OD – 1&2

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

EC/97/2019
IA No.GA/1/2020(Old No.521/2020)

CONCAST CEMENT PRIVATE LIMITED
-Versus-
DECCAN CHRONICLE HOLDINGS LIMITED AND ANR.

RVWO/5/2023
WITH
EC/97/2019
IA No.GA/2/2023

CONCAST CEMENT PRIVATE LIMITED
-Versus-
DECCAN CHRONICLE HOLDINGS LIMITED AND ANR.

BEFORE :
THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE
Date : 1st March, 2023

Appearance :
Ms. Noelle Banerjee, Adv.
Mr. Dipan Dey, Adv.
Mr. Dipanjan Dey, Adv.
Ms. Shreyasi Manna, Adv.
...for the decree-holder

Mr. Rajarshi Dutta, Adv.
Mr. Shyanti Dutta, Adv.
Mr. Sarbajit Mukherjee, Adv.
Mr. Sounak Mukherjee, Adv.
...for the judgment-debtor.

The Court : This is an application seeking review of the order dated 23rd November 2022 passed by this court, where this court was pleased to issue warrant of arrest against judgement debtor No.1 through judgment debtor No. 2. Petitioner/judgement No.2 contended that judgment debtor No.

1 from 2012 started experiencing tremendous financial hardship and various legal proceedings were initiated against the judgment debtor No. 1 by it's various creditors. Eventually an application under section 7 of the Insolvency Bankruptcy Code, 2016 (IBC) was filed by Canara bank against judgment debtor No. 1 before National Company Law Tribunal, Hyderabad Branch (NCLT). Said IBC proceeding was eventually allowed on 19th July, 2017 resultantly moratorium under section 14 of the IBC also commenced from the same date and judgment debtor No. 2 was suspended from his directorship. Being aggrieved by the exception carved out in the moratorium order dated 19th July, 2017, in respect of proceeding pending before the High Court and Hon'ble Supreme Court against the judgment debtor No. 1, Said Bank filed an appeal before NCLAT. Said appeal was disposed of by an order dated 14th September, 2017 clarifying that suits, if filed, before any High Court under original jurisdiction which is a money suit or suit for recovery against the judgment debtor no. 1, such suit could not be proceeded with after declaration of moratorium under section 14 of IBC. The decree holder filed suit being CS no.394 of 2012 against the judgment debtor for reliefs claimed in the plaint. The decree holder also filed application being GA 3248 of 2012 interalia for judgment and decree on admission, the sum of Rs. 15,75,00000/-. Said GA No. 3248 of 2012 was eventually disposed of by the judgment and decree dated 20th August 2017, out of which present execution proceeding has been started.

Mr. Dutta, learned Counsel appearing on behalf of judgment debtor no. 2 submits that no decree has been passed against judgement debtor No.2

and said suit is still pending. He further submits that judgment debtor no. 2, no longer involved with the management or affairs of judgment debtor no. 1 and judgment debtor no. 2 participated in the execution proceeding merely as a proper party. He further submits that one L&T Finance Limited filed an application against judgment debtor 2 under section 95 of the IBC for initiation of insolvency resolution process against the judgment debtor no. 2 as a personal guarantor of judgment debtor no. 1. Upon filing of section 95 application, interim moratorium under section 96 of the IBC commenced and all legal action and proceeding against the judgment debtor no.2 are deemed to be stayed. On 24th June, 2022 such application was allowed and moratorium was imposed and as such present execution proceeding deemed to be stayed. Thereafter judgment debtor no. 2 still continue to be participated in the hearing but he could not appear before the court on 18th November 2022 on which date order impugned was passed. He further submits that no affidavit of asset needs to be filed by the judgment debtor no.2 and as such he prayed for reviewing the said order and/or suitably modifying the order, so that no warrant of arrest issued or executed or any legal action is taken against the judgment debtor.

Learned counsel appearing on behalf of the decree holder vehemently opposed the prayer for reviewing the order and contended that this court has given sufficient opportunity to the judgment debtor to file affidavit of asset but judgment debtor failed to comply the same and as such the court was quite justified in passing the said order which does not call for any modification.

Considered submissions made by both the parties.

Needles to say that the scope of review under order XLVII rule 1 read with section 114 of the Code of Civil Procedure is applicable where mistake or error is apparent on the face of the record and it is not synonymous with re-hearing of the matter, for detecting any error in earlier decision and to correct the same. Error which is not self evident and has to be detected by a process of reason, can hardly be said to be an error apparent of the face of the record, justifying court to exercise his power of review under order XLVII rule 1 CPC. It is also settled position of law that in case of review, it must be remembered that it can be used for limited purpose and it's not an appeal in disguise. There is a clear distinction between erroneous decision and error apparent on the face of the record.

In view of the aforesaid settled position of law let me consider whether the order impugned calls for any review or not. It is apparent from the order sheet that vide order dated 19th March, 2019, this court observed that since no appeal has been preferred from the decree in question there will be order in terms of prayer 'D' of the tabular statement and in the next order dated 2nd April 2019, this court was pleased to direct judgement debtor no. 2 to file affidavit of asset on behalf of the respondent no. 1 within four weeks from the date. Subsequently on 18th November, judgment debtor, while represented were again directed to submit affidavit of asset in terms of earlier order and it was further ordered that in default warrant of arrest may be issued against him. Such orders were never challenged. On the next day i.e. on 23rd November, 2022 judgment debtor No.2 was represented but did not file any affidavit of asset and accordingly the warrant of arrest was issued. Now judgement debtor's contention is in terms of explanation given by him as stated above there is no requirement to file affidavit of asset.

When the court has specifically directed the judgment debtor no. 2 to file affidavit of asset, long back on 2nd April 2019 and also by subsequent order and when judgment debtor in spite of appearance did not bother to comply the same on the plea that such affidavit is not required to be filed in the present context, I find no mistake or error which is apparent on the face of the record. Even when impugned order was passed, opportunity was given to judgment debtor to file affidavit of asset within four weeks and in case filing the same opportunity was given to them for mentioning to discharge the warrant of arrest. Till date, judgment debtor has not complied the same and as such there is no mistake or error apparent on the face of the record and as such the prayer for review is not sustainable.

RVWO/5/2023 arising out of EC 97 of 2019 is rejected.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)

S.Das//As.