

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on : 07th January, 2022
Judgment Delivered on : 14th January, 2022

+ CM(M) 1399/2019 & CM No.42217/2019 (for Stay)

G.S SANDHU & ANR.

..... Petitioners

Through: Ms. Shalini Kapoor, Ms. Sukriti Mago and Mr. Sangram Singh Kheechi, Advocates for petitioner No.1.

Mr. Sameer Nandawani and Ms.Pratibha Singh, Advocates for petitioner No.2.

versus

GEETA AGGARWAL

..... Respondent

Through: Mr. Rajesh Manchanda, Advocate

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J.

1. The present petition under Article 227 of the Constitution of India impugns the order dated 13th August, 2019 passed by the District Judge, Patiala House Courts in Execution No.5359/2016, whereby the petitioners, being the directors of M/s. Silver Fern Hotels Private Limited [hereinafter 'judgment debtor company'] have been directed to file affidavits of assets in pursuance of the judgment of this Court in *Bhandari Engineers and Builders Pvt. Ltd. Vs. Maharia Raj Joint Venture and Ors.*, 227 (2016) DLT 302.

2. The issue involved in the present petition was formulated by this Court in the order dated 20th September, 2019 while issuing notice in the present petition, viz., whether directors of a company can be directed to file affidavits of their assets in an execution petition. Pursuant to directions passed by this Court, written submissions have been filed on behalf of the petitioners and the respondent/decreed holder.

3. Brief facts to the extent relevant for deciding the present petition are set out below:

3.1 The respondent instituted a suit under Order XXXVII of the Code of Civil Procedure, 1908 (CPC) on 16th January, 2012 for recovery of Rs.13,56,625/- against the judgment debtor company. The said suit was decreed in favour of the respondent on 06th July, 2012 for a sum of Rs.6,00,000/- along with interest.

3.2 On 12th August, 2013, execution proceedings were initiated by the respondent against the judgment debtor company seeking execution of the decree.

3.3 Thereafter, on 19th August, 2013, warrants of attachment were issued against the judgment debtor company.

3.4 On 20th January, 2014, auction sale was conducted in respect of the movable property of the judgment debtor company, which resulted in Rs.5,00,000/- being recovered by the decree holder.

3.5 On 05th August, 2014, the decree holder moved an application under Order XXI Rule 37 of the CPC seeking detention of the petitioners, being the directors of the judgment debtor company. The said application was contested by the petitioners by filing a reply, stating that the judgment debtor company had become defunct after

attachment of its movable assets and there are no further assets in the judgment debtor company.

3.6 Vide the impugned order dated 13th August, 2019, the Executing Court directed the petitioners to file affidavits of assets in pursuance of the judgment of this Court in *Bhandari Engineers and Builders Pvt. Ltd.* (supra).

4. Counsels appearing on behalf of the petitioners have contended that (i) the petitioners were neither parties in the suit filed by the respondent, nor were any averments made against the petitioners in the plaint; (ii) even in the application filed by the decree holder under Order XXI Rule 37 of the CPC, no specific allegations have been made against the petitioners; (iii) the petitioners, being directors of the judgment debtor company, were not parties to the suit which was decreed in favour of the respondent; (iv) decree was passed only against the judgment debtor company and not the petitioners but the petitioners were also made parties to the execution petition filed on behalf of the decree holder; and (v) under Order XXI of the CPC the directors of the judgment debtor company cannot be asked to file their list of assets.

5. Reliance has also been placed by the counsels for the petitioners on the judgments of *Anirban Roy and Ors. Vs. Ram Kishan Gupta and Ors.*, 2017 SCC OnLine Del 12867; *Gurmeet Satwant Singh and Ors. Vs. Meera Gupta and Ors.*, 2019 SCC OnLine Del 9505; and, *Delhi Chemical and Pharmaceutical Works Pvt. Ltd. and Ors. Vs. Hingiri Realtors Pvt. Ltd. and Ors.*, 2021 SCC OnLine Del 3603.

6. *Per contra*, counsel appearing on behalf of the respondent contends that (i) only the petitioner no.1 has complied with the order dated 20th

September, 2019 passed by this Court to comply with the direction of the Executing Court; (ii) however, the petitioner no.2 has failed to comply with the direction of the Executing Court; (iii) it has been falsely stated by the petitioner no.1 in his affidavit that the judgment debtor company does not own any immovable property. Reliance in this regard has been placed from the balance sheet of the judgment debtor company; and, (iv) it has been falsely stated in the affidavit of the petitioner no.1 that all movable assets of the judgment debtor company were disposed of through auction and proceeds given to the decree holder.

7. While admitting that the petitioners were not parties in the suit or in the execution proceedings, the counsel for the decree holder contends that specific allegations were made in respect of the petitioners in the application filed on behalf of the decree holder under Order XXI Rule 37, that the petitioners were guilty of making false statement and fraud being committed upon the decree holder. It is further contended that the judgments cited on behalf of the petitioners in *Anirban Roy and Ors.* (supra) and *Delhi Chemical and Pharmaceutical Works Pvt. Ltd. and Ors.* (supra) are not applicable to the facts of the present case. There is no infirmity in the order passed by the Trial Court as when the said order was passed, the judgment in *Bhandari Engineers and Builders Pvt. Ltd.* (supra) had not been overruled. Reliance is placed on the judgment of the Supreme Court in *Delhi Development Authority Vs. Skipper Construction Co. (P) Ltd. and Ors.*, (2000) 10 SCC 130 to justify lifting of the corporate veil in view of the fraud committed by the petitioners, which was discovered by the decree holder in the course of the execution proceedings.

8. In rejoinder, it has been submitted that the averments made in the application under Order XXI Rule 37 of the CPC are vague and general in nature and no specific allegations of fraud have been made against the petitioners. As regards non-compliance with the direction of this Court in the order dated 20th September, 2019 by the petitioner no.2, it is submitted that an application seeking extension of time has been filed by the petitioner no.2 before the Executing Court and an extension has been granted.

9. I have considered the rival submissions and analyzed the judgments relied upon by the parties. The application on which the impugned order was passed was filed under Order XXI Rule 37 of the CPC, which is reproduced hereinafter:

“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.”

10. Order XXI Rule 37 of the CPC provides that when an application is filed in execution proceedings for payment of money seeking arrest and civil imprisonment of the judgment debtor, the court would issue a notice to the

judgment debtor as to why the judgment debtor should not be sent to the civil prison. Order XXI Rule 37 does not provide for a judgment debtor or its directors to file their list of assets. There is not even a prayer made in the aforesaid applications filed on behalf of the decree holder for the petitioners or the judgment debtor company to disclose their list of assets. Therefore, there was no occasion for the Executing Court to pass the impugned order directing the petitioners to file their list of assets under the provisions of Order XXI Rule 37 of the CPC.

11. The requirement to provide list of assets is provided in Order XXI Rule 41 of the CPC, which is reproduced hereinafter:

“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) [where the judgment-debtor is a corporation], 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.]”

12. Sub-rule (1)(b) of Order XXI Rule 41 provides that where a money decree is against the judgment debtor which is a corporation, the decree holder may **apply to the court** for an officer of the said corporation to be orally examined to determine the quantum of debts that are owed by the judgment debtor and whether judgment debtor has the means of satisfying the decree. Order XXI Rule 41(2) provides that **on an application of a decree holder** the court has the power to require the judgment debtor or where the judgment debtor is a corporation, any officer to file an affidavit stating **the particulars of the assets of the judgment debtor**. Order XXI Rule 41(3) provides that in case of disobedience of any order made under Order XXI Rule 41(2), the court may direct civil imprisonment of the person disobeying the said order.

13. It appears that the Executing Court has invoked the provisions of Order XXI Rule 41(2) of the CPC and relied on the judgment of this Court in *Bhandari Engineers and Builders Pvt. Ltd.* (supra) in passing the impugned order to direct the petitioners to file their personal list of assets. Before coming to the judgment of this Court in *Bhandari Engineers and Builders Pvt. Ltd.* (supra), it may be pertinent to mention here that there is no requirement at all under Order XXI Rule 41 of the CPC for filing of the

list of personal assets of the directors/officers of the judgment debtor company. The requirement is only to file particulars of assets of the judgment debtor. Further, the power under Order XXI Rule 41(2) of the CPC can only be invoked upon an application filed on behalf of the decree holder and in the present case, admittedly, no application has been filed by the decree holder under Order XXI Rule 41(2) of the CPC.

14. In *Bhandari Engineers and Builders Pvt. Ltd.* (supra), a Single Bench of this Court directed that in cases of execution of money decrees, the judgment debtor, at the initial stage itself should be directed to file particulars of assets as on the date of the institution of the suit as well as of the current date under Order XXI Rule 41(2) of the CPC along with the statement of the bank accounts for the last three years. It was further provided that if the judgment debtor's affidavit does not sufficiently disclose assets, a further affidavit may also be directed to be filed and the judgment debtor be also examined orally under Order XXI Rule 41(1) of the CPC. This constituted the dicta of *Bhandari Engineers and Builders Pvt. Ltd.* (supra). Thereafter, the Court in *Bhandari Engineers and Builders Pvt. Ltd.* (supra) directed, *inter alia*, the directors of the judgment debtor company therein to file the details of their personal assets. However, the aforesaid directions with regard to the directors filing affidavits of their personal assets was only in the facts and circumstances of the said case and was not the dicta of the said case. Therefore, the reliance placed by the Executing Court on the judgment in *Bhandari Engineers and Builders Pvt. Ltd.* (supra) for directing the petitioners to file their affidavit of personal assets is clearly erroneous.

15. In this regard, reference may be made to the observations made by a Single Bench of this Court in *Anirban Roy and Ors.* (supra), wherein this aspect of the judgment in *Bhandari Engineers and Builders Pvt. Ltd.* (supra) was considered. The relevant observations are set out below:

“14. As far as reference to Bhandari Engineers & Builders Pvt.Ltd. supra is concerned, a perusal thereof does not show this Court to have held that in every case of execution of a money decree against a company, the Directors of the judgment debtor company are required to furnish details of their personal properties. The direction to the Directors, in Bhandari Engineers & Builders Pvt. Ltd. supra, was on account of the business relationship as found therein. There is no such finding in the present case.”

16. Even in the subsequent judgments¹ passed by this Court in *Bhandari Engineers and Builders Pvt. Ltd.* (supra), no directions were made for filing of affidavit of assets by the directors of the judgment debtor company therein. Even while formulating the format in which the list of assets has to be filed by the judgment debtor, no observations were made with regard to filing of personal assets of the directors of the judgment debtor company therein.

17. In *Delhi Chemical and Pharmaceutical Works Pvt. Ltd. and Ors.* (supra), a Division Bench of this Court (of which I was a part) observed that a direction under Order XXI Rule 41(2) of the CPC can only be made upon an application filed by the decree holder in that behalf. As per the provisions of Order XXI, the decree holder has to first make efforts to

¹ *Bhandari Engineers and Builders Pvt. Ltd. Vs. Maharia Raj Joint Venture and Ors.*, (2020) 266 DLT 106; *Bhandari Engineers and Builders Pvt. Ltd. Vs. Maharia Raj Joint Venture and Ors.*, 2020 SCC OnLine Del 1969; *Bhandari Engineers and Builders Pvt. Ltd. Vs. Maharia Raj Joint Venture and Ors.*, 2021 SCC OnLine Del 3595.

determine and find out the assets of the judgment debtor and only if the decree holder is unable to find the same, the assistance of the court can be taken under Order XXI Rule 41(2) of the CPC for direction that the judgment debtor be directed to disclose its list of assets on affidavit. But for such a direction to be passed, an application has to be filed by the decree holder under Order XXI Rule 41(2) of the CPC. In this regard, observations made by the Division Bench in *Delhi Chemical and Pharmaceutical Works Pvt. Ltd. and Ors.* (supra) are set out below:

“57. We are thus of the view that Bhandari Engineers & Builders Pvt Ltd. supra, to the extent extends what is laid down therein to execution proceedings pertaining to all money decrees and to all courts executing a money decree, cannot said to be good law. Axiomatically, what is held in Bhandari Engineers & Builders Pvt. Ltd. supra could not have been followed in the execution proceedings from which this appeal arises.

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62. As per the existing provisions of Order XXI Rule 41 of the CPC, the Commercial Division, in our view erred in issuing direction to judgment debtors to file affidavits and affidavits in a form other than as prescribed in the CPC. The impugned orders do not record that the decree holder had applied therefor, verbally or in writing. A direction under Order XXI Rule 41 could not have been issued without the decree holder applying therefor. Such direction could not have been issued without, inspite of taking steps and owing to obstruction by the judgment debtor, the decree remaining unsatisfied. No reason whatsoever has been given in the impugned orders as to why the directions as issued were called for in the facts of the case or why affidavit in the form prescribed in the CPC could not have sufficed.”

18. At this stage, reference may also be made to the judgment in *Anirban Roy and Ors.* (supra). In the said case also, this Court was dealing with a petition under Article 227 of the Constitution of India impugning an order passed in execution proceedings in exercise of powers under Order XXI Rule 41 of the CPC directing the petitioners therein, being directors of the judgment debtors company, to disclose their personal assets in terms of judgment dated 11th January, 2016 in *Bhandari Engineers and Builders Pvt. Ltd.* (supra). While allowing the said petition and quashing the direction of the Executing Court directing the directors to file their personal list of assets, it was observed by the court as under:

“7. A routine direction against Directors and shareholders of judgment-debtor companies turns the elementary principle of company law, a company law being a legal entity, is distinct from its shareholders and Directors, on its head.

8. It is settled principle of law that the Directors and shareholders of a company are not liable for the dues of the company except to the extent permitted by law.

9. I have in V.K. Uppal v. Akshay International Pvt. Ltd. MANU/DE/0320/2010 held; (i) that there is no provision in the CPC for execution of a money decree against a Pvt. Ltd. company, against its directors; (ii) that though Order XXI Rule 50 of the CPC does provide for execution of a money decree against a firm, from the assets of the partners of the said firm mentioned in the said Rule but there is no provision with respect to directors of a company; (iii) that the Executing Court cannot go behind the decree and can execute the same as per its form only; (iv) that if the decree is against the company, the executing Court cannot execute the decree against anyone other than the judgment-debtor company or against the assets and properties of anyone other than the judgment-debtor company; (v) that the identity of a director or a

shareholder of a company is distinct from that of the company-that is the very genesis of a company or a corporate identity or a juristic person;(vi) *the classic exposition of law in this regard is contained in Solomon v. Solomon & Co. Ltd. 1897 AC 22 where the House of Lords held that in law, a company is a person all together different from its shareholders and directors and the shareholders and Directors of the company are not liable for the debts of the company except to the extent permissible;* (vii) *that though a Single Judge of this Court in Jawahar Lal Nehru Hockey Tournament v. Radiant Sports Management MANU/DE/1756/2008 : 149(2008) DLT 749 observed that there could be a case where the Court even in a execution proceeding lifts the veil of a closely held company, particularly a Pvt. Ltd. company and in order to satisfy a decree, proceed against the personal assets of its directors and shareholders but the said judgment was over ruled by the Division Bench EFA(OS) No. 17/2008 decided on 7th November, 2008 and reported as MANU/DE/1756/2008 : , finding that the director of the company had agreed to be personally liable to satisfy the decree and for this reason holding him liable; however the Division Bench refrained from commenting authoritatively on the aspect of lifting of the corporate veil in execution;* (viii) *that though Section 53 of the Transfer of the Property Act, 1882 allows the creditors to have a transfer of property made with an intent to defeat the creditors set aside but a case therefor has to be pleaded;* (ix) *that it cannot be laid as a general proposition that whenever the decree is against a company, its Directors/shareholders would also be liable-to hold so would be contrary to the very concept of limited liability and obliterate the distinction between a partnership and a company;* (x) *that though the Courts have watered down the principle in Solomon supra to cover the cases of a fraud, improper conduct, etc. as laid down in Singer India Ltd. v. Chander Mohan Chadha MANU/SC/0626/2004 : (2004) SCC 1 but a case therefor has to be made out;* (xi) *that the decree holders in that case had not made out*

any case therefor; the directors were not parties to the proceedings in which decree was passed and were not impleaded in the execution petition also and there were no averments in the execution petition of fraud or improper conduct or of incorporation of the company to evade obligations imposed by law and in which situations Supreme Court in Singer India Ltd. supra has held that the corporate veil must be disregarded.

10. Applying the aforesaid principles, the decree in favour of the respondent No. 1 and against the respondent No. 2 for recovery of money cannot be executed against the petitioners for the reason of the petitioners being directors of the respondent No. 2.

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17. The direction impugned is evidently under sub-Rule (2) of Order XXI Rule 41. However what the said rule permits is a direction for disclosure of the particulars of the assets of the judgment-debtor and not assets of any other person. Though Order XXI Rule 41(1) also permits the Court to examine "any other person" but the words "any other person" are absent from sub-Rule (2) of Rule 41 which permits a direction only against the judgment-debtor where the judgment-debtor is a corporation, against any officer thereof and disclosure as aforesaid, of assets of the judgment debtor only and not of personal assets of such officer.

18. Once the directors of a company are not judgment-debtor in a decree against a company, there can be no direction to them to disclose their assets. Mr. Justice Chagla of the Bombay High Court, in Bachubai Manjrekar v. Raghunath Ghanshyam Manjrekar MANU/MH/0159/1941 : ILR 1942 Bombay 128 held that except in very exceptional circumstances, the Court should never make an order under Order XXI Rule 41 of CPC without in the first instance giving notice to the party against whom an order is sought. In the present case, the order against the petitioners has been made

without even giving any opportunity to the petitioners to show cause as to why the direction against them should not be issued.”

19. The present case is squarely covered by the aforesaid observations of this Court in **Anirban Roy and Ors.** (supra). In view of the fact that no decree has been passed against the petitioners, the decree against the judgment debtor company cannot be executed against the petitioners. Just because the petitioners are directors of the judgment debtor company, they cannot be directed to disclose their personal assets. There is no requirement under Order XXI Rule 41(2) for a direction to be passed against the officers of the judgment debtor company to file their personal list of assets. Even in respect of the judgment debtor, the affidavit of assets can only be directed to be filed upon an application having been filed on behalf of the decree holder under Order XXI Rule 41(2) of the CPC. Such a direction cannot be passed *suo motu* by the Executing Court.

20. In the present case, there was no occasion to pass the aforesaid direction since the application was filed by the decree holder under Order XXI Rule 37 of the CPC. Therefore, the Executing Court committed an error in issuing direction to the petitioners to file affidavits by placing reliance on the judgment of this Court in **Bhandari Engineers and Builders Pvt. Ltd.** (supra).

21. In the judgment of **Skipper Construction** (supra), a clear case for lifting of the corporate veil was made out in the facts and circumstances of the matter. However, in the present case, only vague and general averments with regard to fraud have been made by the decree holder against the petitioners in their application filed under Order XXI Rule 37 of the CPC

and that by itself cannot be a ground for piercing of the corporate veil. Therefore, the reliance placed by the decree holder in the case of *Skipper Construction* (supra) is misplaced.

22. In view of the above, the directions contained in the impugned order dated 13th August, 2019 directing the petitioners to file an affidavit disclosing their personal assets cannot be sustained and are set aside. However, it is clarified that it would be open to the decree holder to pursue her application filed under Order XXI Rule 37 of the CPC and/or to file an application under Order XXI Rule 41 or any other provisions of the CPC, as advised for the execution of the decree.

23. Petition is allowed in the above terms.

JANUARY 14, 2022
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AMIT BANSAL, J.

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