
United Phosphorous Ltd. Vs A.K. Kanoria

Chamber Summons No. 937 of 2001 in Summary Suit No. 4600 of 1997

Court: Bombay High Court

Date of Decision: June 13, 2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 21 Rule 11, Order 21 Rule 11(2), Order 21 Rule 41, Order 21 Rule 41(2)#Limitation Act, 1963 " Article 136

Citation: AIR 2003 Bom 97 : (2002) 4 ALLMR 396 : (2003) 1 BomCR 299 : (2002) 4 MhLj 358

Hon'ble Judges: D.G. Karnik, J

Bench: Single Bench

Advocate: P.V. Shah, Amicus Curiae, S. Suvarna, instructed by D.S.K. Legal, for the Appellant; Prashant Chande, for the Respondent

Judgement

D.G. Karnik, J.

Heard Shri S. Suvarna instructed by DSK Legal for the plaintiff, Shri Mr. Prakash Chande instructed by H. V. Chande

for the defendant and Shri P. V. Shah, Advocate appearing amicus curiae.

2. When this matter came up for hearing before Hon"ble S. A. Bobde, J. on 2-5-2002, he was pleased to request P. V. Shah, Advocate to assist

the Court as Amicus Curiae, Shri Shah ably assisted this Court. I record my deep appreciation of the able assistance rendered by Shri P. V. Shah,

Advocate.

3. Facts :

In summary suit no. 4600 of 1996 filed by the plaintiff a money decree was passed against the defendant. The plaintiff has filed the present

Chamber Summons for an order of this Court requiring the defendant to file an affidavit as provided under Sub-rule (2) of Rule 41 of Order XXI

of the Code of Civil Procedure, disclosing the assets held by him. The Chamber Summons was filed without filing an application under Order XXI,

Rule 11, (commonly known as an ""Execution Petition"" or a ""Darkhast"") of the Code of Civil Procedure.

4. Shri Chande, the Learned Advocate appearing for the defendant opposes the Chamber Summons and contends that Chamber Summons is not

maintainable and deserves to be dismissed because according to him, an application under Order XXI, Rule 41 cannot be filed (i) unless a formal

decree was drawn up and remains unsatisfied for a period of 30 days thereafter and (ii) without first filing an Execution Petition/Darkhast under

Order XXI, Rule 11(2) of the Code of Civil Procedure.

5. Regarding 1st contention:

Whether application under Order 21, Rule 41 can be filed before a formal decree is drawn in accordance with Section 33 read with order XX,

Rule 6 of the Code of Civil Procedure?

6. Shri Chande invited my attention to Clause Nos. 2, 3, 9, 10 and 14 of Section 2 of the CPC and contended that the word ""Judgment"" and

Decree"" are separately defined to make a distinction between them. ""Judgment"" contains the reasons for the decision of the Court and in the last

paragraph gives concisely the adjudication of the disputes and declares the rights of the parties. ""Decree"" follows the judgment and contains the

matters provided in Order XX, Rule 6, and also contains the amount of costs incurred in the suit and in what proportion such costs are to be paid

by whom. The decree is drawn up administratively by the office of the Court and on judge being satisfied that the decree is in accordance with the

judgment, the judge signs the decree. What is then put in execution is not the judgment of the Court but the decree drawn by the office and signed

by the Judge. According to Shri Chande, execution proceedings cannot be commenced until the decree is drawn up.

7. Shri Chande then drew my attention to Order XXI, Rule 41 of the CPC which reads as under :

41. Examination of judgment-debtor as to his property.--(1) Where a decree is for the payment of money the decree-holder may apply to the

Court for an order that -

(a) the judgment-debtor, or

(b) any officer thereof, or

(c) any other person.

be orally examined as to whether any or what debts are owing to the judgment debtor and whether the judgment-debtor has any and what other

property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or

officer or other person and for the production of any books or documents.

(2) Where a decree for the payment of money has remained unsatisfied for a period of thirty days, the Court may, on the application of the decree-

holder and without prejudice to its power under Sub-rule (1), by order require the judgment-debtor or where the judgment debtor is a

corporation, any officer thereof, to make an affidavit stating the particulars of the assets of the judgment-debtor.

(3) In case of disobedience of any order made under Sub-rule (2), the Court making the order, or any Court to which the proceeding is

transferred, may direct that the person disobeying the order be detained in the civil prison for a term not exceeding three months unless before the

expiry of such term the Court directs his release.

Relying on the use of the word ""decree"" in Order XXI, Rule 41, Shri Chande contended that unless the decree was drawn, it cannot remain

unsatisfied for a period of 30 days and therefore, no application under Sub-rule (2) of Order 41 can be made unless the formal decree was drawn.

8. I am unable to agree with the submission of Shri Chande. Sub-rule 6-A of Order 20 (which was introduced by an Amendment Act No. 104 of

1976 with effect from 1-2-1977) reads as under:

6A. Last Paragraph of judgment to indicate in precise terms the reliefs granted.--(1) The last paragraph of the judgment shall state in precise terms

the relief which has been granted by such judgment. (2) Every endeavour shall be made to ensure that the decree is drawn up as expeditiously as

possible, and, in any case, within fifteen days from the date on which the judgment is pronounced; but where the decree is not drawn up within the

time aforesaid, the Court shall if requested so to do by a party desirous of appealing against the decree, certify that the decree has not been drawn

up and indicate in the certificate the reasons for the delay, and thereupon -

(a) an appeal may be preferred against the decree without filing a copy of the decree and in such a case the last paragraph of the judgment shall,

for the purposes of Rule 1 of Order XLI, be treated as the decree; and

(b) so long as the decree is not drawn up, the last paragraph of the judgment shall be deemed to be the decree for the purpose of execution and

the party interested shall be entitled to apply for a copy of that paragraph only without being required to apply for a copy of the whole of the

judgment shall cease to have the effect of a decree for the purpose of execution or for any other purpose :

Provided that, where an application is made for obtaining a copy of only the last paragraph of the judgement, such copy shall indicate the name and

address of all the parties to the suit.

Clause (b) of Sub-rule (2) of Rule 6-A specifically lays down that so long as the decree is not drawn up, the last paragraph of the decree should

be deemed to be a decree for the purpose of execution. By a legal fiction, last part of the judgment containing adjudication of the rights of the

parties, is regarded as the decree. Thus, drawing up of a decree is not and cannot be a condition precedent for filing of an ""execution petition"" or

an application under Order XXI, Rule 41 of the Code of Civil Procedure.

9. There is another reason for holding that a decree holder should be entitled to file the execution proceedings and/or application under Order

XXI, Rule 41 without waiting for the drawing up of a formal decree. Article 136 of the Limitation Act prescribes the time limit for execution of the

decree to be 12 years from the date when the decree or order becomes enforceable. In D.M. Deshpande and Others Vs. Shri Janardhan

Kashinath Kadam (Dead) by Lrs. and Others, , the Hon"ble Supreme Court of India was considering whether the period of limitation under

Article 136 of the Limitation Act, 1963 for execution of the decree will start from the date of the decree which is to bear the date of the judgment

as per Order XX, Rule 7 of the CPC or from the date when the decree is actually drawn up and signed by the Judge. In para-20 of the Judgment,

the Supreme Court in unequivocal terms laid down that the period of limitation starts from the date of the decree (i.e. the date of the judgment

under Order XX, Rule 7 of the Code of Civil Procedure) and not from the date when the decree is actually drawn up and signed by the Judge. If

the contention of Shri Chande is accepted then it would mean that though decree holder cannot execute the decree as it is not drawn up though the

period of limitation for executing a decree has begun to run. Imagine a case where on account of mistake of the Court, or pending backlog a

decree is not drawn up for a period of 12 years. In such a case, if contention of Shri Chande is accepted, the decree would become inexecutable

even before it is signed. Such an interpretation, therefore, cannot be accepted. I therefore, hold that drawing up and signing of a decree by the

Judge is not a condition precedent for filing of an execution petition or making of an application under Order XXI, Rule 41 of the Code of Civil

Procedure.

10. Regarding 2nd contention:

Whether an application under Order XXI, Rule 41 can be filed without or before filing an execution application/Darkhast under Order XXI, Rule

11(2) of the Code of Civil Procedure?

11. Shri Chande, the Learned Advocate for the defendant contended that an application under Order XXI, Rule 41 is an application in an

execution petition; according to him. Execution commences on riling of written application (commonly called as Execution Application or Darkhast)

under Sub-rule (2) of Rule 11 of Order XXI of the Code of Civil Procedure. Unless the execution petition is filed and numbered, contends Shri

Chande, any application under order XXI cannot be filed. Shri Chande submits that after the judgment is delivered, the Court becomes functus

officio and only after filing of an execution petition under Order XXI, Rule 11(2), the Court again assumes Jurisdiction. The petition under Order

XXI, Rule 41, is to be made to the executing Court and not to the Court which passed the decree, because the Court passing the judgment decree

becomes functus officio, the moment judgment and decree is passed.

12. In my opinion, application under Order XXI, Rule 41 is not an application in an execution. It is an application in aid of execution or a step

towards the execution. Under Clause (j) of Rule 11(2) of Order XXI of the Code of Civil Procedure, the execution petition must specify the mode

in which assistance of the Court is required for the execution of a decree. Clause (j) reads as follows :

(j) the mode in which the assistance of the Court is required whether -

(i) by the delivery of any property specifically decreed.

(ii) by the attachment, or by the attachment and sale, or by the sale without attachment, of any property.

(iii) by the arrest and retention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise, as the nature of the relief granted may require.

Examination of a judgment debtor under Sub-rule (1) of Rule 41 of Order XXI or direction to the judgment debtor to file an affidavit to be issued

under Sub-rule (2) of Rule 41 of Order XXI is not one of the mode of execution of a decree provided in Clause (j) of Rule 11(2) of Order XXI,

Rule 30 . Disclosure of the assets is a preliminary step towards the execution of a decree. Rule Nos. 3 to 9 of Order XXI of the CPC contemplate

transfer of a decree by the Court which passed the decree to another Court for execution. The decree holder, who is not aware of the assets of the

judgment debtor, is often unable to decide in which Court he should file the execution petition or in which Court he should get the decree

transferred unless he knows the particulars of the assets of the judgment debtor. Rule 41 of Order XXI enables the decree holder to get from the

judgment debtor the information of the assets, which is within the special knowledge of the judgment debtor. Therefore, an application under Order

XXI, Rule 41 is not an application for execution of the decree but, merely an aid to the decree holder to enable him to execute the decree by

obtaining information which is within the special knowledge of the judgement debtor. If this be so, the application under Order XXI, Rule 41 would

ordinary precede the filing of an execution petition, though it can also be filed in the pending execution petition itself. I am fortified in this view by

the judgment of the Calcutta High Court in Shew Kumar Nopany Vs. Grindlays Bank Limited, wherein the Division Bench observed in para-9 of

its judgment:

We accept the contention of the Respondent that an application for examination of a judgment debtor (under Order XXI, Rule 41) is strictly not

an application for execution"".

In the said case, the Division Bench further held even after the decree is transmitted for execution to another Court, the Court passing the decree

retains jurisdiction in respect of the decree and can examine the judgment debtor, under Order XXI, Rule 41. It is not necessary in this case to

consider whether the Court which passes the decree retains jurisdiction over the decree even after its transmission for execution to another Court,

but I am of the opinion that the Court which passed the decree does not cease to have a jurisdiction to entertain an application under Order XXI,

Rule 41 atleast till the decree is transmitted to another Court for execution.

12A. Shri Chande, the Learned Advocate for the defendant however, handed in to me a typed copy of the judgment and order of this Court

(Coram: F. I. Rebello, J.) passed in Krishna Steel v. Aren Engineers in Chamber Summons No. 864 of 1998 wherein his Lordship observed :

I have seen disturbing signs while taking up this assignment. Applications for execution are being moved in the suit even without proceedings for

execution have filed. Office entertains and places the matter on board. Proceedings in execution can only be after the decree holder applies to

execute the decree in terms of the rules framed by this Court in the Original Side as also the reliefs produced at Order XXI which are applicable.

At any rate, even if the decree has to be executed, the Chamber Summons have to be in the proceedings for execution and not in the summary

suit.

Relying on these observations, Shri Chande contended that a Chamber Summons under Order XXI, Rule 41 cannot be filed unless an Execution

Petition/Darkhast is first filed. In response, the Learned Counsel for the petitioner handed in a copy of another order passed by this Court (Coram

: R. N. Lodha, J) in Balsara Hygiene Products Limited v. Savitri India Limited in Chamber Summons No. 1514 of 1999 in Summary Suit No.

5481 of 1998. In the said matter, His Lordship Justice Lodha had made the Chamber Summons absolute and directed the defendant Judgment-

debtor to file the affidavit stating the particulars of the properties under Order XXI, Rule 41 of the Code of Civil Procedure, even when no

Execution Petition was filed. I am informed at the bar that the said Chamber Summons was taken out, even before decree was drawn up and

sealed. Subsequently, Rebello, J. again confirmed his view by an order dated 5-8-1999 passed in Chandra Chem v. Verma Mukherjee Pvt. Ltd.

in Chamber Summons No. 1058 of 1998 in Summary suit no. 889/97 and dismissed, the Chamber Summons which was taken out under Order

XXI, Rule 41 of the CPC without first filing an execution petition under Order XXI, Rule 11(2) of the Code of Civil Procedure. It was held that

the jurisdiction of the Court which passed the decree is limited to correct the clerical and arithmetical mistakes and the Court may in some rare

cases also invoke Section 151. It appears that these two judgments of this Court decided by Rebello, J. were not brought to the notice of His

Lordship Lodha, J in Balsara Hygiene Products Limited v. Savitri India Limited. There thus, appears to be a conflict in view taken by two learned

single judges of this Court. Rebello, J. has held that an application/chamber Summons under Order XXI, Rule 41 cannot be filed without filing an

execution petition/Darkhast under Order XXI, Rule 11(2) of the Code of Civil Procedure. Lodha, J has however, allowed the application/chamber

Summons under Order XXI, Rule 41 to be filed under the title of the decided suit and before the execution petition in Order XXI, Rule 11(2) was

filed, and even before the decree was drawn up.

13. Shri Chande, the Learned Counsel for the petitioner submitted that the conflict needs to be resolved by making a reference to the Division

Bench. The Learned Advocate Mr. Shah appearing Amicus curiae however, submitted that the judgment of Rebello, J is per incuriam inasmuch as

the earlier decision of Division Bench of this Court in Cooverji Varjang v. Cooverbai Nagsey Champsey reported in 42 Bom LR. 564 was not

brought to his notice. In that case, the plaintiff had sought leave to execute the order of costs made against firm, against the partner of the firm, by

seeking leave under Order XXI, Rule 50(2) of the Code of Civil Procedure. The judgment of Wadia, J holding that an application for leave under

Sub-rule(2) of Rule 50 of Order XXI, is an ancillary application for execution and that unless the leave was granted, decree was not executable

against the alleged partner, was affirmed by the Division Bench. Lord Chief Justice Baumond, in his judgment held:

"Therefore, before executing a decree against a firm, against some alleged partner who has not been served, it is necessary to get the leave of the

Court under that Sub-rule . It is difficult to see what useful purpose is served in making an application to execute the decree before the leave has

been granted. Mr. Munshi contends that an application in execution and one of the methods of execution which must be satisfied under Rule 11.

But the application means one preliminary rule taking any effective step in execution against persons who are not covered by that Rule. Conceding

that it is an application in execution, nevertheless, it is a special form of application which is covered by a rule. It seems to us that it is not apt to say

that an application for leave under Rule 50 is a mode of execution referred to in Rule 11.

Thereafter, it was further observed,

We are inclined to think that it is, but, we are entirely in agreement with a view taken by the trial Judge that it is not necessary to apply in execution

first and then apply for leave afterwards"".

Thus, Division Bench of this Court has held that it is not necessary to file an Execution Petition/Darkhast under Order XXI, Rule 11 before making

of an application under Order XXI, Rule 50(2) of the Code of Civil Procedure. In my opinion, what is held about there being no necessity of filing

of an Execution Petition/Darkhast under Order XXI, Rule 11(2) before filing of an application under Order XXI, Rule 50 equally applies to the

application under Order XXI, Rule 41. The judgment in Krishna Steel"s case is contrary to the ratio of the judgment of the Division Bench in

Cooverji Vajrang"s case because it was specifically held by the Division Bench of this Court that Petition under Order XXI, Rule 50 can be made

before filing of execution petition under Order XXI, Rule 11 of the Code of Civil Procedure. Therefore, the judgment of Rebello, J in so far it

holds that no chamber summons for execution can be entertained or accepted without an application for execution in proper form (under Order

XXI, Rule 11) is per incuriam. Hence, the second objection taken by the Respondent is also overruled.

14-15. In the circumstances, the Chamber Summons is made absolute in terms of prayer Clause (a) and the defendant is directed to file an affidavit

disclosing his assets and properties as provided under Order XXI, Rule 41 of the Code of Civil Procedure. The affidavit to be filed within a period

of five weeks. The chamber summons be listed for consideration of prayer Clause (b) in the event the affidavit is not filed within a period of five

weeks.