

(2006) 12 DEL CK 0094

In the Delhi High Court

Case No : CM (M) No's. 887 and 1287 of 2004 and CM No's. 8663 and 12120 of 2004

Jagdish Prasad Sharma

APPELLANT

Vs

Standard Brands Limited
 Amar Chand Vs Standard
Brands Limited and Another

RESPONDENT

Date of Decision : 07-12-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 37, Order 37 Rule 4, 151, 152, 153
Constitution of India, 1950 — Article 21, 227
Delhi High Court Act, 1966 — Section 5(2)
Transfer of Property Act, 1882 — Section 53A

Citation : AIR 2006 Delhi 1988 : (2007) 1 ILR Delhi 728

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Pradeep Gupta and Suresh Bharti, for CM M No. 887 of 2004 and CM No. 8663/2004 and Anil Mittal, for CM M No. 1287 of 2004 and CM No. 12120/200, for the Appellant; Dinesh Garg, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—The respondent filed a suit on 06.08.2002 for recovery of Rs. 14,43,750/- against the petitioner on account of non-payment of a loan along with interest under the provisions of Order xxxvII of the Code of Civil Procedure, 1908 (hereinafter to be referred to as, "the said Code"). The suit was filed before the District Judge, Delhi. The petitioner failed to appear and consequently an ex-parte decree was passed on 02.11.2002. The respondent filed execution proceedings in which objections were filed by one Shri Amar Chand. These objections were filed as in terms of the execution proceedings, the property bearing No. 61/1, Old Rajinder Nagar, New Delhi owned in part by the petitioner is sought to be attached. The objections were dismissed by the order dated 28.05.2004 and warrants of attachment were issued against the said property. Insofar as the petitioner is concerned, the trial court noticed the stand

of the petitioner that he did not own any movable or immovable property sufficient to satisfy the decree and the warrants of attachment could be issued only in respect of one-third share of the aforesaid property since the two-third share was stated to be owned by the wife and the son of the petitioner. The trial court issued warrants of arrest for the petitioner.

2. The petitioner thereafter filed an application in June, 2004 under Order xxxvII Rule 4 read with Sections 151, 152 and 153 of the said Code for recalling and setting aside the ex-parte decree. The plea raised by the petitioner in this application was that the decree was passed by the Court, which did not have the pecuniary jurisdiction to do so and, thus, the decree was a nullity.

3. The aforesaid plea arose on account of the fact that at the stage when the suit was pending, on 23.08.2002, a Full Bench of this Court in *Geetika Panwar and Ors. v. Govt. of NCT of Delhi and Ors.* 2002 (64) DRJ 588 declared as ultra virus Section 5(2) of the Delhi High Court Act, 1966 and Delhi High Court (Amendment) Act, 2001 raising the pecuniary jurisdiction of the District Courts from Rs. 5 lakhs to Rs. 20 lakhs. The ground for the same was that the Legislative Assembly of the National Capital Territory of Delhi was not competent to pass the legislation affecting the pecuniary jurisdiction of the High Court. It was simultaneously observed that the declaration would have only prospective effect and would not operate retrospectively. Suits instituted till the date of the judgment would not become invalid as a consequence of the judgment, but the suits filed in the Subordinate Courts pursuant to the impugned legislation would stand transferred to Delhi High Court and be tried, heard and determined as if they had been filed in Delhi High Court. In the present case, the suit had been filed on 06.08.2002 while the Full Bench delivered the judgment on 23.08.2002. Thus, the institution of the suit was protected, but the suit was to be transferred to Delhi High Court.

4. The aforesaid judgment was challenged before the Supreme Court and in terms of the order dated 06.09.2002, interim orders were passed directing that the suits, which have already been filed in the District Courts, would not be transferred to Delhi High Court consequent to the impugned judgment of the Full Bench of Delhi High Court.

5. In the year 2003, once again, the pecuniary jurisdiction of the District Courts was enhanced from Rs. 5 lakhs to Rs. 20 lakhs in terms of a notification dated 26.05.2003, but the same had prospective effect.

6. The plea of the petitioner, thus, was that though the suit was properly instituted, which institution was protected by the Full Bench judgment of this Court, the trial court could not have proceeded with the matter, but could have only kept it pending as per the interim orders granted by the Supreme Court on 06.09.2002. The factum of the subsequent increase of pecuniary jurisdiction would, thus, not affect the present judgment, which came into being in the interregnum period on which date the District Courts had no jurisdiction in the

matter.

7. Learned Additional District Judge as per the order dated 05.07.2002 dismissed this application and held that the Supreme Court had not directed the District Courts not to proceed with the matters while staying the transfer of the cases to Delhi High Court as per the interim order dated 06.09.2002. Not only that there was subsequent increase of pecuniary jurisdiction, which was not in doubt.

8. The petitioner has filed the present petition under Article 227 of the Constitution of India seeking to challenge both the orders dated 28.05.2004 and 05.07.2004 Learned Counsels for the parties have been heard on both the aforesaid aspects.

9. I consider it appropriate to first deal with the grievance arising from the order dated 05.07.2004 There is no doubt that the suit was properly instituted by the respondent and that aspect stands protected by the judgment of the Full Bench of this Court. It is also not in dispute that there has been subsequent increase of pecuniary jurisdiction of the trial court but that is after the decree was passed in the suit in question as the notification was issued only on 26.05.2003, while the decree was passed on 02.11.2002. The question, thus, to be considered as to what would be the ramification of the interim order dated 06.09.2002 passed by the Supreme Court on the challenge to the Full Bench judgment of this Court.

10. The directions passed by the Supreme Court on 06.09.2002 clearly stayed the effect of the Full Bench judgment of this Court insofar as the requirement of the transfer of cases from the District Courts to Delhi High Court and thereafter their trial and determination in this Court as if they had been instituted in this Court. The result is that the suits were liable to continue before the District Courts. The direction passed by the Supreme Court was not that the matters would be just kept pending nor was there any direction that the District Courts would not proceed with the matter. In my considered view, the effect and purport of the interim order passed by the Supreme Court on 06.09.2002 is that the matters filed prior to the judgment of the Full Bench of this Court would continue before the District Courts. Thus, the District Courts were well within their jurisdiction to pass a decree.

11. In my considered view, the petitioner cannot take advantage of the factum of the decree being passed during the interregnum period when the interim orders were operating of the Supreme Court and the subsequent increase of the pecuniary jurisdiction of the District Courts. The application filed by the petitioner appears to be a desperate attempt to evade the rigours of the earlier order passed on 28.05.2004

12. Now coming to the order dated 28.05.2004 in terms whereof the warrants of arrest have been issued against the petitioner. Learned Counsel for the petitioner contends that merely because the petitioner has no assets to satisfy the decree, the petitioner cannot be detained in a civil prison invoking the provisions of proviso to Section 51 read with Order XXI Rule 37 of the said Code. Learned

Counsel in this behalf referred to the judgment of the Supreme Court in Jolly George Varghese and Another Vs. The Bank of Cochin, . It was held by the Supreme Court that if a judgment debtor bona fide is unable to pay off his debts, an order for his detention in prison and execution of the decree would be violative of Article 21 of the Constitution of India as well as the spirit of Article 11 of the International Covenant on Civil and Political Rights. The executing court is required to enquire into the present financial position and ability of the judgment debtor to satisfy the debt. There has to be an element of dishonesty or bad faith in liquidating the liability for such an extreme measure.

13. Learned Counsel for the respondent on the other hand, submits that the petitioner has not declared himself insolvent and the procedure prescribed under Sub-section (3) of Section 55 of the said Code requires that after the arrest of judgment debtor in execution of the decree, he will be brought before the Court and the Court will inform him that he may apply to be declared as insolvent and that he may be discharged if he has not committed an act of bad faith.

14. In order to appreciate these rival contentions, it is necessary to reproduce the relevant provisions:

51. Powers of Court to enforce execution. - Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree-

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by the sale without attachment of any property;
- (c) by arrest and detention in prison for such period not exceeding the period specified in Section 58, where arrest and detention is permissible under that Section;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require:

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied-

- (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,-
 - (i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or
 - (ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property, or
- (b) that the judgment-debtor has, or has had since the date of the decree, the

means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation. - In the calculation of the means of the judgment-debtor for the purpose of Clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

55. Arrest and detention. -

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he may be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

ORDER XXI EXECUTION OF DECREES AND ORDERS

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.

15. A perusal of the aforesaid provisions and the legal position as enunciated by the Supreme Court in Jolly George Varghese and Anr. case (supra) makes it abundantly clear that mere inability to pay debts and satisfy the decree would not require the order to be passed by the trial court of detention in civil prison. No doubt Clause (c) of Section 51 of the said Code provides for arrest and detention in prison as a mode of execution of the decree. The proviso, however, stipulates that the detention can take place only if the trial court is satisfied in respect of any of the conditions as specified in Clauses (a), (b) and (c). Para (ii) of Clause (a) of the proviso to Section 51 of the said Code refers to a dishonest

transfer of a property or any other act of bad faith after the institution of the suit.

16. In view of the aforesaid legal parameters, I am of the considered view that the reasoning of the trial court while passing the order dated 28.05.2004 that there is no other option but to effect detention cannot be accepted and it has to be decided whether there is any such transfer of property aforesaid. In this behalf, the order dated 28.05.2004 deals with the objections of one Shri Amar Chand.

17. The petitioner is the owner of one-third share of the property bearing No. 61/1, Old Rajinder Nagar, New Delhi. The petitioner is alleged to have entered into an Agreement to Sell dated 18.07.2001 in respect of the property. The case of the petitioner is that such a transfer of the property is valid, though there is no registered document as the practice of transfer of property through documents of Agreement to Sell, GPA, Will and Receipt are the normal. The important aspect in this behalf is that the present case is not one where all the documents were executed, full consideration received and possession handed over simultaneously. This would have been the normal practice followed. The Agreement to Sell dated 18.07.2001 only talks of a payment of Rs. 20,000/- in cash. All the other documents have been executed much after passing of the decree on 19.02.2003. These are the registered documents of GPA and Will apart from the Receipt. The claim of the petitioner that the genuineness of these documents cannot be doubted in view of the balance payment being made by cheque cannot be accepted for the reason that these documents are post even the decree much less the institution of the suit. The alleged Agreement to Sell, which is prior to the date of institution of the suit, only talks about an advance of Rs. 20,000/- and that too in cash. If it was so, there was no reason to keep the transaction in abeyance for little less than two years. There is, thus, a clear attempt to evade the rigours of a decree by fraudulently seeking to transfer the property to a third party.

18. A reference is made to the Division Bench judgment of this Court in Asha M. Jain Vs. The Canara Bank and Others, , which considered the concept of Power of Attorney sales as a mode of transaction. In fact, the distinguishing factor noticed in the said judgment is that such transactions are different from a mere Agreement to Sell as they are accompanied with documents including General Power of Attorney, Special Power of Attorney and Will along with possession being handed over. It was, thus, held that the provisions of Section 53A of the Transfer of Property Act, 1882 would also apply. This judgment would have no application to the present case because the Agreement to Sell in the present case was not accompanied by such documents and the relevant stage of time prior to the institution of the suit. All these factors have been noted in the order dated 28.05.2004 and these are what have formed the substratum of the order passed by the trial court to issue warrants of arrest. Thus, the legality and validity of the order cannot be doubted, though the rationale for the same as recorded in the order dated 28.05.2004 cannot be accepted. The warrants of

arrest are issued not because the petitioner has no other means to pay to satisfy the decree but because he has dishonestly transferred the property and, thus, committed an act of bad faith in relation to the property so as to evade the consequence of a decree, which was to be passed against the petitioner.

19. In my considered view, there is no patent or jurisdictional error in the impugned order.

20. The order dated 28.05.2004 has also been challenged by Shri Amar Chand in CM (M) No. 1287/2004 and, thus, learned Counsel for Shri Amar Chand was also heard as both the matters were considered together. The only plea of Shri Amar Chand is of the bona fide transaction and, thus, he is aggrieved by the fact that one- third share in the property purchased by him is sought to be attached. It has already been explained above that the transaction cannot be said to be bona fide as the relevant documents of Will, GPA, Receipt, payment and parting of possession were all well after the decree was passed and the only document prior to institution of the suit is the alleged Agreement to Sell dated 18.07.2001 which only records payment of advance of Rs. 20,000/- in cash. This document appears to be a creation to evade the rigours of the decree as there was no reason why payment ought to have been made in cash at that stage when subsequently payments have been made by cheque. There is also no Explanation why for almost two years after the Agreement to Sell, no action was taken. The document is highly suspicious. It is in view thereof that Shri Amar Chand is not entitled to the benefit of the judgment in Asha M. Jain's case (supra) which dealt with the genuine transactions where a sale deed may not have been executed but a set of documents executed of Agreement to Sell, GPA, SPA, Will, etc. simultaneously along with possession being parted. There is, thus, no merit in the petition even filed by Shri Amar Chand.

21. The challenge to both the orders by Shri Jagdish Prasad Sharma and Shri Amar Chand in the two petitions are without any merit and both the petitions are dismissed leaving the parties to bear their own costs.