

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.744 OF 2023

VIRAJ MANOHAR BANDEKAR

... Applicant

Versus

**LOKMANYA MULTIPURPOSE CO-
OPERATIVE SOCIETY LTD., REP. BY ...Respondent
MANAGER MANISHA SALGAOKAR**

Mr Sudin Usgaonkar, Senior Advocate with Ms D. Parab, Advocate
for the petitioners.

CORAM:

BHARAT P. DESHPANDE, J

DATED:

8th February, 2024

P.C.:

1. Heard Mr Sudin Usgaonkar, learned Senior Advocate with Ms D. Parab, learned Counsel for the petitioners.
2. Even though the respondent is duly served, no one appeared.
3. The impugned order dated 21/10/2023 shows that the Court while executing the decree observed that the affidavit under Order XXI Rule 41(3) is not disclosing all the concerned details and therefore directed that an arrest warrant be issued against the Judgment Debtor/Petitioner. The Advocate/respondent was directed to deposit subsistence allowance.

4. Mr. Usgaonkar appearing for the petitioner submits that though the award was passed by the learned Arbitrator, the execution application is filed in the year 2018 and the petitioner is depositing some amount. He submits that the learned Executing Court observed in its order dated 30/09/2023 that part payment made towards satisfaction of the decree is not sufficient or proportionate and accordingly directed the petitioner to disclose on affidavit the assets.

5. Mr. Usgaonkar submits that though the petitioner filed an affidavit, the learned Executing Court observed that such an affidavit though filed failed to disclose the relevant aspects as provided under Order XXI Rule 41 and without giving any opportunity to rectify it, issued a warrant of arrest.

6. It is well settled position of law that issuance of the arrest warrant should be the last resort and that too on a clear finding that the judgment debtor is deliberately avoiding to satisfy the Court. The impugned order nowhere shows that such findings are recorded. Similarly, the learned Executing Court failed to give an opportunity to the petitioner to rectify the so called defect by asking him to file a fresh affidavit.

7. Mr. Usgaonkar placing reliance on the decisions in the case of **Madhusudan Zumbarlal Sarda v/s. State of Maharashtra and others** [2018(6) MhLJ 691] and in the case of **Deepak Mathur v/s. St.**

Anthony's Timbers [Writ Petition No.503 of 2023] decided by this Court, submits that the order itself is without following the procedure and therefore needs to be quashed and set aside.

8. In the case of **Jolly George Verghese v/s. Bank of Cochin** [AIR 1980 SC 470], the Apex Court observed that there must be some element of bad faith beyond mere indifference to pay, some deliberate of recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonesty disowning of the obligation under the decree.

9. In the case of **Madhusudan**(supra) the Division Bench of this Court was dealing with the recovery certificate and arrest warrant for committal to Civil prison issued by Sub-Divisional Officer towards recovery, was questioned on the ground that no opportunity was given before passing such order. Relying upon the case of **Jolly George Verghese** (supra) observing that the arrest warrant cannot be issued for mere failure to pay the amount but only when there is deliberate refusal to comply with the order of the Court by recording such satisfaction.

10. This Court in **Deepak Mathur**(supra) was dealing with the order of issuance of warrant in the event of noncompliance of directions to file

the affidavit disclosing assets observed that issuance of warrant should be the last resort and that too after trying all other means to satisfy the decree.

11. In this matter, though affidavit was filed, the learned Executing Court found that it was defective and not in compliance of order XXI Rule 41 of CPC. Thus an opportunity ought to have been given to file the appropriate affidavit instead of issuing warrant of arrest.

12. The impugned order therefore needs interference in the supervisory jurisdiction as it was issued casually and without application of mind. It also failed to consider the impact of civil imprisonment for such technical default.

13. The impugned order therefore required to be quashed and set aside.

14. Accordingly, the petition stands allowed in the above terms.

15. Parties to act on an authenticated copy of this order.

B. P. DESHPANDE, J

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VISHAL BHOIR

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