

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 4303 OF 2021

- 1) Nandkishore Navalkishore Kothari,
Aged about 66 years,
Occupation – Business,
- 2) Jugalkishore Navalkishore Kothari,
Aged about 64 years,
Occupation – Business,
- 3) Santoshkumar Navalkishore Kothari,
Aged about 61 years,
Occupation – Business.

All Nos. 1 to 3 R/o Gorakshan Road,
Akola, District – Akola.

.... **PETITIONERS**

VERSUS

Mangalchand Gangaram Pasari (HUF),
through Karta – Shri Gopal Shriram Pasari,
Aged about 61 years, Occupation – Business,
R/o Bhagwat Plots, Akola, District – Akola.

.... **RESPONDENT**

Mr. M.G. Sarda, Counsel for the petitioners,
Mr. K.S. Lute, Counsel h/f. Mr. A.S. Agrawal, Counsel for the
respondent.

CORAM : ROHIT B. DEO, J.
DATED : 18th JANUARY, 2022

ORAL JUDGMENT :

The petitioners are the judgment-debtors in Special Darkhast

11/2011 against whom the executing Court issued arrest warrants invoking power under Order XXI Rule 38 of the Civil Procedure Code (CPC). The petitioners sought review vide application dated 12-10-2021, which is rejected by an elaborate order dated 20-12-2021. Aggrieved, the petitioners are assailing the aforesaid orders in writ jurisdiction.

2. The factual matrix is that the respondent-plaintiff instituted Special Civil Suit 121/2009 seeking recovery of money, which the learned 4th Joint Civil Judge (Senior Division), Akola decreed vide judgment dated 25-11-2010 and directed the defendants-petitioners herein to pay the plaintiff/decreed-holder Rs.6,17,618/- (Rupees Six Lac Seventeen Thousand Six Hundred Eighteen) with future interest at the rate of 10% per annum on the principal amount from the date of the decision till realisation. The defendants have not disclosed whether the judgment and decree is challenged. The defendants aver in the memo of petition that due to financial crisis, the decretal amount could not be paid and, therefore, the plaintiff instituted execution proceedings.

3. In execution proceedings, the plaintiff/decreed-holder preferred an application under Order XXI Rule 38 of the CPC on the premise that the judgment-debtors are obstructing the execution of warrants and that

though the judgment-debtors have sufficient means, the decretal amount is not paid.

4. The executing Court issued notice to the judgment-debtors on application under Order XXI Rule 38 of the CPC, and in response, the judgment-debtors preferred an application dated 06-12-2019 styled as “application for directing the decree-holder to furnish documents/evidence”.

5. Since the judgment-debtors called upon the decree-holder to furnish evidence, the decree-holder filed on record an affidavit dated 12-10-2021 stating that the judgment-debtors alienated immovable property vide registered sale dated 26-11-2019 and received Rs.2,30,00,000/- (Rupees Two Crore Thirty Lac) as sale consideration, and that despite the receipt of huge consideration, the decretal amount is not paid. The decree-holder produced on record copy of the sale-deed.

6. The executing Court issued arrest warrants observing that the sale-deed shows wilful default on the part of the judgment-debtors.

7. The judgment-debtors preferred application (Exhibit 27) seeking

recall of the order of issuance of warrants of arrest. Pertinently, all that is averred in the said application is that the sale consideration received pursuant to the sale-deed dated 26-11-2019 is not available as the sale has been utilized for payment of secured debts. The necessary details are suppressed. Recalling of the warrants of arrest was also sought on the premise that the application preferred by the judgment-debtors (Exhibit 23) calling upon the decree-holder to adduce evidence is pending.

8. The decree-holder filed reply to the application for recalling the warrants of arrest. The decree-holder pointed out that the notice issued under Order XXI Rule 37 of the CPC was served on the judgment-debtors on 04-12-2019 and only eight days prior to the service of the notice the judgment-debtors executed sale-deed and received Rs.2,30,00,000/- (Rupees Two Crore Thirty Lac). The decree-holder further pointed out that in application (Exhibit 23) dated 06-12-2019 the judgment-debtors suppressed the factum of execution of sale-deed and receipt of consideration of Rs.2,30,00,000/- (Rupees Two Crore Thirty Lac) and instead sought direction against the decree-holder that evidence be furnished to establish wilful default. The decree-holder further contended that neither application (Exhibit 23) nor the application (Exhibit 25) seeking recall of arrest warrants is signed

muchless affirmed by the judgment-debtors.

The decree-holder then emphasized on the efforts made to execute the money decree and pointed out that warrants under Order XXI Rule 43 of CPC were issued on 11-3-2016, and the bailiff report indicates that the execution was obstructed. Fresh warrants under Order XXI Rule 43 of the CPC were issued after seeking police aid and female members of the family did not allow the bailiff to execute the warrants claiming that the judgment-debtors are residing at Pune and Mumbai. The decree-holder then asserted that the property which is the subject matter of the sale-deed, was not offered as security by the judgment-debtors and the claim that the entire consideration of Rs.2,30,00,000/- (Rupees Two Crore Thirty Lac) received by the judgment-debtors is paid to secure creditors, is false.

9. The executing Court vide order dated 20-10-2021 rejected the prayer of the judgment-debtors to recall the warrants of arrest. Dealing with the contention of the judgment-debtors that their application (Exhibit 23) calling upon the decree-holder to furnish evidence of wilful default is pending, the executing Court observes that the very purpose stood satisfied since the decree-holder did furnish evidence by placing on record the sale-deed which shows that few days prior to the service of notice the judgment-debtors received Rs.2,30,00,000/- (Rupees Two

Crore Thirty Lac) as sale consideration.

10. The executing Court then considered the decisions on which the judgment-debtors placed reliance, and held that the decisions do not take the case of the judgment-debtors any further since despite receiving Rs.2,30,00,000/- (Rupees Two Crore Thirty Lac) a few days prior to the issuance of notice on application under Order XXI Rule 38 of the CPC, the decretal amount has not been paid. The executing Court held that despite having sufficient means to satisfy the money decree, the judgment-debtors are refusing to pay the decree-holder.

11. The learned Counsel for the judgment-debtors Mr. M.G. Sarda reiterates the submission which did not find favour with the executing Court. Mr. M.G. Sarda would rely on the decisions in ***Ch.Harpal Singh and Ors. vs. Lal Hira Lal, 1955 AIR (All.) 402*** and ***Jolly George Varghese vs. Bank of Cochin, 1980 CJ (SC) 166*** to buttress the submission that proof of wilful default is a must before arrest warrant under Order XXI Rule 38 of the CPC could be issued.

12. The learned Counsel for the respondent Mr. Arun Agrawal would support the order impugned.

13. Having heard the learned Counsel and having perused the material placed on record, I have no doubt in my mind that the petitioners/judgment-debtors are intentionally and deliberately avoiding to pay the decree-holder. I hold so, for reasons briefly spelt out hereinafter.

14. It is irrefutable that eight days prior to the receipt of the notice on the application seeking issuance of arrest warrants, the judgment-debtors sold certain property and received consideration of Rs.2,30,00,000/- (Rupees Two Crore Thirty Lac).

15. In the memo of petition, for the first time it is contended that out of the sale consideration of Rs.2,30,00,000/- (Rupees Two Crore Thirty Lac) the judgment-debtors received only Rs.1,15,00,000/- (Rupees One Crore Fifteen Lac) and the rest was given to their three sisters. I notice that such an assertion was not made before the executing Court and the judgment-debtors contended that the sale consideration was paid to secured creditors, without disclosing the requisite details.

16. The judgment-debtors have now claimed, in paragraph E of the grounds in the memo of petition, that part of the sale consideration received as per the sale-deed dated 26-11-2019 was utilized for

repayment of loan availed from friends and relatives.

17. The judgment-debtors are now contending that the balance of the sale consideration, i.e. which was available after making payment to friends and relatives, was utilized to pay to Akola Janata Commercial Cooperative Bank Limited. The document placed on record purports to be certificate dated 03-3-2020 to the effect that loan of Rs.1,00,00,000/- (Rupees One crore) extended to M/s. Navalkishore Kothari Sons is settled under the compromise settlement scheme. It is not clear from the said certificate, even if the certificate is taken at face value, as to when the amount was paid to Akola Janata Commercial Cooperative Bank Limited. Considering the material on record, the irresistible conclusion is that despite having sufficient means to pay the decree-holder, there is an intentional and deliberate refusal to pay.

18. The decision of the Hon'ble Apex Court in ***Jolly George Varghese and another vs. The Bank of Cochin, AIR 1980 SC 470*** is of no assistance to the judgment-debtors since the lack of *bona fides* and wilful default despite having sufficient means, is duly established. Similarly, the decision of the Allahabad Court in ***Ch. Harpal Singh and Others Vs. Lala Hira Lal, AIR 1955 Allahabad 402*** is of no avail to the judgment-debtors since refusal to pay despite having sufficient means is

established.

10. The petition is dismissed.

JUDGE

adgokar