

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**INTERIM APPLICATION NO.1143 OF 2021
IN
COMMERCIAL EXECUTION (L) NO.11069 OF 2021**

Asiatic Gases Limited .. Applicant/Judgment Creditor
v/s.
Ahuja Properties & Associates & Ors. .. Respondents/Judgment Debtors

Mr. Mukul Taly a/w Vithoba Masurkar i/b. S. Mahomedbhai & Co. for
the applicant/judgment creditor.

Mr. Zal Andhyarujina, Sr. Advocate, i/b. Madhukar Mulay for the
respondents/judgment debtors.

**CORAM : A. K. MENON, J.
DATED : 7TH SEPTEMBER, 2021**

P.C. :

1. By this Interim Application, the applicant seeks an order directing judgment debtor nos.1 to 3 jointly and severally to deposit the decretal amount of Rs.4,72,00,000/- pursuant to a Consent Decree dated 14th June, 2019. He also seeks an order directing disclosure on oath of all assets movable and immovable of the judgment debtors including receivables from one "FOSUN" Group, immovable properties including shops and other premises; and in

the event of failure to comply seeking an order for detention in civil prison. The fact is that the decretal payment is not in dispute. The amount payable also is not in dispute.

2. Mr. Taly appearing in support contended that although the consent terms are dated 25th September, 2018 and the first installment of Rs.5 lakhs was payable in September 2018 itself, followed by monthly installments of diverse amounts, not a single installment has been paid. The last installment was due in August 2021. Upon failure to pay, the applicant initiated correspondence addressed to the Advocate for the respondent demanding payment and that no amounts had been forthcoming. An insolvency petition also came to be filed by the applicant. After this matter was listed for hearing, on 9th June, 2021 the applicants informed the court that the respondents had approached them to amicably work out the matter hence, the time was granted. On 10th August, 2021 the court was informed that a sum of Rs.50 lakhs has been received but there was no commitment to pay the balance decretal sum. According to Mr. Taly, the interest amount as on date of the application alone was Rs.1,71,80,799.76 and costs of the suit amount Rs.4,50,000/-.

3. Mr. Taly submitted that amount of Rs.50 lakhs has been appropriated towards over due interest in terms of the decree. He therefore submits that the relief prayed for may be granted. The assets of the respondents are being diverted to other entities viz. a group of Overseas investors. The respondents have tied up with a group referred to as “FOSUN” Group to develop properties and all assets may soon be diverted to such third entities.
4. On behalf of the respondents, Mr. Andhyarujina opposes the application. He relied upon the statements and affidavit of respondent-judgment debtor no.2 dated 16th August, 2021 in which he states that the parties have arrived at a settlement outside of the consent terms and a new schedule of payments has been agreed upon. Mr. Andhyarujina relied upon messages exchanged on WhatsApp between one Mukund Jalan of the applicant and the deponent of the affidavit. According to the respondents, under the new schedule, an amount of Rs.50 lakhs payable on 14th June, 2021 has been paid. Further sums as per the repayment schedule are to be made within 15 months such that the last installment would be paid by 14th August, 2022. He submitted that the sum of Rs.50 lakhs was paid on 11th June, 2021 prior to the due date under the corrected schedule. The amount

was paid by forwarding a letter addressed to the applicants which has been accepted in terms of the amended schedule of payment.

5. Dealing with the applicant's acceptance of the sum of Rs.50,000/- without prejudice, Mr. Andhyarujina submitted that merely because the payment was accepted without prejudice does not mean that the acceptance was not in accordance with the amended schedule. In other words, the schedule for payments under the consent decree was not now applicable since the fresh schedule has been accepted and acted upon. He relied upon the judgment of the Supreme Court in *M/s. Peacock Plywood Pvt.Ltd. v/s. The Oriental Insurance Co.Ltd.*¹ and submitted that correspondence will be protected by without prejudice privilege only if it is written for the purpose of a genuine attempt to compromise a dispute between the parties and not otherwise.

6. In the instant case the fresh schedule has already been accepted and acted upon thus replacing the original schedule. Acceptance without prejudice in the facts of the present case does not mean that applicant can ignore the fresh schedule and seek payment under the schedule forming part of the consent terms. Mr.

¹ (2006) 12 SCC 673

Andhyarujina also invited my attention to the decision of the Court of Appeal in *Cutts v/s. Head and another*² in which he laid emphasis on Lord Justice Fox's observation to the effect that, "while the ordinary meaning of "without prejudice" is without prejudice to the position of the offeror if his offer is refused, it is not competent to one party to impose such terms on the other in respect of a document which, by its nature, is capable of being used to the disadvantage of that other. The expression must be read as creating a situation of mutuality which enables both sides to take advantage of the "without prejudice" protection. The juridical basis of that must, I think, in part derive from an implied agreement between the parties and in part from public policy."

7. Relying upon the aforesaid observations, Mr. Andhyarujina has tried to persuade me to hold that the schedule under the consent decree is now liable to be ignored and the fresh agreement alone is enforceable since it has now been acted upon and there are no defaults to justify grant of relief.

8. Having considered the rival contentions, I am unable to agree with Mr. Andhyarujina. (Simply put, the respondents contention is that it is far from the factual situation nor the payment is of

² (1984) 1 Ch. 290

Rs.50 lakhs has been accepted “without prejudice to all legal proceedings”. This Mr. Taly has explained, refers to not only the present application but other proceedings including a contempt petition, insolvency proceedings etc. that are pending. For the purposes of this order, we are not concerned with those proceedings but I must hasten to add that in the forwarding letter Exhibit ‘B’ to the affidavit in reply, the respondent itself states as follows;

“This amount is due and payable under the Consent Terms.”

(emphasis supplied)

The third sentence of the letter reads as follows;

“We hereby request you to update your records in view of the receipt of the aforesaid amount received by you under the Consent Terms.”

(emphasis supplied)

9. Furthermore, the respondents sought an endorsement confirming and acknowledging receipt of the payment made “under the Consent Terms”. Thus, it is obvious that the parties intended to make payment under the Consent Terms and the Consent Decree. Acceptance of the first installment was “without prejudice to all proceedings” including the present application.

10. Having taken an overall view and considering the affidavit, there is no reason to disbelieve the applicant's version that the respondents are in process of diverting assets having entered into certain arrangements of the "FOSUN" Group. There is no denial of this aspect in the affidavit in reply but it only pleads an alternate arrangement agreement on due dates.

11. One must take note of the fact that the Supreme Court in the case of *Rahul Shah v/s. Jinendra Kumar Gandhi* ³ has issued directions as to the manner in which the execution applications should ideally dealt with. Pending the amendment of rules of the High Court, these directions are required to be followed and in that light of the matter the order that I propose to pass is clearly called for.

12. I am satisfied that grave and irreparable harm would be caused to the judgment creditor if the reliefs prayed for are not granted. Disclosure is one of the basic reliefs that the judgment creditor would be entitled to in the process of executing decrees. In the facts at hand, without such disclosure, the applicants may be rendered directionless while chasing judgment debtors' assets.

3 2021 SCC OnLine SC 341

No relief is sought against respondent no.4 and the relief prayed for judgment debtors no.1 to 3 is absolute and unconditional. In my view, the relief prayed for is liable to be granted.

13. In view of the above, I pass the following order;

(i) Interim Application is made absolute in terms of prayer clauses (A) and (B).

(ii) The deposit in terms of prayer clause (A) shall be made within a period of three weeks from today. However, meanwhile, disclosure of assets shall be made within a period of one week from today.

(iii) In the event of failure to comply, the applicant shall be at liberty to revive this application for reliefs in terms of prayer clause(C).

(iv) Interim Application is disposed in the above terms with liberty to seek restoration for certain relief in terms of prayer clause (C).

(A. K. MENON, J.)