the jurisdiction of this Court cannot arise unless the Court otherwise has jurisdiction to entertain the petition. The decisions in **Chokha Nand Madan** (supra) or **D.V.M. Construction or Choramandalam Investment & Finance Co. Ltd.** (supra) do not suggest that the JDs in those cases were outside the jurisdiction of the executing Court and yet were required to appear to give a statement under Order XXI Rule 41 CPC.

39. The execution petition and the pending applications are accordingly dismissed with liberty to the DH to approach the appropriate Court for enforcement of the Award in accordance with law.

S. MURALIDHAR, J.

MARCH 9, 2015

Rk

