

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

**EC No.240 of 2022
CS No. 196 of 2015
Amrita Engineering And Trading Company Private
Limited
Vs.
Mrs. Malathi Aiyer**

Before: The Hon'ble Justice Apurba Sinha Ray

For the Decree-holder : Ms. Reshmi Ghosh, Adv.
Mr. Altamash Alim, Adv.
Ms. Parna Mukherjee, Adv.

For the Judgment-debtor : Mr. Parashar Baidya, Adv.
Ms. Subhasree Patel, Adv.
Mr. Soham Banerjee, Adv.

CAV On : 17.06.2025

Judgment On : 30.06.2025

Apurba Sinha Ray, J. :-

1. The instant execution petition has been filed by the decree-holder for execution of an ex-parte decree dated 30.08.2019 of Rs. 78,07,890/- (Rupees Seventy Eight Lakh Seven Thousand Eight Hundred and Ninety only) along with an interest @ 18% per annum

from July 17, 2015. Subsequently, the judgment-debtor appeared in this proceeding and submitted her affidavit-of-assets. The judgment-debtor has also been examined by the learned counsel of the decree-holder. The contention of the judgment-debtor is that not a single immovable property is lying within the jurisdiction of this court and further relevant bank accounts are also not within the jurisdiction of this court. The learned counsel for the judgment-debtor has submitted that this court has no jurisdiction to proceed with the instant execution proceeding.

2. The learned counsel Ms. Ghosh appearing for the decree-holder, has submitted that it is admitted by the judgment-debtor in this proceeding that she has taken a sum of Rs. 60,00,000/- (Sixty Lacks only) from the decree-holder for the purpose of paying EMIs for the flat which she has purchased after approaching the decree-holder at its office situate at 7A, Kiran Shankar Roy Road, 2nd Floor, Kolkata - 700001. The judgment-debtor has also admitted that prior to taking the loan in the year 2013, she had a property in her name and also in the name of her son. The address of such property is at 804, 7th Main 1st Cross Hal, II Stage, Bengaluru.

3. The learned counsel has also drawn the attention of this court to the relevant materials on record wherein the judgment-debtor has also admitted that there was another premises being No. 67/3A, 4th Cross Lavelle Road, Bengaluru, Pin – 560001. It is also alleged that the judgment-debtor did not disclose in her affidavit-of-assets and supplementary affidavit the sale proceeds received by her after sale of the apartment measuring about 1365 sq.ft. super built up area at 67/3A, 4th Cross Lavelle Road, Bengaluru, Pin – 560001 along with a vacant land measuring 4100 sq.ft. in Bengaluru municipal area. According to Ms. Ghosh, an affidavit-of-assets is a procedural step to be followed in an execution application whereby all the assets of the judgment-debtor is to be disclosed before the Hon'ble Court both moveable and immoveable in nature. However, the judgment-debtor did not disclose the tax return filed by her in the last financial year concerning the sale of her property.

4. It is alleged by the decree-holder that by selling the apartment at 67/3A, 4th Cross Lavelle Road, Bengaluru, Pin – 560001 for Rs. 1.25 Crore she had got sufficient money to satisfy the decree but the judgment-debtor had not only evaded to pay the decretal amount along with interest but she intentionally did not disclose the sale details, bank details, tax filing details in her affidavit-of-assets. The affidavit-

of-assets and the supplementary affidavit filed by the judgment-debtor were filed in a very casual manner. The suit was filed in the year 2015 and the sale took place in the year 2017 when she was fully aware that payment had to be made to the decree-holder. It also appears from the supplementary affidavit filed by the judgment-debtor that she has disclosed the reference of such an account where there is no money.

5. The learned counsel further submitted that the decree-holder in accordance with the provisions of the Code of Civil Procedure, 1908 and the Original Side Rules, 1925 of the Hon'ble High Court at Calcutta, had filed the execution application to execute the decree dated August 30, 2019. During the hearing of the execution case being EC No. 240 of 2022 the judgment-debtor has taken the objection to the jurisdiction of this Hon'ble Court to execute the decree. The judgment-debtor has relied upon the judgments reported in **AIR 2016 Cal 293 (Srei Equipment and Finance Private Limited Vs. Khoyada Apik & Ors.)**. According to Ms. Ghosh, the said judgment, in fact, supports the decree-holder's case. It is also contended that when execution is sought against moveable property, the question of transfer of decree or award cannot arise since the location of moveable property cannot be determined with certainty and same may be moved by the judgment-debtor from jurisdiction to jurisdiction. Furthermore, in an

age of computerization, bank accounts are not necessarily operated at a single branch. Net banking enables a customer of a bank to transfer funds from any place. So, according to the decree-holder, the objection regarding transfer is irrelevant and such judgment is also inapplicable in view of the fact that this Hon'ble High Court at Calcutta is a Chartered High Court and in its ordinary original civil jurisdiction has evolved its own procedure and practice to execute in connection with property situated outside the territorial limit. It is further contended that the rule making power of the Chartered High Court originated from clause 37 of the Letters of Patent, 1865 read with Section 108 of the Government of India Act, 1915 and this power of this court given by two legislations is unique and it stands on a different footing on other High Courts. Moreover, Section 39 of the Code of Civil Procedure, 1908 cannot take away the power of this Hon'ble Court. In this regard, he has drawn the attention of this court to the judicial decision in the **Salem Advocate Bar Association case** reported in **AIR 2005 SC 3353** (paragraph 25). It is also contended that the Original Side Rules, 1925 which was framed under clause 37 of the Letters of Patent, 1865 read with Section 108 of Government of India Act, 1935 and Article 225 of the Constitution of India has got the effect of Supreme Court legislation and it being a special law obviously override the general law of procedure being Code of Civil Procedure, 1908. The practice and

procedure followed by the Hon'ble High Court at Calcutta for a long time also partakes the character of the law by virtue of Rule 3 of Chapter XL of the Original Side Rule, 1925. This practice and procedure adopted by Rule 3 of Chapter XL of the Original Side Rules, 1925 cannot be taken away and/or curtailed by sub-section (4) of the Section 39 of the Code of Civil Procedure, 1908. Moreover, sub-section (4) has to be read in the context of the parent provision of Section 39 of the Code of Civil Procedure, 1908. The power of execution is primarily derived from Section 38 of the Code of Civil Procedure, 1908 and therefore Section 38 and 39 of the Code of Civil Procedure, 1908 has to be read conjointly and given an objective meaning.

6. Ms. Ghosh has further contended that the word "shall" mentioned in sub-section (4) of Section 39 of the Code, is not intended to mean as being mandatory for it cannot be read inconsistently with the Sub-section (1) of Section 39 of the Code of Civil Procedure, 1908. It is the discretion of the Court either to execute by itself or to send it. But the legislature has provided that in case of a situation as mentioned under sub-section (4) of Section 39 of the Code of Civil Procedure, 1908 the court which has passed the decree will not ordinarily execute by itself if it is found that the execution is possible legally and conveniently if the decree is sent to the appropriate court

within whose jurisdiction the property situates and/or the person resides.

7. According to Ms. Ghosh the same does not mean that the court's discretionary power can be curtailed. Moreover, if the provision is read as being mandatory then unscrupulous judgment debtor who is sought to be executed will go on changing his place of residence locating within the jurisdiction of transferee court and in that case each occasion of change of residence will give rise to fresh order of transfer by the court successively. It is an inconceivable idea that the process of execution will run after judgment-debtor all the time.

8. It is evident from the materials on record that the judgment-debtor after passing of the decree has dealt with one of her immovable properties and has appropriated the sale proceeds without paying the decretal sum of the decree-holder and the same act does not inspire confidence, and as such, in view of innumerable pronouncement regarding expeditious disposal of the execution proceedings, the instant execution proceeding being EC No. 240 of 2022 is required to be disposed of by realizing the decretal sums from the judgment-debtor by taking coercive steps including police action.

9. Judgment-debtor's learned counsel Mr. Baidya, after challenging the instant execution proceeding, has submitted that this court does not have the jurisdiction in view of the explicit bar imposed under Section 39(4) of the Code of Civil Procedure, 1908. In this regard, he has relied upon the judicial decisions of **Nasiruddin and Ors. Vs. Sita Ram Agarwal** reported in **(2003) 2 SCC 577**, **Nathi Devi Vs. Radha Devi Gupta** reported in **(2005) 2 SCC 271**, **Haridas Basu Vs. National Insurance Company Limited** reported in **AIR 1932 Cal 213**, **Delhi Cloth & General Mill Co. Ltd. Vs. Ramjidas Shriram and Ors.** reported in **1981 SCC OnLine Cal 141**, **AIR 1982 Cal 34**, **Mechano Paper Machines Ltd. Vs. NEPC Papers & Boards Ltd. & Ors.** reported in **AIR 2012 Cal 26**, **Mohit Bhargava Vs. Bharat Bhushan Bhargava & Ors.** reported in **2007 4 SCC 795**. By citing those judgments Mr. Baidya has vehemently submitted that Section 38 of the Code provides that a decree may be executed either by the court which passed it or by the court to which it is sent for execution. Section 42 of the Code indicates that the transferee court to which the decree is transferred for execution will have the same powers in executing that decree as if it had been passed by itself. A decree could be executed by the court which passed the decree so long it is confined to the assets within its own jurisdiction or as authorized by Order 21 Rule 3 or rule 48 of the Code or the judgment-debtor is within its

jurisdiction, if it is a decree for personal obedience by the judgment-debtor. But when the property sought to be proceeded against, is outside the jurisdiction of the court which passed the decree acting as the executing court, there was a conflict of views earlier, some courts taking the view that the court which passed the decree and which is approached for execution of the decree cannot proceed with execution but could only transmit the decree to the court having jurisdiction over the property and some other courts taking the view that it is a matter of discretion for the executing court and it could either proceed with the execution or send the decree for execution to another court. But this conflict was set at rest by Amendment Act 22 of 2002 with effect from 01.07.2002, by adopting the position that if the execution is sought to be proceeded against any person or property outside the local limits of the jurisdiction of the executing court, nothing in Section 39 of the Code shall be deemed to authorize the court to proceed with the execution. In the light of this, Mr. Baidya argues, it may not be possible to accept the contention that it is a matter of discretion for the court either to proceed with the execution of the decree or to transfer it for executing to the court within the jurisdiction of which the property is situated.

10. Mr. Baidya, has further submitted that the judgment relied upon by the decree-holder in support of their case i.e. **Birla Corporation Ltd. Vs. Prasad Trading Company & Anr.** reported in **AIR 2007 Cal 38** has already been overruled by the Hon'ble Division Bench of this court in **Mechano Paper Machines Ltd. Vs. NEPC Papers & Boards Ltd. & Ors.** reported in **AIR 2012 Cal 26**. Furthermore, the judicial decision in **Srei Equipment and Finance Pvt. Ltd. (supra)** submitted by the decree-holder is factually distinguishable on the point that the said judgment has been passed in respect of execution case related to an arbitral award and not in reference to a decree passed in a suit. The judgment was decided under section 42 of Arbitration and Conciliation Act, 1996 and the said judgment clearly speaks that an arbitral award cannot be construed as a decree, or as an order for the purpose of Section 38 and 39 of the Code of Civil Procedure, 1908 (paragraph 18).

11. Mr. Baidya has further submitted that by order dated 08.03.2024 this court refused to pass an order of injunction on the ground that admittedly the immovable property of the judgment-debtor situates outside the jurisdiction of this court. The right of the petitioner in respect of immovable property situated at 804, 7th Main 1st Cross, Hal II Stage, Bengaluru - 560 038 has not been crystalized

since an expectancy of succession by survivorship or other merely contingent or possible right or interest shall not be attached for sale.

12. Mr. Baidya has also submitted that the execution application is defective. Furthermore, the decree-holder did not disclose that during the pendency of the suit Rs. 10,00,000/- (ten lakhs only) has been repaid by the judgment-debtor on 22.08.2016 and such suppression amounts to fraud upon the court and vitiates everything.

13. I have considered the materials on record including the affidavit-of-assets and the relevant examination of the judgment-debtor at the instance of the learned counsel of the decree-holder. It appears that there is an admission on the part of the judgment-debtor regarding her liability to pay. However, after going through the examination and affidavit-of-assets, I find that the decree-holder is unable to show either any immovable or movable property is lying within the jurisdiction of this court.

14. After amendment of Section 39 of the Code of Civil Procedure, 1908 stands as follows:-

39. Transfer of decree.- (1) *The Court which passed a decree may, on the application of the decree-holder, send it for*

execution to another Court of competent jurisdiction -

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has no property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.

(4) Nothing in this section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction.”

15. Section 39(1) deals with the procedure when on the application of the decree-holder the court can send the decree for execution to another court of competent jurisdiction. Further Section 39(2) deals with the situation when the court which passed a decree may of its own motion send it for execution to any subordinate court of competent jurisdiction. But Section 39(4) has clearly laid down that the provisions in Section 39 does not authorize the court which passed

a decree to execute such decree against any person or property outside the local limits of its jurisdiction. However, the instant case does not fall under order XXI rule 3 or order under XXI rule 48 of the Code which has laid down a different procedure where lands are situated in more than one jurisdiction and where the question of attachment of salary or allowances of the servant of the government or of a servant of a railway company or local authority is involved. Now, the question is whether the Original Side Rules has any overriding effect over Section 39(4) of the Code of Civil Procedure, 1908 or not.

16. Needless to mention, the case law reported in **AIR 2007 Cal 38 Birla Corporation Limited Vs. Prasad Training Company & Anr.** does not find favour in the judicial decision reported in **AIR 2012 Cal 26 by the Mechano Paper Machines Ltd. (supra)** passed by a Hon'ble Division Bench of this Court. However, the Hon'ble Division Bench has been pleased to observe :-

“In our opinion, the moment sub-section (4) of Section 39 has been incorporated which is couched in a negative form, there is no trace of doubt that the said provision is mandatory in nature subject to Order 21 Rules 3 and 48 as pointed out by the Supreme Court in the case of Salem Bar Association (supra). With great respect to

His Lordship we do not approve the view taken in the case of Birla Corporation Ltd. (supra).

On consideration of the entire materials on record, we find that the learned Single Judge acted without jurisdiction in appointing a Receiver over a property situated beyond the territorial limits of the Court for the purpose of execution of a money decree and as such, we set aside the order impugned.”

17. Therefore, it is not correct that Original Side Rules of the High Court at Calcutta are to be given preference over the Code of Civil Procedure. In this regard Rule 37 of Letters of Patent, 1865 may be quoted as hereunder:-

“37. Regulation of proceedings.- And We do further ordain, that it shall be lawful for the said High Court of Judicature at Fort William in Bengal from time to time to make rules and order for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate, and Matrimonial jurisdictions respectively Provided always,

that the said High Court shall be guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No. VIII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India.”

18. From the above, it is transpired that there is a mandate that the Hon’ble High Court should be guided in making rules and orders regulating proceedings, as far as possible, by the provisions of the Code of Civil Procedure and the provision of any law which has been made, amending or altering the same, by competent legislative authority for India. If that be so, as the Code of Civil Procedure is an enactment of the Indian Parliament, I think the overriding effect of Code of Civil Procedure over the Original Side Rules has already been recognized in Rule 37 of the Letters of Patent, 1865. Therefore, when sub-section (4) of Section 39 of the Code specifically discourages the court passing a decree from executing such decree against any person or property outside the local limits of its jurisdiction, Rule 37 of Letters of Patent, 1865 of the Hon’ble High Court at Calcutta is to be construed accordingly, and thus, I find that this court is not authorized to execute the relevant decree against the judgment-debtor

who is residing outside the State and her properties which are also lying outside the local limits of its jurisdiction and therefore, the prayer for executing the relevant decree cannot be proceeded with in this court for want of jurisdiction. However, from the materials on record and also the affidavit of assets filed by the judgment-debtor it appears that she has properties in the State of Karnataka and further, as this court has power to send the decree on its own motion for execution to any court of competent jurisdiction under sub-section (2) of Section 39 of the Code, I think that the relevant decree should be sent to the court of competent jurisdiction for its execution. The record shows that the petitioner has properties at 804, 7th Main 1st Cross, Hal II Stage, Bengaluru - 560 038 which is within Bengaluru district, Karnataka.

19. The relevant decree dated 30.08.2019 passed in CS No. 196 of 2015 be sent to the Learned Chief Judge, City Civil Court at Bengaluru for execution of the decree by the said court itself or by a competent court having jurisdiction to execute such decree as would be nominated by the Learned Chief Judge, City Civil Court, Bengaluru in accordance with law and relevant rules.

20. However, the time spent in proceedings with EC No. 240 of 2022 in this court will be excluded under Section 14 of Limitation Act. The Learned Registrar, Original Side High Court at Calcutta is requested to send the decree along with connected papers to the concerned court as mentioned above immediately for execution along with a copy of this order.

21. Without touching the merits of the case, EC No. 240 of 2022 is disposed of only on the ground that this court lacks jurisdiction. No order as to costs. Interim order, if any stands vacated.

22. Copies of this Judgment, if applied for, be supplied to the parties on compliance of all necessary formalities.

(APURBA SINHA RAY, J.)