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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 28th February, 2020
+ **CM(M) 267/2020 & CM APPLs. 8083/2020, 8084/2020**
KAPIL KUMAR Petitioner

Through: Mr. R. Ramachandran, Mr. Lakshmi
& Ms. Shobhana Takiar, Advocates
(M-9868211477)

versus

M/S M & A DESIGNS Respondent
Through: Mr. Kapil Kumar, Advocate (M-
9818927234)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. On an oral prayer of the Petitioner, M/s Brushman (India) Ltd. is impleaded as Respondent No.2 in this petition. Amended memo of parties be filed within one week.
2. The Respondent has filed an execution petition seeking execution of the judgment and decree dated 11th February, 2015 by which the Trial Court had decreed the suit of the Respondent in the following terms:

“In view of decisions of above issues, suit of the plaintiff is decreed for a sum of Rs.3,72,772/- from the defendant towards principal amount as on 07.01.2009 with interest @12% p.a., from 07.01.2009 till its realization. Costs of the suit is also awarded in favour of the plaintiff. Decree sheet be prepared accordingly. File be consigned to Record Room.”

3. By the impugned order dated 17th January, 2020, which is under

challenge in this petition, the ld. ADJ has directed as under: -

“Objections are filed by the DH to the affidavit dated 25.04.2019.

Heard from both the parties.

*Additional affidavit and previous affidavit of Sh. Kapil Kumar, the Managing Director of the JD is perused. However keeping in view citation in case titled **M/s. Bhandari Engineers & Builders Pvt. Ltd. V. M/s. Maharia Raj** in execution petition no. 275/12 dated 05.12.2019 all Directors and Managing Director of JD are directed to file fresh affidavit in Form 16A of Appendix-E of CPC and also as per Annexure-A, B and C as per citation referred above. The said affidavits must be filed strictly in terms of annexures provided.*

*JDs are informed in terms of Sub-Section (3) of Section 55 of CPC, 1908 that they are at liberty to get declared as insolvent as applicable under **Law of Insolvency**. Affidavits as directed above be submitted by the Directors and Managing Directors of JD within 06 weeks from tomorrow with advance copy to the opposite party. It is made clear to the Directors of JD and Managing Director that on failure to submit affidavit as directed they will be liable to be detained in Civil Imprisonment.*

It is submitted for Managing Director Sh. Kapil Kumar that Managing Director cannot be held liable as Managing Director has independent standing than of company. The same will be considered after submission of affidavits. However in the meanwhile all the Directors are directed to file affidavit as directed. After filing of such affidavit DH to submit reply on the same as to personal liability is made out on the disclosure made in the affidavit read with decree. Advance copies of these affidavits be supplied by all the Directors and by the Managing Director of the company to the DH within 06 weeks from tomorrow.

Ld. Counsel for DH has referred to order in CM (M) 635/2019 dated 24.04.2019 titled Kapil Kumar v.

M/s. M&A Designs before Hon'ble High Court of Delhi wherein it is submitted by the ld. Counsel for DH that the petitioner himself had stated that he was ready and willing to file his assets and liability in view of order dated 30.03.2019 subject to which his presence was dispensed with. The ld. Counsel for JD submits that the present Court is satisfied for filing of this affidavit before present Court on 26.04.2019.

Heard. There is no issue as to satisfaction of the Court as to liability of the JD but for satisfaction of execution.

Put up for further consideration after filing of reply on the above affidavits on 06.03.2020."

4. The submission of Mr. R. Ramachandran, ld. counsel appearing for the Petitioner, is that in terms of the decision 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 5th December, 2019]***, the Executing Court would have to first arrive at a finding as to whether there are sufficient grounds for lifting the corporate veil and only thereafter can the Directors be directed to file their affidavit.

5. Ld. counsel for the Respondent on the other hand submits that whenever the Trial Court has taken a strict action, the Petitioner has challenged the same before this Court. She relies upon an order passed in the earlier round of litigation wherein a ld. Single Judge of this Court had granted dispensation from personal appearance to the Petitioner.

6. In the said round of litigation, the Petitioner after obtaining dispensation from personal appearance, withdrew the present petition without complying with the order dated 30th March, 2019.

7. Ld. counsel for the Petitioner refutes this contention and submits that the order dated 30th March, 2019 was already complied with, hence the said

petition had become infructuous.

8. A perusal of the previous orders of the Executing Court shows that on 30th March, 2019, the Executing Court had directed as under:

“AR of the JD has filed reply on behalf of Sh. Kapil Kumar, Managing Director of the JD to the application filed by the DH for issuance of warrants of arrest and detention of the JD. Copy supplied.

Let the JD to file affidavit of his assets and liabilities in terms as provided in the High Court Judgment within 15 days and advance copy be supplied to the other party.

Managing Director of the JD will also to appear in person on the next date of hearing.

Put up on 26.4.2019.”

Challenging the said order, the Petitioner, who is one of the Managing Directors of M/s Brushman (India) Ltd i.e., the Judgment Debtor, filed CM(M) 635/2019. In the said petition, order dated 24th April, 2019 was passed wherein the Court had recorded the submission of the ld. counsel for the Petitioner that he is willing to comply with the order dated 30th March, 2019. Accordingly, the personal appearance of the Petitioner had been dispensed with by this Court.

9. The question now is whether the Petitioner, who is the Managing Director of the Company, is liable to disclose his assets. There is no dispute as to the fact that the Judgment Debtor company has disclosed its assets and has filed its affidavit. However, vide the impugned order, the Executing Court has, apart from insisting upon the assets of the Judgment Debtor Company being disclosed, has also directed the Managing Director to file an affidavit of his assets, failing which, he would be liable to be detained in civil imprisonment. Insofar as the issue of liability of the Managing Director

is concerned, the Executing Court has adjourned the matter for decision on the said issue.

10. In terms of the judgment in *Bhandari Engineers (supra)*, the settled legal position is that before directing any Managing Director or Director of the company to file a personal affidavit of their assets, the Executing Court has to arrive at a finding as to whether there is sufficient ground for lifting the corporate veil. It is only after arriving at the finding in respect thereof can the affidavit of the Director/Managing Director be insisted upon. The observation in the said judgment reads as under:

“Conclusion

44. The execution of decrees/awards deserves special attention considering that inordinate delay in execution proceedings frustrates the decree-holder from reaping the benefits of the decree/award.

45. In cases of execution of decrees/awards for recovery of money, the Executing Court shall direct the judgment debtor, at the first instance, to file an affidavit of assets on the date of cause of action, date of the decree/award as well as on the date of the swearing of the affidavit in Form 16A, Appendix E under Order XXI Rule 41(2) of the Code of Civil Procedure within thirty days. The oral prayer/application of the decree-holder for issuance of this direction is sufficient compliance of Order XXI Rule 41(2) of the Code of Civil Procedure.

46. The Executing Court is empowered, at the initial stage itself, to restrain the judgment debtor from transferring, alienating or disposing of or otherwise parting with the possession of any assets to the tune of the decretal/award amount except in the ordinary course of business such as payment of salary and statutory dues. However, the judgment debtor shall not discharge any financial liability, other than the

liabilities of Banks/financial institutions, without the permission of the Executing Court.

47. If the judgment debtor fails to appear before the Court upon service of notice, the Executing Court shall ensure his presence initially by issuing bailable warrants and thereafter, by issuing non-bailable warrants.

48. In the event of the default of the judgment debtor to file the aforesaid affidavit within the stipulated time, the Executing Court shall consider detention of the judgment debtor in civil prison for a term not exceeding three months under Order XXI Rule 41(3) of the Code of Civil Procedure by directing the decree-holder to deposit the subsistence allowance @ Rs. 40 per day per person with the Executing Court for detention of the judgment debtor. Upon deposit of the subsistence allowance, the Executing Court shall issue non-bailable warrants against the judgment debtor for his detention.

49. Since Form 16A, Appendix E under Order XXI Rule 41(2) of the Code of Civil Procedure is not exhaustive to ascertain all the assets of the decree-holder, the Executing Court shall, in exercise of power under Section 151 and Order XXI Rule 41 of the Code of Civil Procedure read with Section 106 and Section 165 of the Indian Evidence Act, direct the judgment debtor to file an additional affidavit of his assets and income in the format of Annexure-A along with documents mentioned therein within thirty days. If the judgment debtor is a proprietor of a proprietorship firm; partner of a partnership firm; member of an HUF and/or Director of a company, additional affidavits be filed by the judgment debtor in respect of the assets of each firm/HUF/Company, as the case may be, in the format of Annexure-B.

50. After examining Annexure-A, the Court may direct the judgment debtor to file an additional affidavit of his expenditure in the format of Annexure-C.

51. If the judgment debtor is a Firm/Company/HUF/Trust, the Court shall direct the judgment debtor to disclose its assets and income in the format of Annexure-B. This affidavit of the Firm/Company/HUF/Trust shall be sworn by all Partners/Directors (other than independent/non-executive and nominee directors)/Members/Managing Trustee, as the case may be.

52. If any ground for lifting of the corporate veil is made out, then all the Directors (other than independent/non-executive and nominee directors) of the judgment debtor Company be directed to disclose their personal assets and income in the format of Annexure-A.

...”

11. The Trial Court has, however, prior to deciding the liability of the Managing Director, directed filing of assets. This approach would not be correct. As held in ***Bhandari Engineers (supra)***, the Court, before directing filing of assets, would have to arrive at a finding as to why the corporate veil needs to be pierced. Upon rendering a finding on the said aspect, Directors including the Managing Director can be directed to file an affidavit of assets.

12. Accordingly, it is directed that on the next date i.e., 6th March, 2020, the Executing Court would hear the parties as to whether there are any grounds made out for lifting the corporate veil. Only after arriving at a finding in respect of this issue, the Managing Director/Other Directors can be directed to disclose their personal assets.

13. Accordingly, the impugned order, to the extent that it directs the Petitioner to disclose his assets, is set-aside and the matter is remanded back for hearing and orders, as set out above.

14. With these observations, the petition is disposed of. It is clarified that

this Court has not given any opinion on the merits of the matter and on the question as to whether any ground is made out for lifting the corporate veil in the present case.

15. Order *dasti*.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 28, 2020

Rahul/C

