



\$~1 (2022 List)

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

+ CM(M) 243/2022 and CM APPL. 13316/2022(stay)

BHAGWAN DASS Petitioner
Through Mr. Om Prakash, Adv.

versus

VINITA Respondent
Through Mr. Mohit Gupta and Ms. Shalu
Rajput, Advs.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR
JUDGEMENT (ORAL)

% **28.03.2022**

1. This petition impugns orders dated 24th December, 2021 and 29th January, 2022, passed by the learned Additional Rent Controller (“learned ARC”) in Ex 1740/2017.

2. The petitioner was the judgment debtor before the learned ARC.

3. It is not necessary, for the limited purpose of disposing of this petition, to venture into factual details. Suffice it to state that, on 1st October, 2021, the following order was passed by the learned ARC:

“In view of order bearing no. 700/RG/DEIC/2021 dated 30.09.2021 of the Hon'ble High court, the present matter has been taken up for hearing today physically.

Present: Mr. Mohit Gupta, Ld. Counsel for the decree holder.

Mr. Durgesh Gupta, Ld. Proxy Counsel for the judgment debtors.



Ld. Counsel for the decree holder files his vakalatnama and submits that only one application remain pending in the present case which is under sections 55,58, Order 21 Rules 37 & 38 and Section 151 of Code of Civil Procedure for arrest of the judgment debtor. He requests that notice of the application be issued.

Ld. Proxy Counsel for the judgment debtors submits that he is accepting notice of the application and that copy of the application be supplied to him.

Copy of the application is supplied to the Ld. Proxy Counsel for the judgment debtors.

To come up for arguments on the said application on 24.12.2021. Judgments debtors are directed to appear in person on the next date of hearing.”

4. Thereafter, the first order which is impugned in the present petition came to be passed on 24th December, 2021, which reads thus:

“Present: Ld. Counsel for the decree holder.

Ld. Proxy Counsel for the legal heirs of the judgment debtor.

Reply to the application for arrest of the legal heir of the judgment debtor has not been filed.

The said application is taken up for consideration.

It has been stated in the application that there are no asset of the legal heir which can be attached for execution of the decree.

It is prayed that Mr. Bhagwan Dass be arrested and be detained in Civil Prison.

Application is allowed.

On filing of PF and depositing subsisting allowance as per rules, issue warrants of arrest of Mr. Bhagwan Dass.



To come up before the undersigned for appointment of bailiff on 28.01.2022 and for report on 25.02.2022.”

5. Mr. Om Prakash, learned Counsel for the petitioner, submits that he was suffering from stones in the gallbladder, for the purpose of which he was submitting himself to repeated hospital treatments and that, for the said ailment, he was hospitalized during the period 18th to 22nd November, 2021, 24th to 27th November, 2021, following which he had to undergo surgery on 21st December, 2021 and was subsequently discharged on 23rd December, 2021 from the Sir Ganga Ram Hospital.

6. Consequent to passing of the afore-extracted order dated 24th December, 2021, the petitioner filed an application seeking recall of the order dated 24th December, 2021 (“the recall application”, hereinafter), paras 3 to 5 of which read thus:

“3. That thereafter, the Decree holder had filed an application under Section 55 & 58 and Order 21 Rule 37 & 38 read with Section 151 CPC in the court and the copy of the said application was supplied to the counsel for the legal heirs of the deceased, judgment debtor on 01.10.2021 and the case was adjourned to 24.12.2021 for reply and argument on said application.

4. That the counsel for the legal heirs of the deceased judgment debtor namely Om Prakash Advocate, fell ill in the 3rd week of October 2021 who initially took treatment from a private doctor of the locality but could not be recovered from the illness, so, he attended the emergency of Dr. Ram Manohar Lohia Hospital, New Delhi on 26.10.2021 as OPD Patient, who was discharged him on same date after giving initial treatment. A copy of OPD registration card, dated 26.10.2021-of said Hospital is attached herewith. The said counsel also attended the St. Stephen Hospital as an outdoor



patient on 03.11.2021 and again on 06.11.2021 and ultimately got admitted in the said hospital on 18.11.2021 and was discharged on 22.11.2021 without complete recovery from the said hospital with an advice of reference to a centre with Oncology and GI Surgery. A copy of discharge summary dated 22.11.2021 issued by said Hospital is attached herewith. Accordingly, the said counsel consulted Dr: S. Tripathi and Dr. Suresh Kumar Singhvi of Sir Ganga Ram Hospital on 23.11.2021 who advised for admission, so he was admitted in the said hospital on 24.11.2021 and after treatment discharged on 27.11.2021 with advice to meet with Dr. Singhvi after two weeks with some reports. Thereafter, the said counsel was again admitted to Sir Ganga Ram Hospital on 20.12.2021 and was discharged after operation on 23.12.2021 but advised to come for Skin Staple removal after 10 days. A copy of discharge summary dated 27.11.2021 and 23.12.2021 of said Hospital are attached herewith for kind perusal of this Hon'ble Court.

5. That as the counsel for the legal heirs of the deceased decree holder undergone a surgery as detailed above, so he. could not prepare the reply to the aforesaid application and was unable to appear this Hon'ble Court on 24.12.2021 for the said reasons, so, he requested a known Advocate to appear before this Hon'ble Court to make a request for an adjournment. However, this Hon'ble Court was pleased to allow the said application of decree holder and to issue warrant of arrest of Mr. Bhagwan Dass, one of the legal heirs and fixed the date for appointment of bailiff on 28.01.2022.”

7. The aforesaid application was taken up and decided by the learned ARC *vide* the following order dated 29th January, 2022, which is also impugned in these proceedings:

“In view of order bearing no. 1/RG/DHC/2022 dated 12.01.2022 of the Hon'ble High Court, the present matter has been taken up for hearing through video conferencing.

File is taken up on an application of Mr. Bhagwan Dass for recalling order dated 24.12.2021.

Present: Mr. Om Prakash, Ld. Counsel for the applicant.



The application under consideration is taken up.

In paragraph numbers 4 and 5 of the application, the applicant has sought to explain the reasons for non-appearance on the previous dates of hearings.

In paragraph no. 6 of the application, the applicants has disclosed reasons to persuade the Court for recalling the direction for his arrest.

Application is accompanied only by the affidavit of the applicant.

Since the averments made in paragraph numbers 4 and 5 are not supported by the affidavit of the Ld. Counsel for the applicant, the averments made in these paragraphs cannot be considered by the Court.

The averments made in paragraph no. 6 ought to have been made when the application for arrest of Mr. Bhagwan Dass was filed.

Since the averments in paragraph no. 6 are being made belatedly and the averments in paragraphs no. 4 and 5. cannot be considered by the Court, the application for recalling order dated 24.12.2021 is dismissed.

To come up on the date already fixed i.e. 25.02.2022.”

8. Mr. Mohit Gupta, learned Counsel for the respondent, points out that there is not even a whisper of an averment, either in the petition or in the recall application filed before the learned ARC, to the effect that the petitioner’s client, who was directed to be personally present on 24th December, 2021, was in any way incapacitated from being present. Nor, he submits, is there any averment that the petitioner could not communicate with his client.



9. The petitioner's Counsel could not communicate with the petitioner. The period of hospitalization of learned Counsel for the petitioner, too, he submits, does not sufficiently explain the absence of the petitioner on 24th December, 2021.

10. He also places reliance on Order XXI Rule 37 of the Code of Civil Procedure, 1908 (CPC), which reads thus:

“37. Discretionary Power to permit Judgment Debtor to show-cause against Detention in prison-

(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court shall, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.”

11. To a query from the Court as to whether, even if the judgment debtor were, for *bonafide* reasons, unable to appear on the date when he was called upon to appear under Order XXI Rule 37(1) of the CPC, the Court would nonetheless be bound to send him to civil prison, Mr.



Gupta fairly submits that if there are *bonafide* reasons, the mandate of Order XXXVII Rule 2 of the CPC, may not rigidly require incarceration. However, he submits that, in the present case, there is no reason forthcoming, whatsoever, to explain the non-appearance of the petitioner on 24th December, 2021, and that, therefore, no fault could be found with the direction, of the learned ARC, to detain the petitioner in civil prison.

12. Be that as it may, when one peruses the order dated 29th January, 2022, I am of the opinion that it does not consider, with the requisite degree of care and caution, the application filed by the petitioner for recall of the order dated 24th December, 2021. The learned ARC has not condescended to consider the averments contained in paras 4 and 5 of the application on the ground that they are not accompanied by an affidavit of the learned Counsel for the petitioner/applicant. This, in my opinion, is an erroneous view. Counsel for the parties ordinarily are not expected to file affidavits before the Courts, save in the most exceptional cases. When a party has filed an affidavit accompanying the application, and the application cites the illness of the Counsel as a ground to explain non-appearance of the petitioner, the Court is required to apply its mind to the merits of the said submission and not disregard the submission on the ground that the application is not accompanied by affidavit of Counsel.

13. The grounds urged in para 6 of the application have also not been taken into consideration on the ground that they ought to have



been made when the application for arrest of the petitioner was filed and that they were belated.

14. As the order dated 24th December, 2021, which directed the petitioner to be detained in civil prison, affects his life and liberty, I am of the opinion that the learned ARC ought to have accorded greater consideration to the submissions contained in the recall application.

15. As on the sole ground that the impugned order dated 29th February, 2022 does not consider, on merits, the grounds urged in the application filed by the petitioner for recall of the order dated 24th December, 2021, I deem it appropriate, in the interests of justice, to set aside the order dated 29th February, 2022 and to remand the recall application to the learned ARC for consideration afresh.

16. For this purpose, the parties would present themselves before the learned ARC on 4th April, 2022.

17. This Court is not returning any finding on merits of the recall application or as to whether it makes out sufficient grounds for non-appearance of the petitioner on 24th December, 2021. The learned ARC is at liberty to take a decision in that regard on the basis of the averments contained in the recall application. No expression on merits of the recall application is made in this order.

18. It would also be open to the respondent to oppose the recall application and respondent would also be entitled to be heard in that



regard.

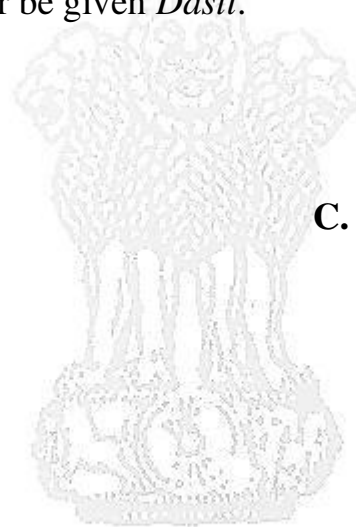
19. The operation of the order dated 24th December, 2021 shall remain stayed pending the decision of the learned ARC on the recall application filed by the petitioner.

20. This petition is allowed to the aforesaid extent with no order as to costs. Miscellaneous application stands disposed of.

21. Copy of this order be given *Dasti*.

MARCH 28, 2022
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C. HARI SHANKAR, J.



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