

M/s. Trimurti Exports, Goa Vs M/s. Modelama Exports Limited

Court: BOMBAY HIGH COURT (GOA BENCH)

Date of Decision: June 8, 2016

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Order 21 Rule 37, Order 21 Rule 41, 151
Constitution of India, 1950 â€” Article 226

Citation: (2016) 5 BCR 636

Hon'ble Judges: C.V. Bhadang, J.

Bench: Single Bench

Advocate: Mr. Nitin Sardessai, Senior Advocate with Mr. Deep Shirodkar and Ms. G. Kakodkar, Advocates, for the Petitioners; Mr. Rajat Wadhwa and Mr. Bhargav Khandeparkar, Advocates, for the Respondents

Final Decision: Dismissed

Judgement

C.V. Bhadang, J.â€”By this Petition, the Petitioners/Judgment Debtors are challenging the Orders dated 17.02.2016, 25.02.2016 and

03.03.2016 passed by the learned Principal District Judge, South Goa, at Margao in Execution Application no. 100 of 2015.

2. The brief facts necessary for the disposal of the Petition may be stated thus:

That the parties herein had entered into an Agreement dated 17.07.2009, a supplementary Agreement dated 01.09.2009 and lastly an additional

Agreement dated 29.05.2010 pertaining to a transaction of purchase of iron ore and its consequent sale to the overseas buyers. Disputes and

differences arose between the parties and the matter was referred to sole Arbitrator who by an Award dated 18.04.2013 and addendum to the

Award dated 19.05.2013 has held the Respondents to be entitled to recover an amount of Rs.14.76 Crores along with interest at the rate of 8%

per annum w.e.f. 31.12.2010 until realisation. The said Judgment and Award was unsuccessfully challenged by the Petitioners before the learned

District Judge, North Goa and thereafter before this Court in AUA no. 1 of 2015 which was dismissed on 07.08.2015. An application for review

of the said Judgment has also been dismissed on 03.03.2016. Thus, the Award has attained finality.

3. The Respondents had filed an Execution Application no. 396 of 2014 before the learned Principal District, North Goa, immediately after the

dismissal of the application under Section 34 of the Arbitration and Conciliation Act of 1996, (Act, for short), by the learned Principal District

Judge, South Goa. On account of an objection being raised about maintainability of the Execution Application before the Principal District Judge,

North Goa, the matter was eventually transferred by consent of the parties to the learned Principal District Judge, South Goa, and was registered

as Execution Application no. 100 of 2015.

4. On behalf of the Respondents, two applications were filed namely application (exhibit D-4) under Order 21, Rule 41 of Civil Procedure Code

(CPC, for short) for examination of the Judgment Debtors as to their properties and an application (exhibit D-5) under Order 21, Rule 37 read

with Section 151 of Civil Procedure Code for arrest and detention of the Judgment Debtors in civil prison. By the impugned Order dated

17.02.2016, both these applications are allowed which is the principal Order challenged in this Petition. The subsequent Orders dated 25.02.2016

and 03.03.2016, merely issue fresh warrants of arrest with police protection. Thus, the discussion will have to be confined to the challenge as

raised to the Order dated 17.02.2016.

5. I have heard Shri Sardessai, learned Senior Advocate for the Petitioners and Shri Rajal Wadhwa, learned Counsel appearing for the

Respondents.

6. It is submitted on behalf of the Petitioners that the impugned Order proceeds on the ground that the Petitioners have not obeyed the notice for

personal appearance and that no reply is filed to the application under Order 21, Rule 37 of CPC. The learned Counsel has pointed out to the

copy of the roznama from 20.12.2014 to 04.02.2015 in order to point out that reply was filed on behalf of the Judgment Debtors at exhibit D-18

to the application under Order 21, Rule 41 and at Exhibit D-19 to the application under Order 21, Rule 37 of CPC. That apart, a separate

objection (Exhibit D-17) was lodged to the Execution Application. The learned Senior Advocate pointed out that the observations in Para 22 of

the impugned Order that ""seriously speaking, there was no reply to the show cause against the detention in civil prison"", is incorrect and not borne

out of record. The learned Advocate also pointed out that the roznama dated 20.12.2014 states that Advocate Goswami on behalf of the

Judgment Debtors had informed that one of the Judgment Debtors will appear before the Court in person on the next date of hearing. It is

submitted that on 19.01.2015, the Judgment Debtor no. 4 was present in the Court. He, therefore, submitted that the impugned Order cannot be

sustained. The learned Senior Advocate has referred to the objections on behalf of the Judgment Debtor to the Execution Application as also to

the applications under Order 21, Rule 37 of the CPC and the application under Order 21, Rule 41 of the CPC in order to submit that the

impugned Order which directs the detention of the Judgment Debtors in civil prison is incorrect and exhibits, jurisdictional error, requiring

interference.

7. The learned Counsel for the Respondents has advanced oral submissions apart from filing brief written submissions. It is contended that the

Judgment Debtors have failed to satisfy the Decree in spite of having capacity to pay which clearly demonstrates bad faith and malafide intention. It

is submitted that the Petitioners had offered their immoveable property namely ""Acamol"" at the time of execution of additional Agreement dated

29.05.2010. However, at the time of opposing the application being CMA no. 60 of 2012 under Section 9 of the Act, it was claimed that the

property does not belong to the Petitioners/Judgment Debtors. An application under Section 340 of Cr.P.C. for initiation of proceedings in the

nature of perjury are also said to be pending. It is contended that the Petitioners have not complied with the Orders directing them to file affidavits

disclosing their assets and liabilities and at the same time had disputed the title to enlisted properties, by the Respondents/Decree Holders, creating

a situation, where Execution of the Award/Decree by attachment and sale of properties has become impossible. It is contended that all the

necessary pre-conditions envisaged in Section 51 of CPC read with Order 21, Rule 37 of CPC have been complied with and the impugned Order

is just and proper.

8. It is contended that on 08.03.2016, this Court had granted interim protection to the Petitioners on furnishing additional security by way of

property namely ""Posrem Bhat"" as it was represented that its valuation is Rs.13.12 Crores. It was also pointed out that another property namely

Acamol"" has already been furnished as security. The learned Counsel submits that in the Sale Deed of the year 2007, the property namely

Posrem Bhat"" is valued at Rs.24,15,360/-. It is contended that the said property is within 100 metres from the high tide line (HTL) and it is in No

Development Zone (NDZ). It is thus contended that the valuation report of the property known as ""Posrem Bhat"" which is based on the potential

of the said property for erection of shipping facilities/business is incorrect. It is contended that the property ""Posrem Bhat"" could not fetch amount

in excess of Rs.75 lakhs based on the "direct comparison method" which is quite insufficient looking to the decretal amount which is sought to be

recovered. Learned Counsel has placed reliance on the decision of the Hon""ble Supreme Court in the case of Shyam Singh v. Collector,

District Hamirpur, UP & Ors. reported in 1993 Supp (1) SCC 693, Jolly George Varghese & anr. v. The Bank of Cochin reported in

AIR 1980 SC 470 and Subrata Roy Sahara v. Union of India & Ors. reported in AIR 2014 SC 3241 in support of his various submissions.

9. I have given my anxious consideration to the rival circumstances and the submissions made. At the outset, it is necessary to mention that the

Award passed by the Arbitrator has attained finality as it was unsuccessfully challenged initially before the learned Principal District Judge, North

Goa, under Section 34 of the Act and thereafter in an Appeal before this Court under Section 37 of the said Act. The Review Application is also

dismissed by this Court. The said Award has thus become executable as a "Decree", for payment of money. Order 21, Rule 30 of the CPC

provides for mode of execution of a Decree for payment of money. It provides that every Decree for the payment of money may be executed by

the detention in the civil prison of the Judgment Debtor or by attachment or sale of his property or by both. It can thus be seen that the mode of

execution of Decree for payment of money, can either be by detention of the Judgment Debtor in civil prison or by the attachment and sale of his

property or simultaneously by both the modes. Section 51 of the CPC to the (extent relevant in respect of execution of a money Decree) provides

that such an execution can be by attachment or sale or by sale without attachment of any property and by arrest and detention in prison, for such

period not exceeding the period specified in Section 58 of CPC, where arrest and detention is permissible under that Section.

10. Although there are elaborate provisions made in Order 21 of CPC for execution of a Decree, the experience is perhaps, it is easier to obtain a

Decree than to get it executed. The following observations of the Hon"ble Apex Court in the case of Shyam Singh (supra), in para 11 are apposite

:

It has been said the difficulties of a litigant ""begin when he has obtained a decree."" It is a matter of common knowledge that far too many obstacles

are placed in the way of a decree holder who seeks to execute his decree against the property of the judgment-debtor. Perhaps because of that

there is no statutory provision against a number of execution proceedings continuing concurrently. Section 51 of the Code gives an option to the

creditor, of enforcing the decree either against the perso or the property of the debtor; and nowhere it has been laid down that execution against

the person of the debtor shall not be allowed unless and until the decree-holder has exhausted his remedy against the property. Order 21, Rule 30

of the Code provides that ""every decree for the payment of money as the alternative to some other relief, may be executed by the detention in the

civil prison of the judgment-debtor or by the attachment and sale of his property, or by both.

(Emphasis supplied)

11. Under Order 21, Rule 41 of CPC, a Decree Holder may apply to the Court, for examination of the Judgment Debtor, 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 or the Court may make an order for the attendance and examination of such Judgment Debtor or Officer or other person or for the

production of any books or documents.

Sub-rule (2) of Rule 41 Order 21 of the CPC provides that 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, of any Officer thereof, to make an affidavit stating the particulars of the assets of

the Judgment Debtor.

Sub-rule (3) of Rule 41 Order 21 of CPC provides that 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.

12. Order 21, Rule 37 read with Rule 40 of the CPC in terms provides the execution of a Decree for payment of money by the arrest and

detention in the civil prison of the Judgment Debtor. The relevant provisions may be reproduced as under :

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 on 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.

Rule 40. Proceedings on appearance of judgment debtor in obedience to notice or after arrest.- (1) When a judgment debtor appears before the

court in obedience to a notice issued under rule 37, or is brought before the court after being arrested in execution of a decree for the payment of

money, the court shall proceed to hear the decree holder and take all such evidence as may be produced by him in support of his application for

execution, and shall then give the judgment debtor an opportunity of showing cause why he should not be committed to the civil prison.

(2) Pending the conclusion of the inquiry under sub-rule (1) the court may, in its discretion, order the judgment debtor to be detained in the custody

of an officer of the court or release him on his furnishing security to the satisfaction of the court for his appearance when required.

(3) Upon the conclusion of the inquiry under sub-rule (1) the court may, subject to the provisions of section 51 and to the other provisions of this

Code, make an order for the detention of the judgment debtor in the civil prison and shall in that event cause him to be arrested if he is not already

under arrest:

Provided that in order to give the judgment debtor an opportunity of satisfying the decree, the court may, before making the order of detention,

leave the judgment debtor in the custody of an officer of the court for a specified period not exceeding fifteen days or release him on his furnishing

security to the satisfaction of the court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

(4) A judgment debtor released under this rule may be re-arrested.

(5) When the court does not make an order of detention under sub-rule (3), it shall disallow the application and, if the judgment debtor is under

arrest, direct his release.

It can thus be seen, that before a Judgment Debtor can be committed to civil prison, in execution of a Decree for payment of money, the Court is

obliged to issue a notice calling upon the Judgment Debtor to appear before the Court and to show cause why he should not be committed to civil

prison. Rule 40 Order 21 of CPC, inter alia, provides for an inquiry being conducted by the Court when the Judgment Debtor in pursuance of the

notice shows cause.

13. The provisions of Section 51 of Civil Procedure Code to the extent relevant, read thus :

Section 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) ...

(b) by attachment and sale or by 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) ...

(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) ...

(ii) ...

(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) ...

Explanation : In the calculation of the means of the judgment debtor for the purposes 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.

(Emphasis supplied)

It can thus be seen that the detention of a Judgment Debtor in civil prison can be ordered under proviso (b) to Section 51 where the Judgment

Debtor has or 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.

Thus, the finding about the Judgment Debtor having sufficient means to pay and satisfy the Decree and the consequent, neglect or refusal to do so,

is the sine qua non for an Order directing the detention of the Judgment Debtor in civil prison.

14. On examination of the relevant provisions as aforesaid, it is evident that the detention of a Judgment Debtor in civil prison may be ordered

under different heads for different reasons as under :

(I) Under the substantive provisions of Section 51 read with Order 21, Rule 37 of the Civil Procedure Code where the Judgment Debtor appears

before the Court, shows cause and the Court holds that in spite of having sufficient means, the Judgment Debtor has refused or neglected to pay

the decretal amount.

(II) Under sub-Rule (2) of Rule 37 Order 21 of Civil Procedure Code, where the Judgment Debtor fails to appear in obedience to the notice

under Rule 37(1) of Order 21 of Civil Procedure Code.

(III) Under sub-rule (3) of Rule 41 Order 21, where in disobedience of the Order under sub-rule (2) of Rule 41 of Civil Procedure Code (i.e.

where the Judgment Debtor is directed to appear for being examined as to his property), the Judgment Debtor fails to appear before the Court.

These are all distinct powers available under distinct heads and for different reasons.

15. For the present purpose, a perusal of the impugned Order would clearly show that the learned Executing Court has not exercised any power

under Rule 41(3) of Order 21 of CPC since perhaps that stage has not arrived as the Petitioners are only directed to remain present, for being

examined as to their properties. Such an order, per se, cannot act to the prejudice of the Judgment Debtors and cannot be said to have resulted

into any manifest injustice, as all that the Judgment Debtors are required to do is to remain present for being examined as to their properties which

can only assist the Executing Court in proceeding with the Execution Application. Thus, I am not inclined to interfere with the part of the order

directing the Petitioners to remain present for being so examined.

16. This takes me to the material challenge to the Order under 21 Rule 37 of CPC. Here again, although strenuous attempt was made on behalf of

the petitioner to show that the Judgment Debtors had never made any default, much less wilful default, to remain present before the Executing

Court, what I find is that these considerations would be irrelevant for the present purpose, for the simple reason that the impugned Order is not

based on Rule 37(2) of Order 21 of CPC. In other words, the Petitioners have not been directed to be detained in civil prison on the ground of

disobedience of any notice to show cause against their detention in civil prison. The impugned Order is clearly relatable to the powers available to

the Executing Court under Rule 37 Order 21 of the CPC. The considerations thus will have to be confined to ascertain whether the requirements

of Section 51 of the Act read with the procedural safeguards under Rule 37(1) of Order 21 of CPC have been complied with and satisfied or not.

17. Under Clause (b) of proviso to Section 51 of Civil Procedure Code, where a Judgment Debtor has had since the date of the Decree the

means to pay the amount of the Decree or a substantial part thereof or has refused or neglected to pay the same, he can be committed to civil

prison. In the present case, under the additional Agreement dated 29.05.2010, the Petitioners had furnished the security of the property known as

Acamol"" admeasuring 12,81,000 square metres near Cuncolim Industrial Estate in Village Ambaulim of Quepem Taluka, towards the payment of

Rs.12.26 Crores. The Additional Agreement clearly recites that this security is in addition to the security already given by the Judgment Debtors in

the Agreement for sale and the supplementary Agreement and the security already given under these two Agreements shall be deemed to have

been given under the Additional Agreement ""as if they are given afresh today"". In the order dated 08.03.2016, this Court had noted submission on

behalf of the Petitioners that the title Deeds in respect of the property named ""Acamol"" if required, can be produced by the Judgment Debtor

before the Executing Court. A submission was made that alternatively, the Judgment Debtors would furnish the security of the property known as

Posrem Bhat"" admeasuring 2125 square metres bearing survey no. 201/3 at Sancoale Taluka, Mormugao District, South Goa. According to the

Petitioners, the valuation of the said property namely ""Acamol"" based on the valuation report dated 04.03.2016, was Rs. 13.12 Crores. In the light

of these submissions, by way of an interim relief, this Court had granted stay of the impugned order on condition that the security of the property

namely ""Posrem Bhat"" will be offered and the Executing Court shall pass necessary Orders in respect of attachment and sale of property now

being offered in pursuance of the said Order or of any one of the property known and identified as above, at the option of the Petitioners. This was

only an Order at the interim stage. The parties are at a serious dispute as to the valuation of the property namely ""Posrem Bhat"". They have

produced their own valuation reports which indicate a wide divergence as to the valuation of the property. A perusal of the valuation report dated

04.03.2016 issued by Mahendra Kakule, which is relied upon by the Petitioners, prima facie, shows that the valuation is on the basis of

investment value of the said property and the consequent income which can be derived from the said facility by optimum utilisation of

barge/repairs constructions"". In other words, it can, prima facie, be seen that the valuation is based on the probable income which can be derived if

the property is used for erection of a barge for repairs and constructions. On the other hand, the valuation report produced and relied upon by the

Respondents is on the basis of the current market value/price in which the property is valued approximately at Rs.75 lakhs. Assuming that there

can be a certain amount of divergence between the valuation by two experts, the same cannot be to such a large extent. It can, prima facie, be

seen that this is on account of the fact that the experts/valuers have employed different methods for the valuation of the property namely ""Posrem

Bhat". If the said property is in a No Development Zone, as claimed by the Respondents, its valuation is bound to be affected. Prima facie, at this

stage, based on the current market price, the valuation is said to be approximately Rs.75 lakhs which would be quite insufficient to satisfy the

award or any substantial part thereof.

18. On behalf of the Respondents/Decree Holders, it was submitted that the Executing Court can be permitted to proceed for attachment and sale

of the property named "Acamol" which has already been furnished as security under the Additional Agreement. However, this was not acceded to

on behalf of the Petitioners, inter alia, on the ground that the said property is very huge admeasuring more than 12.80 lakhs square metres. It can

be seen that on one hand, the property namely "Posrem Bhat" is insufficient to satisfy the impugned Award or any substantial part thereof, and on

the other hand, the Petitioners have their own reservations for the Executing Court to proceed against the property namely "Acamol" and are not

willing for the property namely "Acamol" being put to attachment and sale. After the matter was closed for Judgment, the Petitioners produced two

affidavits namely of Bhalchandra Bakhle and Ameet Bakhle showing willingness to offer two shops situated at Mumbai for attachment and sale, for

satisfaction of the impugned Award. In my considered view, this attempt by the Petitioners cannot be said to be bona fide, particularly when they

are not willing to permit the Executing Court to proceed against the property by name "Acamol" which is already furnished as security and are now

showing willingness to offer two shops situated, beyond the territorial jurisdiction of the Executing Court and which would require the Decree to be

transferred for execution to the competent Court at Mumbai. Thus, the submissions advanced on the basis of these two affidavits cannot be

accepted.

19. A perusal of Para 22 of the impugned Order shows that the Executing Court has found that "seriously speaking, there was no reply to the

show cause notice against detention to the civil prison". A brief reference to the reply would be necessary at this stage. In the said reply, the

Petitioners had initially raised certain preliminary objections about the territorial jurisdiction of the Principal District Judge, North Goa, which does

not survive now in view of the fact that the execution has been transferred to the Court of the Principal District Judge, South Goa. Under the

caption "Further Objections", certain contentions were raised about the execution being initiated at a premature stage as the Award passed by the

Arbitrator was subject matter of challenge before this Court. That also does not survive now, inasmuch as AUA no. 1/2015 and the review

application have been disposed of confirming the Award. Under the caption ""Reply on merits"", certain contentions are raised with regard to some

representations and misleading statements made by the Respondents in the Petition under Section 9 of the Act. The said reply further mentions that

It is nowhere recorded in the Order sought to be relied upon by the Decree Holder that the Judgment Debtor did not have rights or interest in

Acamol"" property." It further recites that ""At the relevant time, there were certain difficulties with regard to the properties that were being faced

which are no longer existent today." Thus, there is nothing in the reply to show that any acceptable cause was shown against an Order for detention

in civil prison. It was in this context that the Executing Court has said that seriously speaking there was no reply to the show cause against detention

in civil prison. The Executing Court, in para 43 of the impugned Order, has held as under :

It has been borne out from the records that the judgment-debtors have been playing on words to avoid the execution of the award in favour of the

decree-holders by raising one objection or the other. It is apparent therefore that the judgment-debtors have the means and are still refusing to pay

entitling therefore the decree-holders to the relief seeking their arrest and detention in civil prison.

It has been further held that the Judgment Debtors have failed to show cause in terms of Order 21, Rule 37 of CPC against their detention in civil

prison. Therefore, the Decree holder would be entitled to an Order for detention of the Judgment Debtors in civil prison. I am unable to hold that

the findings so recorded and the discretion so exercised, can be said to be perverse or arbitrary requiring interference by this Court.

20. Before concluding, it would be necessary to advert to the nature of the challenge to the impugned Order. The Petition is filed under Article 226

read with Article 227 of the Constitution of India. It is well settled that a writ under Article 226 of the Constitution of India would not issue, against

an Order passed by a Civil Court of plenary jurisdiction (as in the present case), in a dispute arising between private parties, which is of a

contractual nature. (See the case of Shalini Shyam Shetty & anr v. Rajendra Shankar Patil reported in (2010) 8 SCC 329). Thus, the

challenge has necessarily to be examined in the context of the supervisory jurisdiction available under Article 227 of the Constitution of India which

has to be exercised in order to ensure that ""inferior Courts and Tribunals"" are kept ""within the bounds of their authority." The Petition under Article

227 of the Constitution of India is not an Appeal in disguise. Thus, unless and until it is shown that the findings recorded are perverse and/or the

sub-ordinate Court has assumed jurisdiction not vested in it or failed to exercise jurisdiction vested or that there is material irregularity in the

exercise of jurisdiction, resulting into manifest injustice, no interference is called for. None of these circumstances or grounds exist in this case.

21. In the result, I find that the Petition is without any merit and it is accordingly dismissed. Rule is discharged with no Order as to costs.