

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1422 OF 2018

SK MUNEER SK HUSSAIN
VERSUS
ANTIKABAI YADAV GAWALI AND OTHERS

Advocate for Petitioner : Shri D.R. Kale Patil.

CORAM : RAVINDRA V. GHUGE, J.
Dated : 08th February, 2018

PER COURT :

1. The petitioner is aggrieved by the order dated 20/09/2017 below Exhibit 37, 02/11/2017 below exhibit 43 and 09/01/2018 below Exhibit 50 in Regular Darkhast (MACP) No. 221/2008.

2. I have considered the strenuous submissions of the learned advocate for the petitioner, who has primarily raised two issues. Firstly, that the decree is sought to be executed after a passage of 12 years and hence, it is non-executable. Secondly, that before issuing the warrant for detaining the judgment debtor in Civil imprisonment, the procedure laid down under Order XXI Rule 37 of the Code of Civil Procedure, has not been followed. Reliance is placed on the judgment of the Hon'ble Apex Court in the matter of **Bimal Kumar and another Versus**

Shakuntala Debi and others [2012 AIR (SC) 1586] and the judgments of this Court in the matter of **Satish Ramchandra Shahapurkar Versus Gorakshnath Madhavrao Pund [2010 (1) AIR Bom R 591]**, and in the matter of **Pundlik Mahadu Nazire Versus Maharashtra State Farming Corporation [1992 (1) Mh.L.J. 455]**.

3. After considering the submissions of the learned counsel for the petitioner, the judgment cited and the record available, I find that this is a classic case of a judgment debtor having kept the execution proceedings at bay for a period of 10 years, and yet, despite his conduct, which I have noted below, contends that the procedure laid down in law has not been followed.

4. In so far as the first issue raised by the petitioner about limitation is concerned, it needs to be noted that the Trial Court/Motor Accidents Claims Tribunal at Aurangabad, delivered its verdict on 31/10/1988 in MACP No. 72/1987. Copy of the said judgment is not placed on record. Thereafter, the judgment debtor preferred First Appeal No. 671/1989, for challenging the judgment and decree before this court. By judgment and decree dated 29/04/2008, the First Appeal was dismissed with a reasoned order and the

judgment of the Tribunal merged with the judgment of this Court. During the pendency of the appeal, this Court had granted a conditional stay and the judgment debtor was directed to deposit some amount. In pursuance to the said direction, the judgment debtor deposited an amount of Rs. 15,000/-, which was received by the decree holder. The amount recoverable today is about Rs. 2,36,000/-.

5. Contention is that since, Regular Darkhast No. 221/2008, was lodged after about 19 years from the judgment of the tribunal, the said decree is non-executable and is beyond the limitation period of 12 years as is prescribed by Article 136 of the Limitation Act, 1963. It is provided under Article 136 that the execution of a decree would be permissible within 12 years when the decree or order become enforceable and whether the decree or any subsequent order directs any payment of money or the delivery of the property to be made at a certain date or at recurring periods.

6. As is noted from the record, this petitioner had preferred First Appeal in 1989, which came to be dismissed on 29/04/2008. Naturally the conditional stay granted earlier, stood vacated by the judgment of this Court. It is,

thereafter, that the judgment and decree of the Tribunal became enforceable under Article 136.

7. The Hon'ble Apex Court in the matter of **Chandi Prasad and others Versus Jagdish Prasad and others (3 Judges bench)[2004(8) SCC 724 SCALE]**, has relied upon its earlier judgments and has concluded that the doctrine of merger would render the judgment and decree merged in the judgment of the Superior Court. Relying upon the judgment in the matter of **UJS Chopra Versus State of Bombay [AIR 1955 SC 633]**, it was concluded that a judgment of the High Court, delivered in exercise of its appeal powers entertaining an appeal, notwithstanding whether it is allowed or dismissed the appeal, would replace the judgment of the Lower Court and therefore, the judgment of this Court would be treated as final.

8. The Hon'ble Apex Court has concluded, while dealing with the doctrine of merger, that the said doctrine is based on the principles of propriety in the hierarchy of the justice delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate Court. The merger of a decree would take place irrespective of the

fact as to whether the appellate Court happens to confirm or modify or reverse the decree passed by the Trial Court. It is only when a Special Leave Petition is dismissed by the Apex Court summarily, that the doctrine of merger would not apply as such an appeal has been dismissed summarily.

9. Considering the law laid down by the Hon'ble Apex Court in the matter of Chandiprasad's case (Supra), the judgment and decree of the Trial Court would merge in the judgment and decree of this Court, by which, the First Appeal was dismissed after having being admitted for 20 years and a conditional stay had been granted. When this Court dismissed the First Appeal filed by the petitioner herein and vacated the conditional stay, the decree became executable.

10. Considering the above, the first contention of the petitioner is without merit.

11. Order XXI Rule 37 reads as under :

“Discretionary power to permit judgment debtor to show cause against detention in prison.- (1) Notwithstanding anything in these rules,

where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court shall, instead of issuing a warrant for his arrest, issue a notice calling upon on him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.

(2) Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.”

12. Learned counsel for the petitioner has strenuously canvassed that, before the judgment debtor can be sent to prison, Order XXI Rule 37 of the Code of Civil Procedure is to be followed. This requires no debate. The judgments cited by the learned counsel are with regard to the said aspect.

13. Contention is that during the execution of a decree

for the payment of money, though the judgment debtor can be arrested and detained in civil prison in pursuance to the application made for the said purpose, the Court shall, instead of issuing a warrant of arrest, issue a notice to call upon him to appear before the Court on the date specified in the notice and to show cause why he should not be committed to the civil prison.

14. I find that the proviso to Rule 37 under Order XXI indicates that such a notice shall not be necessary if the Court is satisfied that, with the object or effect of delaying the execution of the decree, the judgment debtor is likely to abscond or leave the local limits of the jurisdiction of the Court. Order XXI Rule 37 (2) provides that where appearance is not made in obedience to the notice, the Court shall, if the decree holder so desires/requires, issue a warrant for the arrest of the judgment debtor.

15. In the light of the above, it needs to be seen from the record available as to whether the petitioner/judgment debtor has acted in a manner which would be covered by Clause 2 under Rule 37 of Order XXI. The decree holder had moved an application Exhibit 24 on 24/09/2013, seeking a direction to send the judgment debtor to civil

imprisonment. The executing Court had ordered on 24/09/2013, that since the judgment debtor has refused to accept the notice, a notice be issued under Order XXI Rule 37 (1).

16. The decree holder once again made an application Exhibit 31 on 01/11/2014, praying for sending the judgment debtor to civil imprisonment. Once again the executing Court issued notice under Order XXI Rule 37 (1). Yet the appearance of the judgment debtor could not be secured. The decree holder then once again made an application Exhibit 36 on 11/12/2015, seeking issuance of a notice to send the judgment debtor to civil imprisonment. The Trial Court ordered on 11/12/2015, that before the judgment debtor could be detained in civil imprisonment, notice be issued and the decree holder would furnish the details about the movable and immovable properties of the judgment debtor.

17. Since, the above exercise was rendered futile, the decree holder become exasperated and moved application Exhibit 37 giving the detailed postal address of the judgment debtor and prayed for sending him to civil imprisonment. After notice was again issued and the

judgment debtor refused to accept the notice, the executing Court passed an order on 20/9/2017, observing that efforts under Order XXI Rule 37 to secure his presence had failed and hence, the arrest warrant be issued. Till today, the judgment debtor has succeeded in evading arrest. A further order was passed by the executing Court on 2/11/2017, on the application filed by the decree holder praying for execution of the arrest warrant with the aid of the police. After considering the bailiff report and upon taking into account all the earlier circumstances, the executing Court ordered police aid on 02/11/2017.

18. It is, thereafter, that the judgment debtor moved an application on 11/12/2017, Exhibit 50, wherein skeletal pleadings were put forth solely contending that the decree cannot be executed as the execution proceedings have been filed beyond 12 years. By order dated 13/12/2017, the executing Court granted time to the advocate for the judgment debtor on his request. It is, thereafter, that the impugned order dated 09/01/2018, has been passed rejecting application Exhibit 50 filed by the judgment debtor.

19. The petitioner judgment debtor has made every

effort to frustrate the decree holder by initially refusing to appear before the Executing Court, thereby leaving no option to the Executing Court to pass an order of his arrest.

20. Taking into account the fact situation as noted in paragraph Nos. 16, 17 and 18, it is evident that the Executing Court has followed the procedure as is prescribed under Order XXI Rule 37 of the C.P.C.

21. Considering the above, this petition is devoid of merit and therefore, stands dismissed.

(RAVINDRA V. GHUGE, J.)

S.P.C.