

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 22nd February, 2018**

+ **EX.P. 16/2018 & EA No.54/2018 (u/O XXI R-41 CPC).**

M.L. GUPTA

..... Decree Holder

Through: Mr. Manish Vashisht, Mr. Sameer
Vashisht and Ms. Trisha Nagpal,
Advs.

Versus

**AERENS GOLD SOUK INTERNATIONAL
LTD. & ANOTHER**

..... Judgement Debtors

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

**EA No.55/2018 (for exemption) and EA No.56/2018 (for exemption from
filing certified copy of decree sheet).**

1. Allowed, subject to just exceptions.
2. The applications stand disposed of.

EX.P. 16/2018 & EA No.54/2018 (u/O XXI R-41 CPC).

3. Execution is sought of a money decree dated 3rd January, 2018 of recovery of Rs.5,90,62,500/- from judgment debtor no.1 and Rs.5,00,00,000/- jointly and severally from the judgment debtors no.1&2 namely Aerens Gold Souk International Ltd. and M/s. Aerens Projects & Infrastructure Pvt. Ltd., both with interest at 18% per annum from the date of filing of the suit till realisation. A sum of Rs.12,72,79,687/- is stated to be due under the decree from the judgment debtor no.1 and a sum of Rs.10,77,50,000/- is stated to be due from the judgment debtors no.1&2, as on the date of filing of this Execution Application.

4. The decree holder, in para 10 of the Execution Application,

whereunder the decree holder is required to state the “Mode in which assistance of the Court is required” has stated (i) by directing the judgment debtor no.1 to pay Rs.12,72,79,687/- and judgment debtors no.1&2 to pay Rs.10,77,50,000/-; and, (ii) in the event of judgment debtors failing to pay the said amount, the Managing Director of the judgment debtor no.1 namely Amit Gupta and Managing Director of judgment debtor no.2 namely Gaurav Gupta be arrested and be sentenced to civil imprisonment. The affidavit accompanying the Execution Application merely confirms the contents of the Execution Application to be correct and does not state anything further.

5. The counsel for the decree holder states that notice of the Execution Application be issued and the judgment debtors be asked to disclose their assets.

6. The question which arises for consideration is, whether the Execution Application as filed is maintainable.

7. The mode of execution of a money decree, as the subject decree is, under Order XXI Rule 30 of the Code of Civil Procedure, 1908 (CPC) is prescribed as, by the detention in the civil prison of the judgment debtor, or by the attachment and sale of his property, or by both.

8. As far as the mode of execution prescribed of, by detention in civil prison of the judgment debtor is concerned, not only does Order XXI Rule 11A provide that where an application is made for arrest and detention in prison of the judgment debtor, it shall state, or be accompanied by an affidavit stating the grounds on which arrest is applied for, Supreme Court as far back as in *Jolly George Varghese Vs. The Bank of Cochin* (1980) 2 SCC 360 has held that such mode is to be followed only on reaching a conclusion that the judgment debtor, to avoid the decree, has arranged his

affairs accordingly. The Execution Application neither complies with Order XXI Rule 11A CPC nor with the judgment aforesaid. Thus, execution sought by arrest and detention in civil prison of the Managing Director of judgment debtors is to be rejected.

9. The only other mode of execution of a money decree prescribed is by attachment and sale of the properties of the judgment debtor. The Execution Application is conspicuously quiet in this regard. I may add that it is quiet, in spite of a reading of the judgment leading to the decree, of which execution is sought, disclosing the disputes between the parties to have emanated from an Agreement by the judgment debtors to sell immovable property to the decree holder with the decretal amount being the admitted amount of earnest money received by the judgment debtors under the said Agreement to Sell. It thus appears that the property of the judgment debtors which was subject matter of sale still remains with the judgment debtors. In any case it is not the stand of the decree holder that the judgment debtors have since disposed of the said property. There is no explanation as to why the mode of execution prescribed of attachment and sale of properties of the judgment debtors is not available.

10. The question which arises for consideration is, whether it is open to a holder of a decree for money to apply for execution thereof, without pleading the mode in which assistance of the Court is required.

11. Order XXI Rule 11(2) requires a written application for execution to contain in a tabular form the particulars as prescribed therein and clause (j) whereunder requires the application for execution to contain the particulars of the mode in which assistance of the Court is required, *inter alia* whether

by attachment or by attachment and sale of any property or by arrest and detention in prison of any person or otherwise as the nature of the relief granted may require. Appendix – E of the CPC also in Form No.6 thereunder prescribes the format of an execution application. Though, the decree holder has filed the Execution Application in the format prescribed but without containing the particulars required to be contained therein, particularly in clause (j) of Order XXI Rule 11(2) and merely by paying a lip service thereto. The only mode in which execution is sought is by arrest as aforesaid and which has been dealt with above.

12. The decree holder in the present case has merely pleaded, i.e. by direction to the judgment debtors to make payment and by arrest of the Managing Director of the judgment debtors. As far as the direction sought is concerned, the same is contained in the judgment and decree itself and no further direction is required. As far as the mode of arrest and civil imprisonment is concerned, the necessary ingredients thereof are missing as aforesaid.

13. As far as request of counsel for decree holder for issuance of notice is concerned, under Rule 22 of Order XXI, issuance of notice of an Execution Application is mandatory only where execution is applied for more than two years after the date of the decree or against the legal representative of a judgment debtor or of a decree filed under Section 44A or against assignee or receiver in insolvency, where the judgment debtor has been adjudged to be an insolvent. None of the said conditions exist in the present case. Though the decree could have been executed without issuance of notice, resulting in the decree holder realising the decretal amount expeditiously, but strangely

the decree holder wants to take the long route of issuance of notice.

14. Issuing notice at the mere asking, as is being done in the present case, when law does not mandate any such notice, is found to be one of the causes of long duration for which Execution Applications are found to remain pending in this Court and in the sub-ordinate courts. Though it is open for the decree holder to, if had cared to comply with the mandate of CPC of furnishing the particulars of the properties of the judgment debtors, have warrants of attachment thereof issued and have the said properties put to sale but the decree holder, for inexplicable reasons, has shied away from doing so and wants to take the longer route to a destination for which a shorter route is available. A stitch in time by the decree holder is capable of saving literally nine dates of hearing in this execution proceeding, if notice were to be issued and thereafter pleadings were permitted to be completed. Though the decree holder does not appear to be in any hurry for recovering its money but this Court cannot be a silent spectator to its time being so abused.

15. I have wondered, whether it is open to a holder of a decree for money to, instead of furnishing the particulars required to be furnished in the application for execution i.e. the mode in which the assistance of the Court is required, straightaway ask for examination of the judgment debtor in the Court to disclose its assets, without even furnishing any explanation or justification therefor. The decree holder in the present case, in the application for execution or in the affidavit accompanying the same, has not even laid any groundwork for the same and the request is made verbally.

16. Rule 41 of Order XXI of the CPC is as under:-

“41 . Examination of judgment-debtor as to his

property— Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—

(a) the judgment-debtor, or

(b) where the judgment-debtor is a corporation, an officer thereof, or

(c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

(2) Where a decree for the payment of money has remained unsatisfied for a period of thirty days, the Court may, on the application of the decree-holder and without prejudice to its power under sub-rule (1), by order require the judgment-debtor or where the judgment-debtor is a corporation, any officer thereof, to make an affidavit stating the particulars of the assets of the judgment-debtor.

(3) In case of disobedience of any order made under sub-rule (2), the Court making the order, or any Court to which the proceeding is transferred, may direct that the person disobeying the order be detained in the civil prison for a term not exceeding three months unless before the expiry of such term the Court directs his release.”

17. Kania J. as a Judge of the Bombay High Court, in **Vallabhdas Narandas Vs. Kantilal G. Parekh** AIR 1947 Bom 430 was concerned with the question whether an application for execution in which under the column “mode in which assistance of the Court is required” it was written “by the issue of a notice under Order XXI Rule 22 of the CPC against the respondent

herein”, was an application within the meaning of Order XXI Rule 11 of the CPC. If it was one, it was within time and if it was not, limitation prescribed for execution had lapsed. The argument was, that the issue of such a notice is not a mode in which assistance of the Court can be required. It was held that the issue of a notice under Order XXI Rule 22 of the CPC is not a mode of execution and enforcement of decree.

18. A Division Bench of the High Court of Allahabad, in ***Nawab Newazish Ali Khan Vs. Raja Bhanu Pratap Singh*** AIR 1953 All 74, was also concerned with the question, whether an application for execution without containing the particulars of the mode in which assistance of the Court is required, even if filed within time, would permit the decree holder to subsequently, after the expiry of limitation, furnish the list of properties, by attachment and sale of which a money decree was sought to be satisfied. It was held that the decree holder, after twelve years of the decree, was seeking to attach fresh/new property and which could not be permitted. It was yet further held that a decree holder should not be allowed, by subsequent application made after the expiry of the period of limitation for execution of the decree, to add other properties to the list given in original application presented within the prescribed time. It was yet further held that pendency of an application for execution did not entitle the decree holder to apply to the Court to proceed against other properties of the judgment debtor.

19. Supreme Court, in ***Jugalkishore Saraf Vs. Raw Cotton Co. Ltd.*** AIR 1955 SC 376, held that the application for execution without setting out the particulars under clause (j) of Order XXI Rule 11(2) i.e. mode in which the

assistance of the Court is required, and merely seeking declaration of the applicants as assignees of the decretal debt, was not an application for execution of a decree and was not in proper form.

20. The Full Bench of the High Court of Andhra Pradesh also, in ***Kammela Somasekhara Rao Vs. Kammela Seshagiri Rao*** AIR 1960 AP 321, held that an application for execution is required to set-out all the particulars required by Order XXI Rule 11(2) of the CPC and that it is necessary to state in an Execution Application the mode in which the assistance of the Court is required and without setting out the same, the Execution Application is incomplete since any decree, to be put into execution, must say in what manner the decree is to be executed. A mere application to have a decree transferred to another Court was held to be not an application for execution.

21. The same is the view of the Division Bench of the High Court of Calcutta in ***Kasi Prosad Khaitan Vs. Moti Lall*** AIR 1959 Cal 566, holding that unless the Execution Application mentions the mode in which the assistance of the Court is required, the matter will be entirely at large and the Court or the judgment debtor will not be in a position to know what steps are proposed to be taken for execution of the decree.

22. A Division Bench of the High Court of Bombay in ***T.A. Darbar & Co. Vs. Union Bank of India*** AIR 1994 Bom 217 reiterated that setting out under the column “mode in which assistance of the Court is required”, in the Execution Application, the words “by issuing notice to the defendants under Order XXI Rule 22”, is not permissible.

23. The High Court of Bombay yet again in ***United Phosphorous Ltd. Vs.***

A. K. Kanoria AIR 2003 Bom 97 held that an application under Order XXI Rule 41 of the CPC 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. It was further held that the application under Order XXI Rule 41 of the CPC would ordinarily precede the filing of an Execution Application though it can also be filed in the pending Execution Application.

24. As far as this Court is concerned, I find a co-ordinate bench in **Chokha Nand Madan Vs. Asian Exhibitors** ILR (1989) II Delhi 295 to have held that it is open to a decree holder to seek assistance of the Court in finding out assets of the judgment debtor inasmuch as in present day circumstances, when human relationship has increasingly become impersonal, decree holder has no ordinary means to know the assets of the judgment debtor. I also find **Cholamandalam Investment & Finance Co. Ltd. Vs. CEC Ltd.** 1995 (34) DRJ 379 holding that an application under Order XXI Rule 41 of the CPC seeking examination of the judgment debtor as to their properties is to enable the Court to make discovery for the purposes of execution without delay or difficulty and it cannot be rejected by calling it roving enquiry. I may however hasten to add that the former judgment aforesaid is on no contest to the proposition being offered and neither of the said two judgments contain any detailed discussion or reasoning. The same can thus not be treated as precedents.

25. Moreover, it is not the case of the decree holder that it has no means to know the assets of the judgment debtors. Both the judgment debtors are corporate entities and which under the law applicable to them, are required

to file their annual reports and balance sheet with the Registrar of Companies with which they are registered and which records of the Registrar of Companies are open for inspection/examination by the public. It is not the plea of the decree holder that he has inspected the said records and the judgment debtors are not shown to have any assets or properties, by attachment and sale whereof the money decree can be executed. Rather, the counsel for the decree holder, on enquiry, fairly admits that no such attempt even has been made.

26. The view in the other judgments cited above supports what I have hereinabove indicated, that furnishing of particulars under Order XXI Rule 11(2)(j) i.e. of the mode in which assistance of the Court is required, is mandatory, unless the reasons for seeking exemption from furnishing such particulars are set out and the Court is satisfied therewith. Order XXI Rule 17 of the CPC titled “Procedure on receiving application for execution of decree” also requires the Court to ascertain whether the requirements of Rules 11 to 14 as may be applicable to the case have been complied with or not and if they have not been complied with, allow the defect to be remedied and if not remedied, to reject the application.

27. Though the language of Order XXI Rule 41 of the CPC is wide but cannot be interpreted as widely as to hold that in every case the decree holder, instead of doing its spadework i.e. setting out the mode in which assistance of the Court is required, simply ask for notice to be issued. If the same were to be permitted, it would nullify Order XXI Rule 11(2)(j) which requires such particulars to be furnished and Order XXI Rule 22 of the CPC which does not mandate notice of execution to be issued when applied for

within two years of the date of the decree. I have already hereinabove observed that issuing such notice leads to avoidable delays.

28. The Execution Application is thus not found to be in order and is rejected.

RAJIV SAHAI ENDLAW, J

FEBRUARY 22, 2018

‘pp’..

