

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO.822 OF 2019

WITH

(LD-VC-OCW-69/2020)

IN

WRIT PETITION NO. 822 OF 2019.

M/s Trimurti Exports & ors.

..... Petitioners.

Vs

M/s Modelama Exports Ltd.

..... Respondents.

Shri J. Supekar and Shri S. Sayyed, Advocates Petitioners.

Shri J. Vaz and Shri T. Vaz, Advocates for the respondents.

Coram:- DAMA SESHADRI NAIDU, J.

Reserved on:- 9th September 2020.

Pronounced on:-14th September 2020.

ORDER:

Introduction:

Law is an ideal that sets standards of conduct for society. Litigation is its bye-product. But it will have neither—neither an ideal nor a standard. It is Oliver Wendell Holmes’s ‘bad man’¹. This bad man is hydra-headed; the more heads you slay, the more sprout. Here is one such case out of an inexhaustible stock². Close to a decade ago, the creditor

¹“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material ...” Oliver Wendell Holmes Jr., *The Path of the Law*, The Floating Press, 2009, p.7

²Caveat: This ‘bad man’ theory is litigation centric, not individual-centric; it applies to neither the client nor the lawyer.

gets an award; the debtor challenges it all the way up to the Apex Court—without success.

2. Then begins the excruciating execution. A few rounds of interlocutory orders and their ritualistic challenge before this Court take place. Once, one such order has, travelled up to the Supreme Court. All with predictable failures. Meanwhile, the award amount swells with interest, but that interest imposition is a flea bite for a businessman. So in the end, the choice is between paying a few crore rupees immediately and closing the litigation or spending a few lakhs and dragging it. The choice is obvious. Order 21 CPC is a procedural paradise even for a hopeless pessimist. Horses may fly.

Facts:

3. The first petitioner is a partnership firm. The second and the third petitioners, besides the second respondent, are the partners. Initially, they had a contract with the first respondent company. That contract gave rise to certain disputes, and they were arbitrated. Eventually, on 19.5.2012, the first respondent company secured an award for Rs.9.11 crore.

4. Aggrieved, the petitioners and the second respondent, who will be compendiously referred to as the partnership firm, applied to the District Judge under Section 34 of the Arbitration and Conciliation Act, 1996 (“the Arbitration Act”). But on merits, the Principal District Court

declined to interfere; it dismissed that application on 24.9.2014. Further aggrieved, the partnership firm appealed to this Court under Section 37 of the Arbitration Act. Again, this Court, through its judgment dated 7.8.2015, dismissed that appeal. Though the partnership firm once again filed a review petition, that yielded no result.

5. Unfazed, the partnership firm took the matter to the Supreme Court in a Special Leave Petition; but there too it failed.

6. On 21st September 2014, the first respondent company laid execution. It was before the Principal District Judge, North Goa, in Execution Application No.100/2015. Later, those Execution proceedings were transferred to the Principal District Judge, South Goa. In Execution Application No.100/2015, the first respondent company (now onwards called "the decree-holder") filed two applications one under Rule 41 and the other under Rule 37 of Order 21 CPC, for simultaneous execution.

7. As seen from the record, on 25.2.2016, the Executing Court issued a warrant of arrest. Questioning this warrant of arrest, the partnership firm and its partner (now onwards called "the judgment-debtors") filed WP No.295/2016. This Court dismissed it on 8.6.2016. Against that order of dismissal, the judgment debtors filed a Special Leave Petition before the Supreme Court. That one too failed on 26.3.2018.

8. Owing to the lapse of time, the earlier warrant did not survive, so on 26.11.2016, the Executing Court issued a second order for the

judgment-debtors' arrest. Again, this order of detention was challenged in WP No.187/2007 but without any success. This Court dismissed that Writ Petition on 12.4.2017.

9. In the face of these successive failures, the judgment-debtors it seems, have tried, as they called it, a negotiated settlement. The decree-holder, too, agreed. And that led to a compromise on 20.6.2017.

10. As a result of that settlement, the judgment-debtors undertook to pay Rs.9 crore as a full and final settlement—in four instalments. The terms of the settlement have also recorded that if the judgment debtors defaulted on any instalment, the decree-holder would forfeit the amounts thus far paid. In this context, we may note that as part of the first instalment, the judgment-debtors paid only 1.80 cores. Then, they defaulted. Even the judgment-debtors' counsel fairly admits that the judgment-debtors stake no claim on the amount already forfeited.

11. On 15th November 2017, the decree-holder reported to the Executing Court about the judgment debtors' failure to adhere to the terms of compromise. Besides, on 20th December 2017, the decree-holder applied under Order 21 Rule 54 CPC for the attachment of the judgment debtors' properties. On the very same day, the Executing Court attached all the properties the decree-holder showed in its application.

12. Once again in June 2018, the judgment-debtors approached the decree-holder for a settlement

13. This time, the decree-holder insisted that given its experience,

the judgment-debtors must show their bona fides by making certain substantial payments. It seems, at any rate, they had a second compromise. The judgment-debtors transferred a piece of property worth Rs.75 lakh to the decree-holder. It was in July 2018. That apart, they also paid Rs.31 lakh through an account transfer. Again, they failed to adhere to the terms of the second compromise.

14. On 12.12.2018, the Executing Court proclaimed to sell the residential bungalows and one flat of the second and the third petitioners—that is, two of the three judgment-debtors. Once the proclamation of sale was issued, the respective wives of these judgment-debtors filed objections or claim petitions. But Executing Court dismissed them on 26.3.2019. Then they challenged those orders of dismissal before this Court in First Appeal Nos.84 and 85 of 2019. Through its judgment, dated 28.6.2019, this Court set aside the Executing Court's orders and remanded the matter. Those claim petitions are still pending.

15. On 27th February 2019, the decree-holder applied for the arrest of the judgment debtors. The trial Court issued a warrant of arrest on 20th July 2019. But a week later, the judgment-debtors applied to the Executing Court to have those warrants of arrest recalled. The Court, through its order dated 3.8.2019, dismissed that application.

16. Immediately, in the third week of August 2019, the judgment debtors filed an affidavit disclosing both movable and immovable properties they allegedly owned and possessed. But the Executing Court

through its order dated 22.8.2019 rejected that affidavit. It was on the premise that the judgment debtors, among others, only provided the numbers of their bank accounts without disclosing the balances. It has felt that the judgment debtors are not bona fide in their approach. Therefore, it passed an order of rejection on 22nd August 2019. Eventually, on 27th August, it issued NBWs.

17. In the above backdrop, on 11th September 2019, the partnership firm and the two partners out of three filed this Writ Petition under Article 227 of the Constitution. In this Writ Petition the petitioners have challenged these orders of the Executing Court:

- (i) Order dated 20.7.2019, the warrant of arrest;
- (ii) Order dated 3.8.2019, refusing to recall the arrest warrant;
- (iii) Order dated 22.8.2019, rejecting the affidavit providing property details and
- (iv) The Non-Bailable Warrants issued on 27.8.2019.

18. On 23.9.2019, this Court stayed the execution and implementation of the impugned orders. While staying the impugned orders, this Court recorded the submissions advanced by the petitioners' counsel: the judgment debtors have land admeasuring 12 lac sq. mts. Out of that land, one lac sq. mts as per government valuation would fetch Rs.15 crore. And the petitioners are ready and willing to transfer that land to the decree-holder. It seems this offer has weighed with this Court, and

that has earned the judgment debtors a reprieve—one too many—from arrest.

Submissions:

Petitioners:

19. In this backdrop, Shri Jitendra Supekar, the learned counsel for the judgment debtors (petitioners) has first narrated the background facts, took me through the chronology of events, and has in the end elaborated on the bona fide efforts the judgment debtors made to satisfy the award.

20. To begin with, Shri Supekar had stressed that the Executing Court has grossly disregarded the subsequent developments. To elaborate, he has submitted that under the first settlement, the judgment debtors paid Rs.1.80 crore. But that has been forfeited under the terms of the settlement. According to him, the judgment debtors have not made any grievance about that forfeiture. And that amply demonstrates their bona fides.

21. Even under the second settlement, according to Shri Supekar, the judgment debtors transferred a piece of property worth Rs.75 lakh, besides paying about Rs.30 lakh. In this context, Shri Supekar has pointed out that the Executing Court has missed out on these developments. He has further argued that the judgment debtors have fully disclosed their assets both movable and immovable, but for no apparent reason, the Executing Court has disbelieved the affidavit. According to him, the

judgment debtors' properties under attachment are worth more than Rs.40 crore. If at all the decree-holder wants to realise the award amount, it could have had those properties brought for sale and realised the proceeds. Instead, it has been insisting on the judgment debtors' arrest.

22. On the legal front, Shri Supekar has pointed out that the Executing Court had conducted no inquiry under Rule 37 or Rule 40 of Order 21. Besides, he has also pointed out that the impugned order of arrest in annexures A, B and C do not specify the period of detention.

23. In the end, Shri Supekar has submitted that there is no ground for either the Executing Court or this Court to doubt the judgment debtors bona fides. If the Executing Court brings for sale the properties already under the attachment, it will have the entire award amount realised. According to him, under these circumstances, subjecting the judgment debtors' to arrest and confinement in civil prison is totally unwarranted.

Respondent No.1:

24. In response, Shri J. Vaz, the learned counsel for the decree-holder, has taken me through a couple of orders the Executing Court has passed earlier. According to him, those orders amply demonstrate the mala fides on the judgment debtors' part. He has also elaborated on, what he terms, all the dilatory devices they have adopted to defeat the award.

25. Shri Vaz has pointed out that even before this Court, the judgment debtors made a false representation as if they were willing to

transfer a valuable piece of property, but without any valid title at all. According to him, the decree holder's inquiry has revealed that the judgment debtors have no valid title to that piece of property. He has also stressed that the judgment debtors have other valuable properties, but they have not disclosed them to the Executing Court.

26. Based on this Court's earlier directions, now the Judgment debtors have filed a few statements of accounts regarding nine bank accounts they hold. Drawing my attention to those statements of accounts, Shri Vaz points out that the accounts reveal transaction worth crores of rupees. Yet the judgment debtors have never decided to satisfy the award. That apart, he has also drawn my attention to the fact that the present balance in the account is only a few thousands, though the realisable debt runs into about Rs.15 crore.

27. Shri Vaz has further submitted that apart from the amount forfeited under the first settlement, whatever the amounts the judgment debtors have paid later, the decree-holder is willing to account for them. He has stressed that under two settlements as the Judgment Debtors' have offered, the decree holder, has agreed to receive amount less than it is entitled to. But, even then, the judgment-debtors have not fulfilled their own undertakings and promises.

28. On the legal front, Shri Vaz pointed out that this Court ought not to entertain any writ petition under Article 227 of the Constitution against a warrant of arrest in an execution petition. It is more so when

the Executing Court's orders have become final.

29. Eventually, Shri Vaz has asserted that the orders the Executing Court passed earlier have already become final. The judgment debtors can no longer hang on to fringe technical aspects without any merits. So, he has urged to this Court to dismiss the writ petition.

30. Heard Shri Jitendra Supekar, the learned counsel for the petitioners, and Shri Joseph Vaz, the learned counsel for the first respondent. None appears for the second respondent.

Discussion:

Preface:

31. Before we begin our discussion on the merits, we should preface it with certain accepted norms of execution. First, the decree-holder can lay simultaneous execution: one for the arrest and the other for the sale of properties if any. Second, the judgment debtor may admit means to pay the decretal debt but raise other objections to the execution. Then, the Executing Court need not inquire into the means; it is a *fait accompli*. Third, in the execution proceedings, the parties' conduct, too, matters.

The Proceedings so far:

32. In the arbitration proceedings, the decree-holder claimed over 21 crores but secured the award for 9.11 crore. That was in 2012. The judgment debtors tested the award, first, under Section 34 and, later, under Section 38 of the Arbitration Act; but they failed. Eventually, the

decree-holder laid the execution for realising Rs.15,70,56,636/-. That was in 2015. By 31st October 2019, with interest the amount is said to have come to Rs.16,77,78,687/-. Not only the decree holder's counsel has contended, but also the Executing Court has noted that during most dates of hearing, neither the judgment debtor nor their counsel was present. Illustratively, from the Roznama, the decree-holder counsel picks up these dates: 16/04/2019, 04/05/2019, 04/06/2019, 15/06/2019, and 29/06/2019.

33. In the Execution Petition, the decree-holder filed two applications: one under Rule 41 and another Rule 37 of Order 21 CPC. Rule 41 allows the decree-holder to examine the judgment debtor as to his properties. Once the decree-holder applies, the Executing Court may order the judgment debtor to attend the Court and be examined by the decree-holder. The Executing Court may also require the judgment debtor to "make an affidavit stating the particulars" of his assets. Suppose the judgment debtor disobeys the order made under sub-rule (2). In that case, the Executing Court may direct the person disobeying the order to be detained in the civil prison for a term not exceeding three months unless, before the expiry of that term, the Court directs his release.

34. On 17th February 2016, the Executing Court noted in its order that in response to the show-cause notice under Rule 37 of Order 21 CPC, the judgment debtors filed an affidavit. But "seriously speaking,

there was no reply to the show cause against detention in civil prison". Even under Rule 41 of Order 21 CPC, the judgment debtors have not responded to the Court's directive to subject themselves to be cross-examined. It has further observed that "the judgment-debtors have been playing on words to avoid the execution of the award" by raising one objection or another. It has also concluded that the judgment-debtors have the means but are still refusing to pay the decree-holder. It has, on facts, noted that "the judgment-debtors have also not come clear in their reply to the application under Order XXI Rule 41 of CPC". They have, the Executing Court stresses, made evasive statements regarding the properties in the list they submitted.

35. The Executing Court has, thus, concluded that the Judgment Debtors have failed to show cause Order 21, Rule 37 CPC against their detention in prison; therefore, the decree-holder would be entitled to an order for their detention in civil prison. The decree-holders would also be entitled, according to the Executing Court, to examine the judgement-debtors on oath about their properties.

36. As the record reveals, against the Executing Court's order, dated 17th February 2016, the judgement debtors filed WP No. 295 of 2016 before this Court. They failed. Then, in March 2018, it seems almost two years later, they filed a Special Leave Petition before the Supreme Court but, again, without any success. In the wake of the Executing Court's

order, dated 17th February 2016, the decree-holder secured fresh warrants of arrest. Challenging these warrants, the judgement debtors filed WP No. 942 of 2016 before this Court. Again, they had no success. Once again on 13th December 2016, the Executive Court issued warrants of arrest for the third time. Yet again, the judgement debtors filed WP No. 187 of 2017. In April of the same year, this Court dismissed that writ petition, too.

37. With the imminent imprisonment, the judgement debtors "entered into an undertaking" with the decree-holder to pay ₹ 9 crore in four instalments. Though the decree-holder is entitled to more amount, it agreed to close the issue by receiving a lesser amount. This undertaking, however, was subject to one condition: if the judgement debtors defaulted, the amount, if any, they paid thus far should be forfeited. As part of the first instalment, the judgement debtors paid 1.8 crores. Of course, they paid no further amount. As a result, the decree-holder has forfeited that amount. Indeed, the learned counsel for the judgement debtors makes no grievance about it.

Properties:

38. We may have a word about the judgement debtors' properties. As we have already noted, the partnership firm has three partners. Even in this writ petition, the firm and the partners one and two are contesting the execution proceedings. The third partner has not chosen to contest.

Therefore, the remaining partners as the petitioners have shown the third partner as the *pro forma* respondent.

39. The judgement debtors' counsel has contended that before the Executing Court, the judgement debtors have revealed all their properties. And those properties, the learned counsel stresses, are worth over ₹ 30 crore. This assertion clarifies one thing. That is, the judgement debtors have no defence that they lacked the means to pay the award amount. What they lacked, perhaps, is the will to pay. Even in reply to the show-cause notice under rule 37 of order 21 CPC, as the Executing Court noted, they have not advanced any substantial defence on the grounds of means or their lacking them.

40. In this context, I may safely observe that the means established, the judgement debtors have no further defence under Rule 37 of Order XXI CPC. On that count, any further inquiry is a ritual, wasting judicial time. That apart, twice earlier, the judgement debtors challenged the warrants of arrest before this Court and also the Supreme Court. On both occasions, they did not succeed. Thus, the Executing Court's orders have become final.

Bona Fides:

41. About the judgement debtors' bona fides, the Executing Court has observed much. To counter that, the judgement debtors have not filed any material before this Court; nor have they redeemed themselves with

any improved conduct. They have been bent, it seems, on exploiting the laws' delays. On the one hand, they contended that the properties the court attached are more than enough to satisfy the decretal debt. On the other hand, the judgement debtors' wives, including that of the non-contesting second respondent, have filed claim applications. They claim that either they are the owners of the properties or the co-owners, at least. Those applications are still pending. So much so for the judgement debtors' bona fides.

42. Startling as it may seem, when the judgement debtors filed this writ petition, what appears to be the third round of litigation, they represented to this Court that they own 12 lakhs sq. mts., at Quepem. Out of that, 1,00,000 sq. mts., would fetch, as per the government valuation, ₹ 15 crore. They were ready to transfer that piece of land to the decree-holder. That was on 23rd September 2019. To this day, though they have been enjoying the interim stay, they have never made any attempt to fulfil their word—not even an application filed before this Court to that effect.

43. What disturbs this Court's conscience is the unscrupulous methods, I am constrained to observe, the judgement debtors have adopted. They have indulged in multiple rounds of litigation with broken promises, unfulfilled undertakings, and deliberate dilatory devices. At the very beginning, when the decree-holder initiated the arbitration proceedings, it applied under Section 9 of the Arbitration Act for an

interim attachment of the properties. In the schedule of the property, the decree-holder showed the property which the judgement debtors offered on 23rd September 2019 to transfer to the decree-holder. Of course, that promise before this Court was to secure interim protection. But, then, in Section 9 proceedings, they filed a reply asserting that they had no title to that property.

44. At one stage, when the decree-holder wanted to attach the property, the judgement debtors took a plea that they did not have title to the property. After many years and after many rounds of litigation, faced with arrest, the same persons offer to transfer that piece of property to the decree-holder. Indeed, the learned counsel for the decree-holder informs the Court that the decree holder's inquiries have revealed that the property does not belong to the judgement debtors.

45. The judgement debtors have also contended that the Executing Court ought to have considered the changed circumstances or the subsequent developments. Under the second compromise, out of many crores to be paid, the judgement debtors paid about one crore to the decree-holder. It transferred a piece of land worth ₹ 75 lakh and paid ₹ 30 lakh through account transfer. The decree-holder secured the award eight years ago; the judgment-debtors have the means; they have not paid the amount; they have dodged the due process; and at last, they paid one core out of over 17 crore. They wanted to call it a changed circumstance. I am

afraid it is not. If it is any, it is an exasperating factor.

46. As to their statements of accounts in nine bank accounts, they reveal they have robust business transactions; crores of rupees got transacted. But the balance always remains paltry. They themselves claim they own properties worth crores and that a part of those properties will satisfy the award. When I queried how much time the judgment-debtors wanted to sell a piece of property and pay the amount, the learned counsel has said “eight months”. Many such eight months have passed; actually, it has been eight years since the decree-holder secured the award.

Cooperation:

47. The Executing Court has observed in its order, dt.03.08.2019, that

“the judgment debtors Nos.3 and 4 are not even coming to the Court in order to conduct their cross-examination about the properties possessed by them and therefore, there is clear disobedience of the order of this Court on the part of the judgment debtors. Hence, warrants issued under Order XXI, Rule 38 and Order XXI, Rule 41(3) cannot be recalled.

48. As seen from the record, the Executing Court has given the judgment debtors every opportunity to settle the matter with the decree-holder. Both have filed even consent terms before the Court but to no avail. They were allowed to sell the property or to bring in some prospective purchaser. Nothing came out of it. The judgment debtors' repeated efforts before this Court and twice before the Supreme Court yielded no fruit. The Courts have felt the judgment debtors' pleas are with no merit.

Conclusion:

49. I see no legal ground to set aside the Executing Court's Orders, dt.20.7.2019, 3.8.2019, 22.8.2019, and 27.8.2019.

50. Besides, on 23rd September 2019, almost a year ago, the judgment debtors secured a stay from this Court on a false premise or, at least, on a promise they never tried to fulfil. Had it not been for this Court's interim orders, the Executing Court would have proceeded further. For the delay, there ought to be recompense for the decree-holder. Let there be no premium on dishonesty. It does not always pay to prevaricate.

I, therefore, dismiss the writ petition with costs quantified at ₹3,00,000/- to be paid to the decree-holder in three months. If the judgment debtors fail to pay, the decree-holder may add this amount to the award amount and realise it as if it were part of the award amount.

DAMA SESHADRI NAIDU, J.

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51. The learned counsel for the petitioners, at this juncture, pointed out that given the prevailing pandemic, this Court may suspend the operation of the judgment and allow the petitioners some breathing time.

52. As this Court has already dismissed the Writ Petition, there is no positive direction that needs to be suspended. At any rate, I reckon, the

petitioners have been given a very long rope in this matter, but they have not made use of it.

DAMA SESHADRI NAIDU, J.

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