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

Reserved on : 22nd October, 2019
Date of decision : 8th November, 2019

+ **CM (M) 1524/2019 & CM APPLs. 46443-44/2019**

SUBHASH AGARWAL Petitioner

Through: Mr. J. K. Bhola and Mr. Rajiv Raheja,
Advocates. (M: 9811211146)

versus

ABHISHEK ANDLEY & ORS. Respondents

Through: None.

CORAM:

JUSTICE PRATHIBA M. SINGH
JUDGMENT

Prathiba M. Singh, J.

1. Respondent No.1/Decree Holder/Plaintiff – Mr. Abhishek Andley (*hereinafter, “Plaintiff”*) had filed a suit for recovery of a sum of Rs.14,68,979/- against Petitioner/Judgment Debtor/Defendant No.1 - Mr. Subhash Agarwal (*hereinafter, “Defendant No.1”*), Respondent No.3/Judgment Debtor/Defendant No.3 - Mr. D.K. Agarwal (*hereinafter, “Defendant No.3”*) and Respondent No.2/Judgment Debtor/Defendant No.2 - their partnership firm, i.e., M/s Precision Castings (*hereinafter, “Defendant No.2”*).

2. The suit was filed in March, 2010. Vide judgment and decree dated 21st November, 2014, the suit was decreed for a sum of Rs.14,64,367/-, along with pre-suit and *pendente-lite* interest at 12% p.a. The decree has not been challenged and has attained finality.

3. In 2015, execution proceedings were filed by the Plaintiff and warrants of attachment were issued in respect of the movable properties of the three Defendants. In the meantime, Defendant No.1 filed an application, even prior to the passing of the decree, wherein he sought to be declared an insolvent. The said petition continues to remain pending. On the basis of the insolvency suit, an application was moved by Defendant No.1 for adjournment *sine die* of the execution proceedings against him.

4. The Id. ADJ had initially stayed the warrants of attachment *qua* Defendant No.1. Thereafter, an application was filed by the Plaintiff under Order XXI Rule 41 CPC seeking disclosure of assets by Defendant No.1 and praying for Defendant No.1 to undergo civil imprisonment. On 1st December, 2017, warrants of arrest were issued by the Id. ADJ against Defendant No.1, however, Defendant No.1 sought cancellation of the said warrants. The warrants of arrest were then stayed.

5. On 3rd August, 2018, the executing Court directed Defendant No.1 to disclose the bank accounts of the partnership firm, i.e., Defendant No.2, since 2010. On 17th May, 2019, detailed arguments were heard by the Executing Court in the various applications. After hearing the parties, the following order was passed:

“ Arguments heard at length on the application of JD no.1 for adjourning the matter sine die.

*Ld. Counsel for JD no.1 submits that JD no.1 has filed an insolvency petition way back in the year 2012 and the JDs do not have any money to pay the decretal amount. He relies upon judgment of **Jolly George Verghese Vs. Bank of Cochin, AIR 1980 SO 470 in his support.** Perused the same.*

On the other hand, Ld. Counsel for DH strongly opposed the stand of the JDs submitting that JD no.1

resides in a posh colony of South Delhi i.e. Safdarjung Development Area and had sufficient means to pay the decretal amount. The DH cannot be excepted to dig into the assets of the JDs.

On being inquired, JD no.1 who is present in court submits that he is aged 70 years and resides in a joint family property bearing no.C-1/66, Safdarjung Development Area, New Delhi measuring 350 square yards, on the ground floor, alongwith his wife and one son. The said son was earlier working in an advertisement company and is no longer doing any work and wife of his son is working as Deputy Director in DERC and they have two school going children. JD no. 1 further submits that his second son is settled in USA, having done his Production Engineering degree from Punjab Engineering College, Chandigarh.

On being inquired, JD no.1 submits he does not have any family disputes. However, he submits that he has no assets through which he can pay the decretal amount.

Ld. counsel for JD no.3 submits that JD no.3 had already paid Rs.3 lakhs to the DH and does not have any money to pay to the DH.

On being inquired, JD no.3 who is present in the court, submits that he is 77 years of age and lives at Panchsheel Park in a family property having area of 300 sq. yds, living there at the ground floor. He further submits that he has one son who lives in Greater Kailash and does the business of Auto parts and his two daughters are settled in U.K. He further submits that he does not have any means to pay the decretal amount.

Ld. counsel for DH submits that though the decree dated 21.11.2014 is for a sum of Rs.14.64,367/- as the principle amount, DH is even ready to forgo the interest part and is ready to accommodate the JDs to the extent that he is satisfied if they make the total payment of Rs.15 lakhs, that too by way of instalments.

However, he strongly disputes that JDs have no amounts to pay the decretal amount. He further argues that though the alleged insolvency petition was filed before the decree could be passed in the present case but said petition has not yet been allowed and JD has not been declared as insolvent.

In my considered opinion, considering the totality of facts and circumstances and the background and way of life of the JDs, no case is made out for adjourning the matter sine die.

JDs are directed to pay the decretal amount and on their failure to pay the same, let the JDs be sent to civil imprisonment for a period of 30 days on filing of PF and subsistence allowance.

Put up for further proceedings on 19.07.2019.”

6. Thus, as per the above order, the Court noted that Defendant No.1 was living in a posh colony of Safdarjung Development Area in New Delhi. He has two sons, one of whom is settled in the U.S. His daughter-in-law works as the Deputy Director in DERC. The other partner, i.e., Defendant No.3 lives in Panchsheel Park. His son is in the business of auto-parts and lives in Greater Kailash. Thus, the Court did not accept the stand of the Defendants that they do not have the wherewithal or capacity to pay. Accordingly, the Defendants were directed to pay the decretal amount or face arrest for thirty days.

7. Subsequent to this order, Defendant No.2, i.e., the second partner, agreed to pay his share of the liability, amounting to Rs.7.5 lakhs. However, Defendant No.1 continued to take the stand that he is unable to pay the amount. Thus, a direction was issued for taking all steps, in terms of the order dated 17th May, 2019, including for arrest of Defendant No.1.

8. The submission of ld. counsel for Defendant No.1 is that a reading of

Section 51 and Order XXI, Rule 37 CPC shows that an enquiry has to be conducted as to whether Defendant No.1 has the capacity to pay or not. The order of arrest cannot be passed in a routine manner. The Court would have to satisfy itself as to whether Defendant No.1 had the capacity and means to pay and has refused/neglected to pay.

9. It is further urged, that under Order XXI Rule 37 CPC, notice needs to be issued, specifically calling upon the Judgment Debtor to show cause as to why he/she should not be committed to civil prison. Without such a notice being issued, the order of arrest cannot be passed. Further, it is also argued that under Order XXI Rule 41 CPC, the statement of the Judgment Debtor needs to be recorded in order to ascertain his capacity to pay and the reasons for non-payment. Reliance is placed on the Hon'ble Supreme Court's judgment in ***Jolly George Verghese v. Bank of Cochin, AIR 1980 SC 470***, wherein the Hon'ble Supreme Court has held that committing a person to jail is an extreme step, especially for the purposes of enforcing a money decree, and that this would violate Article 21 of the Constitution of India.

10. Reliance is also placed on ***Suresh Jindal & Ors. v. Delhi Financial Corporation & Anr., 166 (2010) DLT 462*** to argue that only dishonest conduct of the borrower would attract the coercive steps of arrest and detention. The other judgments relied upon are:

- i. ***Jagdish Prasad Sharma v. M/s Standard Brands Limited, ILR (2007) I Delhi 728***
- ii. ***G. Arumugham v. M. Ramanathan [Madras High Court, C.R.P. 596/2003, decided on 20th August, 2007]***
- iii. ***Pundlik v. Maharashtra State Farming Corporation, AIR 1992 Bombay 48***

iv. *K. Karunakar Shetty v. Syndicate Bank, Manipal, AIR 1990 Karnataka 1*

11. The legal position insofar as Section 51 CPC, Order XXI Rule 37 CPC and Order XXI Rule 41 CPC is concerned, has been considered after the judgment in ***Jolly George Varghese (supra)*** in two judgments of the Supreme Court. In ***Anand Agro Chem India Ltd. v. Suresh Chandra & Ors. [Civil Appeal No. 897/2014, decided on 24th January, 2014]*** the Supreme Court was dealing with a case wherein the Directors of a company had sought a stay on the order of arrest on the ground that their sugar mill was already attached to recover the dues and the Director was a senior citizen of 65 years of age who ought not to be arrested as a defaulter. In the said case, the Supreme Court held as under:

*“11. Thirdly, because there is nothing before us to suggest that the company and its Directors are incapable of raising funds for liquidating the outstanding liability towards dues payable to the farmers. Simply because the sugar factory has been attached, is no reason for us to assume that the company or its Directors are in any financial distress thereby disabling them from making the payments recoverable from them. The fact situation in the - present case is, therefore, completely different from that in ***Jolly George Varghese*** case (supra) relied upon by Mr. Ram Jethmalani.”*

12. Thereafter, in ***Subrata Roy Sahara v. Union of India & Ors. [W.P. (Criminal) 57/2014, decided on 6th May, 2014]***, the issue of non-payment of dues by a Judgment Debtor was considered again and the Supreme Court observed as under:

*“77. ...
Having perused the judgment rendered by this Court in Jolly George Verghese’s case (supra), we are of the*

view, that the conclusions recorded therein, have a pointed and definite reference to the ability of a judgment debtor, to pay off his debt. The conclusion drawn in the above judgment, was with respect to a judgment-debtor, who was unable to pay off his debt. Accordingly it was felt, that an order of detention in prison should not be adopted, to effectuate the execution of the decree. While dealing with the preconditions expressed in the proviso to Section 51 of the CPC, we have already concluded, that the Sahara Group has enormous assets with a huge market and marketable value. It is also clear that after 5.12.2012, the two companies have not deposited a single paisa, in furtherance of the compliance of this Court's orders (dated 31.08.2012 and 5.12.2012). It is therefore clear, that despite the petitioner (and the other companies) having means to pay, they have unfairly and willfully failed to pay. It is, therefore also clear, that the petitioner in the present case is not similarly situated as the petitioner in Jolly George Varghese's case (supra). Accordingly reliance placed by the learned counsel for the petitioner on the above judgment, is wholly misconceived."

13. From the above two judgments of the Supreme Court, it is clear that the principles laid down in **Jolly George Varghese (supra)** were in a case where the Judgment Debtor was unable to pay of his debt. The Supreme Court in **Anand Agro Chem India Ltd. (supra)** considered the assets of the Judgment Debtor and came to a conclusion that an assumption cannot be made that there is financial distress either because the Judgment Debtors immovable property has been attached or if funds are not readily available. If the Judgement Debtors have the means to pay the debt, then **Jolly George Varghese (supra)** would not apply as per these two judgements of the Supreme Court.

14. A ld. Single Judge of this Court in *M/s Bhandari Engineers & Builders Pvt Ltd. v. M/s Maharia Raj Joint Venture & Ors. [Ex. P. 275/2012, decided on 11th January, 2016]* has laid down the procedure for filing of assets by Judgment Debtors under Form 16A of Appendix E of the CPC. As per the said judgment, an affidavit has to be taken by the Court in respect of the various assets of the Judgment Debtor(s) and only thereafter can the petition proceed further.

15. In the present case, a perusal of the record shows that on 8th January, 2016, warrants of attachment of the movable properties were issued against all the Defendants. Thereafter, Defendant No.1 moved an application seeking adjournment of the execution proceedings *sine die*. The Plaintiff then moved an application under Order XXI Rule 41 CPC seeking the following prayer:

“It is therefore most respectfully prayed that his Hon’ble Court may be pleased to:

(a) Direct the Judgment Debtors to file the affidavit of assets as on the date of the institution of the suit as well as the current date along with the up-to-date statement of all their bank accounts in Form 16A, Appendix E under Order 21 Rule 41(2) CPC.

(b) Direct the Judgment Debtors be directed to be detained in civil prison as per the provisions of Order 21 Rule 41(3) CPC.

(c) and to pass any such other or further orders as this Hon’ble Court may deem fit and proper in the facts and circumstances of the case and in the interest of justice.”

16. In response thereto, Defendant No.1 filed an affidavit disclosing his assets in terms of the requirements under Form 16A of Appendix E of the CPC. A perusal of the affidavit shows that he admits to jointly owning the

immovable property being C-1/66, Safdarjung Development Area, New Delhi -110016. Defendant No.1 owns 1/4th share in the said property. He also has two saving bank accounts – one in the State Bank of India and one in the Bank of India, which he claims are not operational for more than the last three years. He also lists various debts which are due to be paid by him. After making these disclosures, it is simply submitted that the proceedings be adjourned *sine die*. The affidavit filed on 8th October, 2018 shows that Defendant No.1's partnership firm – M/s Precision Castings also had immovable property which was auctioned by the State Bank of India.

17. In the impugned orders, the Executing Court has analysed the various assets of Defendant No.1, as also his family status to arrive at the conclusion that the background and standard of living of Defendant No.1 does not support the plea that he does not have any assets. The execution has been pending for the last four years. The Executing Court has given sufficient notice to Defendant No.1. In fact, the other Judgment Debtor i.e., the brother of Defendant No.1 has already agreed to pay the Plaintiff a sum of Rs.7,50,000/-. There is no reason why Defendant No.1 ought not to raise funds to pay the Plaintiff and satisfy the decree.

18. It is also revealed from the facts of the present case that Defendant No.1 and the other Judgment Debtors have borrowed huge funds from various financial institutions and banks and the mere filing of an insolvency petition by itself cannot lead to the conclusion that all execution proceedings should be stayed till the said petition is decided. The said petition clearly appears to be an attempt to ward off payments to the Plaintiff and other similarly situated parties. Defendant No.1 cannot be allowed to subvert the process of execution and payment under the decree by the mere filing of an

insolvency petition.

19. If in each and every money decree, judgement debtors are permitted to not pay without any consequences, despite they having the capacity to pay or raise funds, then the entire decree is set at naught. Decrees of courts cannot be treated as '*paper decrees*' which can be ignored or rendered worthless by the Judgement debtors on a mere plea that the capacity to pay does not exist or by merely filing a petition seeking a declaration as being insolvent. If such a course of action is permitted, there would be complete erosion of the judicial process and money decrees will never be given effect to. The plea that Defendant No.1 has no capacity to pay is not true and is also not borne out from the record. In fact, the social status of Defendant No.1 clearly reveals that Defendant No.1 is capable of raising funds to satisfy the decree. Thus, following the recent judgments of the Supreme Court in *Anand Agro Chem India Ltd. (supra)* and *Subrata Roy Sahara (supra)*, which have considered *Jolly George Varghese (supra)*, it is held that there is no illegality or perversity in the orders of the Executing Court.

20. On the facts and circumstances of the present case, no cause for interference is made out. Accordingly, the petition is dismissed. All pending applications are disposed of.

PRATHIBA M. SINGH, J.
JUDGE

NOVEMBER 08, 2019/dj