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

Judgment Reserved on: 8th July, 2020
% *Judgment Delivered on: 23rd September, 2020*

\+ **EX.P. 71/2019**
&
E.A (OS) 394/2019 (under Order XXXIX Rule 1 and 2 CPC), E.A. (OS) 924/2019 (reply/objections by JDs) E.A. (OS) 266/2020 (under Order XX Rule 11 CPC r/w Section 148 and 151 CPC by judgment debtors)

NEENA KHATRY ..... Decree Holder
Represented by: Mr.Anunaya Mehta and Ms.Mallika Bhatia, Advocates.

versus

VARUN MOUDGIL & ORS. .... Judgement Debtors
Represented by: Ms.Kanika Agnihotri, Advocate for judgement debtors.
Mr.Rajshekhar Rao and Ms. Gauri Puri, Advocates for Mr.Nirbheek Moudgil.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. The present petition Ex.P.71/2019 has been filed seeking execution of the decree dated 1st May, 2019 passed in CS(OS) Nos.674/2017 and 675/2017. The decree considered under present petition was passed based on a Settlement Agreement dated 22nd April, 2019, which is common to both the suits.

2. The comprehensive settlement agreement entered between the parties was qua the following properties

a) Property Bearing No.D-6/32, Basement, Vasant Vihar, New Delhi.

b) Property Bearing No.D-6/32, Ground Floor, Vasant Vihar, New Delhi.

c) Property Bearing No.D-6/32, Third Floor with Terrace, Vasant Vihar, New Delhi.

3. Judgment Debtor No.1/Varun Moudgil was the guarantor to IDFC First Ltd. in respect to the financial facilities advanced to M/s Foremost International for which the equitable mortgage was created by deposit of the documents relating to the properties abovementioned by judgment debtor.1 who is the owner of the properties.

4. Relevant clauses of the settlement agreement dated 22nd April, 2019 on the basis whereof the decree was passed which are the bone of contention in the present execution petition are Clauses 11, 12 and 13, material portions whereof read as under:

> *11. That it has been undertaken by second party that within 3 days of payment of Rs.10,50,00,000/- (Rupees Ten Crores fifty Lacs Only) by the First Party to IDFC First Ltd. concerned title holders of the second party shall execute and get registered three separate Irrevocable General Power of Attorneys in favour of the First Party/her nominee(s) in respect of the properties described in preceding paragraph of this compromise i.e. basement, ground floor and third floor with terrace of D-6/32, Vasant Vihar. In case of failure on the part of the second party to get such POAs executed and registered, this document itself shall act as a power of attorney.*
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> *12. That it has been mutually agreed that in case second party will pay a total sum of Rs.13,39,00,000/- [This sum being based on the amount being paid by the First Party/her husband to IDFC First under this agreement, the amount already earlier paid by the first party to the second party, the disputes, litigation compensation etc. and second party will not be entitled to dispute or*

challenge this repayment amount of ₹13,39,00,000/-] to the first party or her husband Prakash Khatry within a period of 10 months from the date of payment of Rs.10,50,00,000/- (Rupees Ten Crore Fifty Lakhs) by the First Party to IDFC First Ltd., and if this payment is made by demand drafts in the manner indicated hereinafter, then in such an event, as and when the payments are being made by the Second Party to the First Party, the properties shall be released by the first party to the second party in the following manner, in seriatim, else at the expiry of 10 months, the first party shall be entitled to use the POAs/ on the basis of this settlement, execute sale deeds of the below properties executed in her favour or in favour of her nominee:

Xxx xxx xxx
Xxx xxx xxx

13. *That time is the essence of this transaction. In case second party fails to make payment of the amount of Rs. 13.39 crores in the manner indicated hereinabove to the First Party within the period time referred to hereinbefore, second party would not be left with any right to subsequently insist for payment of the aforesaid amount, and that upon expiry of a period of ten months from the date of payment of Rs. 10,50,00,000/- (Rupees Ten Crores Fifty Lacs Only) by the First Party to IDFC First Ltd., First Party would be entitled to get executed and registered sale deeds on the basis of Irrevocable Power of Attorneys referred to above / or on the basis of this agreement as a deemed PoA, in respect of the three properties described in paragraph no. 10 and 12 of this compromise in her own favour or in favour of her nominees without there being any requirement of any involvement of any of the member of the second party. No further consideration would be liable to be paid by the First Party to Second Party.*

5. It was thus agreed between the parties that the title deeds/documents of the above stated properties would be released to the Decree Holder/husband of the decree holder upon settling the loan account of Foremost International Ltd. with the IDFC First Ltd. and payment of the outstanding dues as on the date when the settlement agreement was entered into, for a total sum of ₹10,50,00,000. It was also agreed that the Decree Holder or her husband Mr.Prakash Khatry would make the lump sum payment of ₹10,50,00,000 to the IDFC First Ltd. It was admitted that no other amount shall remain outstanding and payable by the decree holder or her husband upon the payment of the outstanding dues to IDFC First Ltd. On payment of the outstanding due, IDFC First Ltd. would not be entitled to put any restrain on dealing with the said properties in any manner.

6. It was agreed that within 3 days of payment of the outstanding dues by the decree holder to IDFC First Ltd, judgment debtors were to execute and get registered three Irrevocable General Power of Attorneys in favor of the Decree Holder/her nominee(s) in respect to the above stated properties and in case of failure to do so, the settlement agreement would act as a power of attorney. It was also agreed that there would be no bar on Judgment Debtor No.1 to transfer valid and marketable title of the above stated properties along with actual physical possession, subject to conditions agreed upon by the parties under the Settlement Agreement.

7. Further upon payment of total sum of ₹13,39,00,000 by the Judgment Debtor to the Decree Holder/her husband within a period of 10 months from the date of payment of ₹10,50,00,000 by the Decree Holder to IDFC First Ltd., the properties shall be released by the decree holder to the judgment debtor in the manner provided under the Settlement agreement. It was also

agreed, that upon expiry of the 10 months, the decree holder would be entitled to use the Power of Attorneys or the Settlement agreement to execute the sale deeds in respect of the properties/part(s) of the property in her favour or in favour of her nominees.

8. Time being the essence of the transaction under the settlement agreement, it was also agreed that until all the obligations under the settlement agreement are not complied by the Judgment Debtor and until the entire sum of ₹13.39 crores is not paid back to the Decree Holder in the manner specified in the settlement agreement, the judgment debtor shall not sell, alienate, mortgage, or enter into any agreement in respect of, or in any manner create any third party interest in respect of the any of the properties which form part of the agreement. That only upon the payment of the tranches specified in para 12 of the settlement agreement, the respective properties would be released from lien which form the subject matter of the completed tranche.

9. The decree holder by way of this execution petition has stated that the judgment debtors have already started defaulting and were not complying with the terms of the Settlement Agreement. Judgment debtors have not executed and registered the Power of Attorneys in favour of the decree holder. It is stated that on or about 11th June, 2019 the possession of the decree holder was interfered with and obstructed by the judgment debtors, and they continue to interfere with and obstruct even thereafter. Decree holder is in possession of the ground floor with basement and third floor with roof rights in terms of the consent decree. The settlement agreement records the deemed actual physical possession of the decree holder. However, since the keys of the premises are with the Judgment Debtor(s)

they are taking unfair advantage thereof. The decree holder against the judgment debtors in this regard had also filed a complaint with SHO, PS Vasant Vihar.

10. It is stated by the Decree Holder that vide letter dated 13th June, 2019 and 20th June, 2019, the judgment debtor informed that they have a prospective buyer for the Third Floor of the property and asked decree holder to show the original property papers of the said portion of the property to the prospective buyer at the office of the buyer and his attorney. The letter dated 20th June, 2019 stated that the judgment debtors have been holding the buyer and that any delay on the part of Decree Holder in showing the documents will lead to suspicion in the mind of the buyer.

11. The Decree Holder vide letter dated 22nd June, 2019 took strong objections to the letters dated 13th June, 2019 and 20th June, 2019 stating that Judgment Debtors were always at liberty to bring the buyer to the Decree Holder for inspection and perusal of the original documents, however, that the decree holder would not visit an outside location with the documents as the same was not agreed.

12. The Judgment Debtors were to make the payment of ₹13,39,00,000/- within ten months of the payment to IDFC Ltd. pursuant to the settlement agreement dated 22nd April, 2020, however, instead of making the payment in the time prescribed i.e. by 24th February, 2020, the Judgment Debtor No.1 filed E.A. 266/2020 seeking extension of time to comply with the consent decree and filed objections under Section 47 of the Code of Civil Procedure 1908 qua the executability of the consent decree.

13. Thus the case of the decree holder is that as despite the decree holder having made the payment of the sum of ₹10.50 crores to IDFC First Ltd. no

power of attorneys were executed by the judgment debtors within three days of the payment as agreed vide Clause-11 of the settlement agreement, therefore, this settlement document itself is liable to be treated as a power of attorney. It is further contended that since within a period of 10 months from the date of payment of ₹10.50 crores which end on 24th February, 2020, the payment is not made by way of demand drafts by the judgment debtors, the decree holder shall be entitled to use the POAs/on the basis of this settlement, execute the sale deed of the properties in favor of the decree holder or in favour of her nominee. A perusal of clause-12 of the settlement agreement leaves no scope of further negotiation of time and by clause-13 it is specifically provided that time is the essence of this transaction.

14. Learned counsel for the Judgment Debtors contends that Decree Holder created hindrances in the efforts of the Judgment Debtors in discharging the money decree, by selling the property. Judgment Debtor vide letters dated 13th June, 2019 and 20th June, 2019 requested Decree Holder to cooperate with the Judgment Debtor towards honouring the Decree, however there was total non-cooperation on the part of the Decree Holder. Since as per clause 6 and 7, the original papers of the properties were with the decree holder, the judgment debtor could not sell the properties without the cooperation of the decree holder.

15. It is further contended that Judgment Debtor had taken steps to sell the suit premises and accordingly satisfy the decree, but due to the prevailing unprecedented pandemic of COVID 19, no economic activity has taken place. Thus, the attempt of the Judgment Debtor did not fructify. It is contended that Judgment Debtor has already filed an affidavit of a proposed buyer on record, establishing the interest of a genuine buyer in buying the

property in question. Pursuant thereto, the Judgment Debtors would have the funds to comply with the decree in its entirety. Learned counsel for the judgment debtors in support of her arguments for extension of time for making the payment relies upon the decision reported as 1983 (2) SCC 127 *Periyakkal vs. Dakshyani*.

16. Contention of judgment debtors in E.A. 266/2020 under Order XX Rule 11 read with Sections 148 and 151 CPC is that despite the judgment debtor No.1 doing very good in the business a fire broke out during the intervening night of 20th-21st November, 2017 resulting in a loss of ₹10 crores in stored stock and ₹14 crores on account of payment that were not made by the purchasers on account of inability of judgment debtor No.3 to service the orders. Claim of judgment debtor No.2 before the insurance company was rejected. It is further the case of the judgment debtors that the immovable properties were and continue to be security towards refund/return/ repayment of the monies and since the title deeds of the property are in possession of the decree holder their interest is sufficiently secured. It is also claimed that the decree holder would recover the money by sale of the floors of the suit properties and that the execution of the Irrevocable General Power of Attorney was in the form of a penalty clause so as to meet the contingency of the money decree not being satisfied.

17. In addition to seeking extension of time to comply with the decree, Judgment Debtor has raised the objections to the enforceability of the decree. As per the Judgment Debtor, Decree Holder has failed to comply with Order XXI Rule 34, CPC whereby the Decree Holder is bound to place on record a draft of the document, which he seeks execution of. Compliance

with the provisions of the CPC are mandatory. Having obviated to comply with the said provisions, the decree is not enforceable in its present form.

18. Learned counsel for the Judgment Debtor contends that on perusal of the prayer clause and contents of the Execution Petition, Decree Holder alleges that the Judgment Debtor has refused to/neglected to execute the power of attorney. It is undeniable that the power of attorney is a document, which is compulsorily registrable and stamped. Thus, by way of the Decree Holder's own submission, the Decree Holder was bound to place on record a draft of the power of attorney, which it seeks execution of, and having failed to do the same, the Decree Holder cannot seek execution of the power of attorneys.

19. Learned counsel for the judgment debtors has heavily relied on the decision of the Supreme Court in *Periyakkal* (supra) wherein based on the compromise between the parties, the appellants therein agreed to pay a certain sum to the respondent therein within a stipulated time in full and final settlement of the decree, time being the essence of the agreement. Though the High Court dismissed the application holding that the Court could not extend the time where time had been stipulated by the parties themselves in the compromise, Supreme Court held that where the contract between the parties has merged in the order of the Court, the Court's freedom to act to further the ends of justice would not stand curtailed. It was also clarified that time should not be extended ordinarily and on mere asking but in rare cases to prevent manifest injustice. Therefore, the Supreme Court in *Periyakkal* clearly held that the Court may in its discretion, in the interest of justice extend the time of payment however, the

same should not be extended ordinarily on the mere asking but in rare cases to prevent manifest injustice.

20. In the application for extension of time, the judgment debtors have not given any plausible explanation for non-payment of ₹10.50 crores within the period of ten months prescribed. The only explanation is that the judgment debtor had a buyer whose affidavit is on record and the decree holder did not cooperate by showing the original documents at the office of the prospective buyer. Except writing letters Judgment Debtor made no efforts to fix meeting with the Decree Holder so as to show the prospective buyer, the original title deeds. It is thus evident that there was no sincere effort to satisfy the decree by selling the property, thus no case is made out by the judgment debtor for grant of extension of time.

21. The judgment debtor further states that the judgment debtors took all steps to sell the suit property but due to the prevailing unprecedented pandemic of COVID-19 situation no economic activity has taken place and thus the attempt of the judgment debtors has not fructified. Unfortunately this argument holds no ground for the reason the judgment debtor was to provide with the money within ten months of the date of payment by decree holder to IDFC First Ltd., that is, 24th February, 2020 by which time the pandemic had not affected this country and there was no slow down of the economy due to COVID-19. The period of ten months with the judgments debtors preceded the lock down period and hence the judgment debtor cannot take any benefit thereof. Except stating that the judgment debtor made efforts to sell the property however, the decree holder did not cooperate by handing over the original documents and that affidavit of one of the proposed buyer has been placed on record, the judgment debtors have

not shown any material efforts made by them to sell off the property. The judgment debtor has sought to distinguish the decisions relied upon by the learned counsel for the decree holder reported as 2009 (2) SCC 294 *Deepa Bhargava vs. Mahesh Bhargava* and MANU/SC/3053/2008: 2009 (74) ALR 604 *Premium Exchange and Finance Ltd.& Ors. vs. S.N. Bagla & Co. & Ors*. It is trite law that unless the parties agree to the extension of time thereby agreeing to varying the terms of the consent decree, the executing court cannot go behind the decree and as held by the Supreme Court in *Periyakkal* (supra) it can be done only to prevent manifest injustice.

22. In the present case, after ten months were nearing completion, the judgment debtor has come forward for extension of time. The judgment debtor even did not bother to execute the power of attorney as agreed vide clause-11 of the settlement agreement which was to be executed within three days of payment made by the decree holder to the IDFC First Ltd. on 24th April, 2019.

23. Considering the conduct of the judgment debtors, that the parties agreed that time was the essence of the contract and that for the ten months period granted to judgment debtor no effective steps were taken to satisfy the decree, this Court finds no ground to extend the time of the judgment debtors to sell the property and pay back the amount to the decree holder.

24. In view of the discussion aforesaid, this Court finds no merit in E.A.266/2020 (under Order XX Rule 11 CPC r/w Section 148 and 151 CPC) seeking extension of time.

25. Raising objections to the execution of the decree, contention of learned counsel for judgment debtors is that the decree is unenforceable in view of the decision of this Court reported as 2009 SCC OnLine Del. 1376

Novartis A.G. vs. Wander Pvt. Ltd. and the decree holder is required to file a fresh suit.

26. In *Novartis* (supra) this Court held that the decree for payment of damages of ₹5 crores was unenforceable in execution because the said decree of damages included not only breach of the terms of decree rather breach of the terms of a fresh distribution and marketing agreement and the said agreement involved third parties besides the parties to the suit. In the present case, the power of attorney is required to be executed by Varun Moudgil, the judgment debtor who is a party to the consent decree and after the decree has been passed there is no further agreement between the parties and only a power of attorney was required to be executed in which the judgment debtor has failed and thus the decree holder would be entitled to the second option as agreed based whereon the decree was passed, that is, the settlement agreement itself was to be treated as a power of attorney.

27. Contention of learned counsel for the judgment debtors that the object of the settlement agreement and default clause therein was to create future obligations and promises by the parties and in case of dispute therein the claim cannot be adjudicated in execution petition and fresh proceedings are liable to be initiated also holds no ground as the settlement agreement does not create any future obligations and only provides for an alternative mode of performance of the settlement agreement. Hence no fresh proceedings are required to be initiated.

28. Learned counsel for the judgment debtors further contends that the title in the property cannot be transferred on the basis of power of attorney as has been agreed between the parties and the same would be contrary to the decision of the Supreme Court reported as 2012 (1) SCC 656 *Suraj*

Lamp and Industries Pvt. Ltd. vs. State of Haryana & Anr. In the present case the property is not being transferred by way of power of attorney. The power of attorney is being utilized to execute the sale deed in favour of the decree holder or her nominee. Hence the decision in *Suraj Lamp* (supra) is not applicable to the facts of the present case.

29. The judgment debtors having failed to comply with the first requirement of the settlement agreement, that is, judgment debtor No.1 will execute the power of attorneys in favour of the decree holder or her nominee as the case may be and considering that the objections raised by the judgment debtors have no merit E.A.(OS) 924/2019 and E.A. (OS) 266/2020 are dismissed.

30. Ex.P.71/2019 and E.A. 394/2019 (under Order XXXIX Rule 1 and 2 CPC) are disposed of directing that on the necessary stamp duty being paid by the decree holder, the settlement agreement dated 22nd April, 2019 between the decree holder and the judgment debtors will be treated as an irrevocable power of attorney in favour of the decree holder in respect of the basement, ground floor and third floor along with roof rights of the property situated at D-6/32, Vasant Vihar, New Delhi. The judgment debtors are restrained from interfering with the possession of the decree holder qua the basement, ground floor and third floor along with roof rights of the property situated at D-6/32, Vasant Vihar, New Delhi.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 23, 2020
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