IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 11TH DAY OF MARCH 2021

THE HON'BLE MR. JUSTICE R.PONGIAPPAN

A.No.8989 of 2019
in
A.No.8334 of 2018
in
EP.D.No.36475 of 2018
and
A.No.365 of 2021
and
A.No.8988 of 2019

M/s.Moorgate Industries India Pvt. Ltd.,
WeWork, 3A-109 / 110, 3rd Floor,
G Block, Bandra Kurla Complex,
Bandra East, Mumbai-400 051
Rep. by its Authorised Signatory
Mr.Rajendra Bohra ..Applicant/Decree-Holder
(A.No.8334 of 2018)

/Versus/

M/s.Rai Ispat India Pvt. Ltd.,
Old No.13, New No.6, Park Avenue,
Kesavaperumalpuram
Off Greenways Road,
Chennai 600 028. ..Respondent/Judgment Debtor
(A.No.8334 of 2018)

<u>A.No.8989 of 2019 in A.No.365 of 2021 and A.No.8988 of 2019:</u>

M/s.Rai Ispat India Pvt. Ltd.,
Old No.13, New No.6, Park Avenue,
Kesavaperumalpuram
Off Greenways Road,
Chennai 600 028. ..Respondent/Judgment Debtor

Vs

M/s.Moorgate Industries India Pvt. Ltd.,
WeWork, 3A-109 / 110, 3rd Floor,
G Block, Bandra Kurla Complex,
Bandra East, Mumbai-400 051
Rep. by its Authorised Signatory
Mr.Rajendra Bohra ..Respondent/Decree-Holder

A.No.8989 of 2019

Application praying that this Hon'ble Court be pleased to set aside the order of the Learned Master dated 14/11/2019 passed in A.No.8334 of 2018 in E.P.D.No.36475 of 2018.

This Application coming on this day before this Court for hearing, the Court made the following Order:

This Application in A.No.8989 of 2019, is directed against the order dated 14.11.2019 in A.No.8334 of 2018 in E.P.D.No.36475 of 2018 passed by the learned Master, ordering the arrest of the applicant under Order XXI Rule 41 (3) of CPC.

2. The applicant is the Judgment Debtor, in Arbitration case in LCIA India Case No.LI6014. The relevant facts are as follows:

(i) The applicant is the Director in one M/s.Rai Ispat Private Limited, who is the Judgment Debtor. The respondent is the constituent of the

Decree Holder, who is also a company registered under the Companies Act. The Judgment Debtor and the Decree Holder being the companies, have entered into a contract, which is for sale by the Judgment Debtor to the Decree Holder of 3500 MTS of Pig Iron as per the specifications contained therein at the rate of INR 25,000/MT for Steel Grade & INR 26,500/MT for foundry grade plus taxes as applicable in each case. Though in the clause relating to price there is nothing to suggest that the price shown therein is provisional, the Contract provides that the balance is payable subject to sale of the goods by the Decree Holder at the best price reasonably achievable less commission to be calculated as provided therein less accrued interest due but unpaid, and further less by any pre-payment not repaid. The total shown in the Contract is INR 8,00,00,000/- (INR 80 Million). The material terms with regard to delivery, delivery terms and penal interest are produced herein:

DELIVERY TERMS : EX SBQ PLANT ("THE STORAGE AREA") ACCORDING TO INCOTERMS 2010)

DELIVERY : DELIVERY TO BE MADE WITHIN 1 MNTH FROM THE DATE OF PRE-PAYMENT.

PENAL INTEREST : IN EVENT OF DEFAULT TO SHIP MATERIAL WITHIN THE STIPULATED TIME AS ABOVE. RAI INSLPAT PRIVATE LIMITED WILL REFUND THE PRE-PAYMENT AMOUNT OF RS.8 CRORES ALONG WITH PENAL INTEEST OF RS.16.8 LACS.

(ii) Admittedly, the Decree Holder paid INR 8,00,00,000/- to the Judgment Debtor on 3rd September, 2012. Accordingly, delivery was to be made within 1 month from the date thereof, which is 3rd October, 2012. Instead of that an amount of INR 3,90,00,000/- (INR 39 Million) has been repaid by the Judgment Debtor to Decree Holder in 2 tranches on 1st December, 2012 to 1st January, 2013. The claim is for the balance sum of INR 4,10,00,000/- (INR 41 Million) along with interest @ 25.2% and liquidated damages amounting to INR 16,80,000 (INR 1.68 Million) with interest thereon also @ 25.2% aggregating to Rs.INR 8,66,08,547.95 (about INR 86.60 Million) as on the date of filing of Statement of Claim.

(iii) In the arbitration proceedings, the learned Arbitrator passed an award in favour of the respondent and thereafter, the respondent/decree holder being the successful party, intended to file an execution petition and filed the same in the Registry. But the same is not yet numbered. Since the Decree Holder is not aware of the assets of the Judgment Debtor, he filed an application in A.No.8334 of 2018, before the learned Master under Order XXI Rule 41 (2) CPC.

(iv) In respect to the said application, on 07.02.2019, the applicant/Judgment Debtor, represented by one Mr.Joseph Philip, was directed to file an affidavit in respect to the assets of the company. Further, after filing the affidavit, he himself subjected to cross examination as per the directions of the learned Master. In due course, this Court, sought for filing an additional affidavit of Mr.Joseph Philip and Mr.K.N.Narayanan (Auditor), seeking for explanation of related party transactions in the balance sheet. It was held on the side of Mr.Joseph Philip and Mr.K.N.Narayanan (Auditor) that the transactions made in the balance sheet are mere book entries. They were very particular that the entries made are all not cash transactions.

(v) In the said circumstances, the learned Master came to the conclusion that Mr.Joseph Philip has given false affidavits before him and therefore, he is guilty of Order XXI Rule 41 (3) of CPC and awarded punishment of simple imprisonment for a period of one month. Now, challenging the same, the applicant/judgment debtor is before this Court.

3. Now, the contention raised by the applicant is that though the applicant/judgment debtor has filed the documents, with less delay, the production of documents by the judgment debtor amounts to complying with the order passed under Order XXI Rule 41 (2) of CPC. On the other hand, before the learned Master, the Decree Holder wrongly interpreted the particulars found in the documents, as a false one and ultimately, by relying on the same, the learned Master had passed the impugned order.

4. Per contra, the respondent/Decree Holder would contend that the learned Master by order dated 07.02.2019, directed the applicant/Judgment Debtor to file an affidavit of assets within a period of two weeks. But the Judgment Debtor instead of furnishing the correct details filed an affidavit with wrong particulars and therefore, on 14.11.2019, the learned Master passed the impugned order.

5. Now, on considering the rival submissions made by the learned counsel appearing on either side, it would appear that the said impugned order is under challenge contending that before ordering arrest, the Court must have passed an order under Order XXI Rule 41 (2) CPC and when no such order has been passed, the order of arrest is unsustainable. It was further submitted that Order XXI Rule 41 (2) CPC speaks about the examination of the Judgment Debtor prior to passing of any order in the execution petition. It was urged that the order dated 07.02.2019, is not a conditional order for the Court to arrest, in an automatic manner.

6. Further, on behalf of the applicant/Judgment Debtor the learned counsel has contended that Order XXI Rule 41 of CPC is an application in

aid of execution and not by itself an execution. Now for considering the said submission, it is necessary to see Order XXI Rule 41 of CPC, which reads as follows:

> “41. Examination of judgment-debtor as to his property. —
>
> (1) 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) any 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.”

7. Now, on a close reading of the said provision, the object of Order XXI Rule 41 CPC, is to obtain discovery in aid of execution of money

decrees when there is a difficulty in getting information regarding the Judgment Debtor's property. The object is to enable the Decree Holder to get information of the assets within the special knowledge of the Judgment Debtor.

8. Considering the scope of Order XXI Rule 41 CPC, in the decision in ***United Phosphorous Limited Vs. AK. Kanoria,*** reported in **AIR 2003 Bom 97**, the Bombay High Court has observed as follows:

> "12. In my opinion, application under Order XXI, Rule 41 is not an application in an execution. It is an application in aid of execution or a step towards the execution. Under Clause (j) of Rule 11 (2) of Order XXI of the Code of Civil Procedure, the execution petition must specify the mode in which assistance of the Court is required for the execution of a decree. Clause (j) reads as follows :
>
> (j) the mode in which the assistance of the Court is required whether —
>
> (i) by the delivery of any property specifically decreed.
>
> (ii) by the attachment, or by the attachment and sale, or by the sale without attachment, of any property.
>
> (iii) by the arrest and retention in prison of any person;
>
> (iv) by the appointment of a receiver;
>
> (v).....
>
> Examination of a judgment debtor under sub-rule (1) of Rule 41 of Order XXI or direction to the judgment debtor to file an affidavit to be issued under sub-rule (2) of Rule 41 or Order XXI is not one of the mode of execution of a decree provided in clause (j) of Rule 11(2) of Order XXI, Rule 30. Disclosure of the assets is a preliminary step towards the execution of a decree.

9. In the said occasion, the learned counsel appearing for the applicant relied on the judgment of ***Anirban Roy and others vs. Ram Kishan Gupta and Others,*** reported in **MANU/DE/3524/2017**, wherein, the Delhi High Court has observed as follows:

> "9...(xi) that the decree holders in that case had not made out any case therefor; the directors were not parties to the proceedings in which decree was passed and were not impleaded in the execution petition also and there were no averments in the execution petition of fraud or improper conduct or of incorporation of the company to evade obligations imposed by law and in which situations Supreme Court in Singer India Ltd. v. Chander Mohan Chadha [2004 SCC 1] has held that the corporate veil must be disregarded.
>
> 10. Applying the aforesaid principles, the decree in favour of the respondent No.1 and against the respondent No.2 for recovery of money cannot be executed against the petitioners for the reason of the petitioners being directors of the respondent No.2
>
> 11. The High Court of Madhya Pradesh in Vimalchand Vs. Arora Distillery Pvt. Ltd. Co., Vidisha 2009 (3) MPLJ 332 held that decree obtained against a private company cannot be executed against its managing director or directors and the managing director and directors cannot be held personally liable for the decretal amount."

10. Further in a case of ***Balmer Lawrie & Company Limited Vs.***

Saraswathi Chemicals, reported in **2017 SCC OnLine Del 7519**, the Delhi

High Court has held as follows:

> "15. In the present case, none of the grounds for lifting the corporate veil are established. The DH has not made out a case of egregious fraud; the same has been neither been pleaded nor established. Thus, there is no occasion for this Court to examine the question of lifting the corporate veil. The statement that the Mundhra family members have been conducting the affairs of the JD company is no ground for piercing the corporate veil. The decision of the Bench of this Court in V. K. Uppal v. M/s Akshay International Pvt. Ltd. (2010 SCC OnLine Del 538) is also of no assistance to the petitioner. On the contrary, in that case, this Court had observed that ***"The court as the executing court cannot execute the decree against anyone other than the judgement debtor or against the assets/properties of anyone other than the judgement debtor. The identity of a Director or a shareholder is distinct from that of the company***"".

11. More than that in the judgment of ***K.S.Narasimhan Vs. The Commercial Tax Officer***, reported in **Manu/TN/7268/2007**, this Court has held as follows:

> "3. Heard the learned Counsel for the petitioner and the learned Government counsel who admits that the liability of the director of the company, for that matter, retired director of the company has been dealt with by this Court in the case of Sri George J. Mathew v. CTO, Bodinayakanur, Theni district 2002 (1) CTC 285 by a learned single Judge of this Court and in the case of Chamundeswari v. CTO, Vellore Rural in Writ Petitions No. 3085 and 3086 of 2000, by an order dated 05.01.2007, I have held that a company is a legal entity by itself and it can sue or can be sued as a legal entity and any dues from the company has to be recovered only

> from the company and not from its directors, by relying on the judgments of various High Courts, such as, the cases in Desiraju Venkatakrishna Sarma, In re, (1955) XXV Company Cases 32, Lalita Shivaram Ubhaykar v. CTO, XII Circle, Bangalore (1975) 35 STC 267, Ramachandran v. State of Kerala (1984) 55 STC 209, Punalur Paper Mills Ltd v. District Collector, Quilon (1985) 60 STC 193, Nishad Patel v. State of Kerala (1999) 113 STC 395, Subash Chandra Kankaria v. State of Rajasthan (1999) 114 STC 413."

12. Now on a conjoint reading of the judgments rendered by the Delhi High Court as well as by this Court, it is very clear that the Judgment Debtor being a legal entity, it can be sued as a legal entity and any dues from the company has to be recovered only from the company and not from the Directors.

13. Though the above judgments are in respect to the maintainability of execution proceedings, herein, it is a case that the present application has been preferred only in respect to the disobedience committed by the Director of the company. In the impugned order it has been specifically stated that while at the time of examining the applicant, he had given a false evidence. Further, he has specifically refused to give the details of bank accounts which are all stands in the name of the company. The said act committed by the Director / applicant is against the particulars found in the balance sheet, wherein the debt and liability of the Judgment Debtor was

clearly narrated. In the said circumstances, only for the reason that the Judgment Debtor/applicant, has not furnished the assets of the Company, the learned Master, passed an order for arrest.

14. Now, on going through the order dated 07.02.2019 passed by the learned Master, it was held that "on perusal of balance sheet it is seen that various investments have been made in multiple companies".

15. Though, the applicant/Judgment Debtor contended that the entries in the balance sheet and other things are only book entires, during the time of cross examination, the person representing the company had admitted that in respect of the number of bank accounts, the correct particulars are not disclosed at the time of filing the affidavit. In fact, after getting direction from the Court, it is his duty to furnish the correct particulars, in respect to the assets having by the company. Suppressing particulars in respect of the assets, is nothing but amounts to failure to file the affidavit in true sense.

16. The clinching evidence which is necessarily to be looked into in this matter is that at the time of filing the affidavit, the applicant/Judgment

Debtor has clearly stated that every entries made are all book entries. On the other hand, the balance sheet pertains to the company shows that the liability amount towards R.K.K.R Steels Limited as on 31.03.2017, is Rs.2,41,70,613/- and subsequently, it has reduced to Rs.73,62,625/-. Similarly, payments have been made to various other companies.

17. So, all the above is evident that the applicant/Judgment Debtor has submitted a false affidavit, after suppressing the liabilities and assets. The same is nothing but amounts to disobedience. If this type of practice is encouraged, then nobody can file an execution petition, after getting the particulars from the Judgment debtor.

18. As rightly pointed out by the learned counsel appearing for the respondent/Decree Holder, suppressing the details of assets amounts to non disclosure and this Court is also of the view that the same is nothing but disobedience of the order passed by this Court. Only in the said circumstances, the learned Master had directed to send the person who deliberately not furnished the entire details, to civil prison. However, considering the fact that the company is under sickness, this Court is of the opinion that sending the applicant/Judgment Debtor to civil prison, for a period of two weeks, for disobedience of the orders of this Court, is sufficient to meet the ends of justice.

19. In the light of the above discussion, the application in A.No.8989 of 2019 is dismissed, with the above modification.

Sd/- R.P.A.J
11.03.2021

//Certified to be a true copy//

Dated this the day of 2020

jj 11/03/2021 COURT OFFICER(O.S.)

From 25.09.2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.