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KANCHAN VINOD MAYEKAR
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO. 1144/2021
IN
COMMERCIAL EXECUTION APPLICATION NO. 194/2020

1. Urban Infrastructure Trustees Ltd.)
a Company incorporated under the)
Companies Act, 1956 and having its)
Registered office at 46-47,)
Maker Chambers VI, Nariman Point,)
Mumbai 400 021 as trustee of)
Petitioner No.2, Urban Infrastructure)
Venture Capital Fund)

2. Urban Infrastructure Venture Capital Fund)
a Trust registered as a Venture Capital)
Fund, under the SEBI (Venture Capital)
Funds) Regulations, 1996 having its)
Registered office at 46-47,)
Maker Chambers VI, Nariman Point,)
Mumbai – 400021) ….. APPLICANTS

IN THE MATTER BETWEEN

1. Urban Infrastructure Trustees Ltd.)
a Company incorporated under the)
Companies Act, 1956 and having its)
Registered office at 46-47,)
Maker Chambers VI, Nariman Point,)
Mumbai 400021 as trustee of)
Petitioner No.2, Urban Infrastructure)
Venture Capital Fund)

2. Urban Infrastructure Venture Capital Fund)
a Trust registered as a Venture Capital)
Fund, under the SEBI (Venture Capital)
Funds) Regulations, 1996 having its)
Registered office at 46-47,)

Maker Chambers VI, Nariman Point,)
Mumbai – 400021) ….. APPLICANTS/ DECREE HOLDERS/ JUDGMENT CREDITORS/ ORIGINAL CLAIMANTS

VERSUS

1. Kishor N. Shah)
residing at Samruddhi, Plot No. 157,)
18th Road, near Ambedkar Gardens,)
Chembur, Mumbai – 400 071)
And having his office at Godrej Colesium,)
A Wing, 1301, 13th Floor, Behind Everard)
Nagar, Off. Eastern Express Highway,)
Sion (East), Mumbai – 400 022)

2. Vimal K. Shah)
residing at Samruddhi, Plot No. 157,)
18th Road, near Ambedkar Gardens,)
Chembur, Mumbai – 400071)
And having his office at Godrej Colesium,)
A Wing, 1301, 13th Floor, Behind Everard)
Nagar, Off. Eastern Express Highway,)
Sion (East), Mumbai – 400 022)

3. Nainesh K. Shah)
residing at Samrudhi,Plot No. 157,)
18th Road, near Ambedkar Gardens,)
Chembur, Mumbai – 400 071)
And having his office at Godrej Colesium,)
A Wing, 1301, 13th Floor, Behind Everard)
Nagar, Off. Eastern Express Highway,)
Sion (East), Mumbai – 400 022) ….. JUDGMENT DEBTORS/ORIGINAL RESPONDENT NOS. 1 TO 3

4. Joyce Realtors Pvt. Ltd.,)
A Company incorporated under the)
Companies Act, 1956 and having its)
Registered office at Meeting Room,)

Godrej Coliseum, A Wing, 1301,)
13th Floor, Behind Everard Nagar,)
Off. Eastern Express Highway,)
Sion (East), Mumbai – 400022) ….. Original Respondent No.4

Senior Counsel Mr. Zal Andhyarujina a/w. Adv. Jahaan Dastur, Adv. Siddharth Joshi i/b. M/s.Dastur Kalambi & Associates for the Applicants.

Senior Counsel Mr. Aspi Chinoy a/w. Adv. Rohaan Cama, Adv.Ayushi Anandpara, Adv. Rohan R. Dakshini, Adv. Etika Shrivastav, Adv. Nishant Kaushal, Adv. Nishi Doshi, Adv. Abhyarthana Singh, Adv. Aanchal Maheshwari i/b. M/s.Rashmikant and Partners for the Respondent Nos. 1 to 3.

CORAM: RAJESH S. PATIL, J.

RESERVED ON : 7 APRIL, 2026

PRONOUNCED ON : 29 SEPTEMBER 2026

JUDGMENT :-

1) This interim application has been filed by the decree holder seeking following reliefs as under :

> (a) That notice be issued to each of the Judgment Debtor Nos. 1 to 3 under Order XXI Rule 37 directing each of them to remain present before the Court and to show cause why an order should not be passed for their respective arrest and detention;
>
> (b) this Hon'ble Court be pleased to pass appropriate orders and directions for the arrest of detention of Judgment Debtor Nos. 1, 2 and 3, *inter alia*, under Order XXI Rule 11 (2)(j)(iii) and Section 51 of the Code of Civil Procedure, 1908;
>
> (c) for ad-interim reliefs in terms of prayer clause (a)

above;

2) The applicants are the decree holders pursuant to the Award passed against the respondent Nos.1 to 3/judgment debtors. They have filed commercial execution application in this Court since according to them the respondents have willfully failed and neglected to pay the decreetal amount.

2.1) It is the case of the applicants that between the applicants and the respondent nos. 1 to 3, there were three separate agreements wherein the applicants had invested large amounts, in three separate Special Purpose Vehicles (SPV). As there were dispute and difference between the parties it led to three separate arbitration proceedings. The present proceeding is one of such proceedings which arises in respect of an SPV called " Joyce Realtors Private Limited" – respondent no.4 herein.

2.2) In the present proceedings the Arbitration Tribunal consisting of three Retired Supreme Court Judges, passed an Award dated 19 May 2019 (corrected on 13 August 2019), thereby directing, the judgment debtors to pay to the applicants a sum of Rs.106.61 crores together with interest and Rs.16.56 crores towards compensation.

2.3) Being dissatisfied the judgment debtors challenged the Award u/s. 34 of the Arbitration Act before this Hon'ble Court. While the said Section 34 petition was pending and no orders were passed therein, the applicants herein filed execution application under Order XXI, Rule 11 read with Section 51 of the CPC.

2.4) In the pending execution application, the judgment debtors filed interim application, seeking unconditional stay to the execution of the Award. By an order dated 14 December 2020, the said application for stay was dismissed, however liberty was granted to the judgment debtors to deposit the awarded amount or to furnish bank guarantees to secure the same on or before 29 January 2021, in which event the execution of the award would be stayed. As the judgment debtors failed to deposit the amount or furnish bank guarantee, there was no stay to the execution of the award.

2.5) The judgment debtors, thereafter filed S.L.P. impugning the order dated 14 December 2020. The S.L.P. was disposed of by the Supreme Court while upholding the order dated 14 December 2020 passed by High Court. However, it modified the said order to the extent that the judgment debtors were given the liberty to secure the interest component under paragraph no. 65 sub-paragraphs (d-I) of

the said judgment by furnishing security to the satisfaction of the Prothonotary & Senior Master. Paragraph No.65 (a) sub-paragraphs (i) to iii reads as under :

> "65. Consequently:
>
> (a) The impugned award will be stayed upon, and only upon, the Applicants depositing with the Prothonotary & Senior Master no later than by 29th January 2021
>
> (i) the entire amount of Rs.106.61 crores with interest calculated as per the Award up to the date of deposit;
>
> (ii) The entire amount of Rs.16.56 crores with interest as per the Award up to the date of deposit;
>
> (iii) The entire amount of Rs. 7,04,90,666/- with interest as per the Award up to the date of deposit."

2.6) The decree holders have thereafter in the execution application, preferred the present interim application. The judgment debtors have filed their affidavits-in-reply, opposing the interim application.

SUBMISSIONS:-

3) Mr. Zal Andhyarujina, learned senior counsel appeared on behalf of the decree holder, and made his submissions.

(i) He first showed the order passed on 5 February, 2026. He submitted that the present execution application is filed pursuant to an award passed whereby the amount payable has escalated to around Rs.400 to Rs.500 crores.

(ii) He submitted that Section 34 application was filed by the judgment debtors wherein an application under Section 36 for stay

was preferred. The judgment debtors were directed to deposit the award amount. However, the judgment debtors did not deposit the amount and challenged the same by way of S.L.P. which was dismissed.

(iii) He submitted that though some of the properties of the judgment debtors have been attached, the value of the said attached property is around Rs.10 crores. He submitted that there are also receiveables, worth of which is around Rs.130 crores to be received by the judgment debtors.

(iv) He thereafter showed the provisions of Order XXI Rule 37 of the C.P.C. which according to him is mandatory. He submitted that he is pressing today, only for issuance of 'show cause notice'. He thereafter referred to Rule 47 of Order XXI which refers to the things to be done after the notices are issued.

(v) He further submitted that even after passing of the Award, the judgment debtors have executed gift deed, gave away donations, incurred education expenses and have also invested in mega projects with reputed builders. He submitted that the judgment debtors are doing their business as usual and are investing monies but are not ready to satisfy the decree.

(vi) He thereafter showed the provisions of Section 51 sub-section (c) of CPC and thereafter to proviso (a), sub-section (ii) and proviso (b). He submitted that stage of Section 51 has not arrived as of now. He submitted that the question of the provisions of Section 51 of the CPC arises at the stage after issuance of notice under the provisions of Order XXI Rule 37 and prior to Order XXI Rule 41 which is regarding detention of the judgment debtors. He then referred to section 60 of the CPC.

(vii) He thereafter showed me Form No.12 of Appendix (E) in the CPC, which mentions that notice to judgment debtors to appear to show cause why the judgment debtors should not be committed to civil prison in execution of decree. He submitted that said notice is very much a formal in nature therefore issuance of said notice will not amount immediate arrest of the judgment debtors as an opportunity is granted to the judgment debtors to answer why they should not be committed to civil prison.

(viii) He submitted that there is no need of mini trial for issuance of show cause notice under the provisions of Order XXI Rule 37. He submitted that as of today, this Court is not going to issue a warrant of arrest or detain the judgment debtors. All that the Court

is going to do is issue a show cause notice why the judgment debtors should not be detained.

(ix) He also referred to the observations made by the Supreme Court in S.L.P. preferred by the judgment debtors under Section 37 of the Arbitration Act, wherein the court has referred to the observations made by the learned arbitrator in the award.

(x) He submitted that Supreme Court has time and again held that it will be great frustration for a decree holder when he is not able to execute a decree. He thereafter referred to the concept called "has means to pay and the judgment debtor declines to pay".

(xi) He thereafter submitted that the judgment debtors have themselves stated in their two affidavits filed on 27 September, 2019, in section 9 arbitration petitions that 'in any event, the financial position of them is sound'. They have invested in SPV. Present decree holder has five awards against the judgment debtors and the total decreetal amount as of today Rs.1,436 crores amongst which the principal amount is Rs.535 crores as on the date of the award. He submitted that in the present proceedings the arbitral award is passed by a tribunal consisting of three retired Supreme Court Judges. He submitted that Section 34 petition was filed where prayer for stay was

made in the year 2019. However, the judgment debtors failed to seek any kind of urgent relief in Section 34 petition.

(xii) He submitted that the present judgment debtors are developing two properties in the heart of the City, in the area at Wadala and Worli. In the affidavit of disclosure dated 5 November, 2020, the judgment debtors have disclosed the value of their assets to be more than Rs.130 crores.

(xiii) He submitted that in the impugned award and in the order passed in the proceedings under Section 36 before the Single Judge of this Court, there is clearly observation that after the applicant had deposited monies in the account, the judgment debtors have siphoned off - 'take away money'. And have now raised their hands and said they don't have means to pay, when infact they have all the means to pay, atleast to satisfy part of the decreetal amount as it stood on the date of passing of the award. It is a matter of fact that not even a single rupee has been paid by the judgment debtors, who are carrying on business as usual with different identities.

(xiv) He further submitted that he has specifically stated in his interim application para no. 18 that the estimated revenue of the ongoing projects of the judgment debtors-Everest Group (now known

as Terraform Group), works out to around Rs.1800 crores. He submitted that while responding to said para, in paragraph no.13, the judgment debtors has mentioned that there is no direct relationship of the said statement, hence denied.

(xv) An additional affidavit of judgment debtor no.2 (Vimal K. Shah) dated 26 February, 2026 mentions in paragraph no.2, the details regarding debts due from group companies – Schedule X of the balance-sheet shows that the judgment debtor no.2 has advanced loans to few companies wherein he is also a director.

(xvi) He submitted that these all companies to which the judgment debtors no.2 and 3 have let huge finances, are intra-group lending. He submitted that the judgment debtors are infact parked their monies in their group companies and are now trying to make out a case that these group companies are different legal entities and hence this Court cannot pass any orders against those companies.

(xvii) Though the different group companies of the judgment debtors are separate juristic entities, but they are under the control of the judgment debtor nos. 1, 2 and 3 who are the directors of these companies.

(xviii) He referred to the following Supreme Court judgments:

(a) *S.Shah Vs. Jitendra Kumar Gandhi & Ors., (2021) 6 SCC 418 ;*

(b) *Bhoj Raj Garg Vs. Goyal Education And Welfare Society & Ors., (2025) 9 SCC 618 ;*

(c) *Jolly George Varghese & Anr. Vs. The Bank of Cochin (1980) 2 SCC 360 .*

(d) *Madhusudan Prabhakar Chitale Vs. Trimbak Vyankatesh Joshi, 1960 SCC Online Bom 53.*

4) Mr.Aspi Chinoy, learned Senior Counsel appeared on behalf of the judgment debtors and made his submissions.

(i) He submitted that when there is a decree for payment of money and the judgment creditor seeks to arrest the judgment debtor and detain him in the civil prison under the provisions of Order XXI, Rule 37, the court has to look into who is liable to be arrested. Therefore, instead of issuing a warrant of arrest, the court will have to issue a notice calling upon him to appear before the Court and show cause why he should not be committed to a civil prison. He further submitted that time and again in various judgments it has been held that, the pre-condition for issuance of a show cause notice under Order XXI Rule 37 of CPC is that whether the judgment debtor is 'liable to be arrested'.

(ii) He further submitted that, this in turn require that the decree holder should establish, and the court should *prima facie* be satisfied about the existence of the conditions stipulated in the

proviso, to section 51 clause (a) (ii) and (b). He submitted that there is a duty cast on the decree holder to show that the judgment debtor has dishonestly transferred, concealed or removed the whole or any part of the property or committed any act of bad faith in relation to his property. Therefore, a duty is cast on the decree holder to prove that the judgment debtor has infact transferred or created third party right in any of his properties belonging to him. So also, as per sub-section (b) of section 51, the judgment debtor had the means to pay the amount of the decree or substantial part thereof, and refuses or neglects to pay the same.

(iii) He submitted that two conditions are mentioned in sub-section (b). First, that the judgment debtor had " means to pay " which means to pay the amount of the decree or substantial part thereof and then, that he refused to pay the said amount. He submitted that means to pay means will not mean that there is a property with him and he has not sold that property and given away the money to the judgment creditor. The decree holder can always take steps to attach the property of the judgment debtor and thereafter take steps to sell the property to recover the decreetal amount.

(iv) To canvass his points, he referred to the following judgments :

(a) *Jolly George Verghese Vs. The Bank of Cochin, (1980) 2 SCC 360*

(b) *Harpal Singh Vs. Lala Hira, 1954 SCC OnLine All 216.*

(c) *Mayadhar Bhoi Vs. Moti Dibya, 1984 SCC OnLine Ori 43.*

(d) *Mukh Ram Vs. Hardeep Singh, 1985 SCC OnLine Raj 35*

(e) *A.Mani Vs. A.Chandranath, 1992 SCC OnLine Mad 703*

(f) *M. Tharmapitchai Vs. ACA Funds, 1995 SCC OnLine Mad 47*.

(g) *Madhusudan Prabhakar Chitale Vs. Trimbak Joshi, 1960 SCC OnLine Bom 53*

(h) *Xavier Vs. Canara Bank, 1969 SCC OnLine Ker 147* .

(i) *A.S.Venkatesan Vs. Velayutham, 2009 SCC OnLine Mad 1617.*

(v) He thereafter referred to section 51 proviso (a) sub-section (ii) and led emphasis on the words 'acts of bad faith'. He referred to the Delhi High Court judgment in case of ***Suresh Jindal & Ors. vs. Delhi Financial Corporation & Anr., 2010 SCC OnLine Del 59***. He referred to the reference of 54th Report of the Law Commission in the year 1973. He submitted that imprisonment if it follows to cases is not based on mere non-payment nor on mere inability to pay, but is confined to cases where a person is liable to pay and dishonestly makes default in payment. He thereafter referred to the judgment of

Supreme Court in ***Jolly George*** (supra).

(vi) He thereafter referred to what he called as a second stage. He submitted that the matter of arrest of a judgment debtor is not just a innocuous matter, it is an extra ordinary step and has an impact on human dignity. He thereafter referred to the following judgments :

(a) ***G.Sudhakar Reddy Vs. Ms.Jahnavi Chit Fund, 2006 SCC OnLine AP 527***

(b) ***Pandugayala Subbarayudu Vs. Kasttamuri Sri Krishna (2008) 2 AP LJ 129*** .

(c) ***Senthil Kumar Vs. KM Surendran, 2012 (3) CTS 294 Mad***.

(vii) He submitted that as per the proviso B to section 51, the decree holder has to show that the judgment debtor had means to pay the amount of the decree or some substantial part thereof or neglects to pay the same. He submitted that the decree holder has referred to affidavit of disclosures of judgment debtor wherein there is a reference of disclosed asset of Rs.130 crores and which is mentioned at para no.11 at page no.15 and that Terraform Group of Companies having ongoing projects as setout in Exh.S from which estimated revenue is expected of Rs.1800 crores in para nos. 17 and 18 at page no.19. He submitted that the dominant part of this disclosure assets of Rs.115 crores relates to loans advanced by respondent nos. 1 to 3,

to group of associate companies and firms, from time to time for last 20 years. He submitted that the additional affidavit dated 26 February, 2026 filed by the respondent pursuant to the liberty granted by order dated 5 February 2026, furnishes particulars of such loan and established that the recipient companies are not in a position to repay the same as in most they have utilized the money or acquired the property or the development right, which are under dispute or litigation.

(viii) He submitted that it is pertinent to note that the applicants/decree holders have not filed any response or counter affidavit disputing the position. Accordingly the amount of this loans are not presently realizable or available to the judgment debtors. He submitted that balance of Rs.17 crores of the disclosed assets constitute bank balances of Rs.13.3 lakhs, investment of shares and debentures Rs.11.82 crores, investment in mutual funds of Rs.50.81 lakhs and shares in partnership firms Rs.4.79 crores. He submitted that most of which has already been attached by the applicants/decree holder or are able to be attached by the decree holder.

(ix) The ongoing project as setout in 'Exh.S' from which the estimated revenue in 2021 was Rs.1800 crores, as mentioned in

paragraph nos. 17 and 18. The respondents by their additional affidavit dated 14 March 2026 pointed out that the projects in Exh.S were being carried out by three entities viz.,

(a) Money Magnum Nest Private Limited in which respondent hold only 5% shares each which means 15%,

(b) Money Magnum Construction in which respondents have 55% shares and

(c) M/s. Merit Magnum Construction in which respondents have 57% shares. The statement at Exh.S had only referred to estimated revenues of Rs.1172 crores but had not referred to the cost required to be incurred by these three companies and firms, including construction cost, and land cost.

(x) That the project in Exh.S were acquired and commenced by the said three companies/firms 20 years ago, and that as of 31 March 2025, the total revenue generated from the said projects was approximately Rs.573 crores, whereas the total expenditure incurred on the same was around Rs.711 crores. Hence, it resulted in a deficit of Rs.137 crores.

Accordingly none of the projects had resulted in profit or

surpluses which could have accrued to respondents as shareholders/partners, hence they could not pay the decreetal amount in the present proceedings. The decree holders have not filed any reply or response countering the affidavits filed by the judgment debtors.

(xi) For satisfying clause (a) (ii) of the proviso to Section 51 of the CPC, the judgment debtor should have dishonestly transfer, conceal or remove any part of his property or committed any act of bad faith in relation to his property. In the present proceedings the applicant has relied upon the fact that in 2020, the respondent had given a gift of Rs.18.25 lakhs, to Greeshma Singh, daughter of respondent no.1 and sister of respondent nos. 2 and 3. Second aspect is in 2020, the respondent had given donations of Rs.15,88,500/-. Third column is that the respondent no.1 had incurred forward and option losses of Rs.90.84 lakhs. That in the year 2020, the respondent no.2 had spent Rs.13,82,000/- as school fees and had made additional drawing of Rs.13 lakhs. That the respondent no.3 had spent a sum of Rs.11,15,000/- as school fees and had made additional drawing of Rs.12 lakhs.

(xii) He submitted that in the additional affidavit dated 26

February 2026, filed by the respondent nos. 1 to 3 it has been disclosed that post 2019 after passing of the award, the respondent had continued to advance almost Rs.7 crores by way of loans to their group companies and firms.

(xiii) The respondent have in their affidavit in response in paragraph no. 2.2(c) pointed out that the payments which aggregates to approximately Rs.1.7 crores were made in the ordinary course for the payment of education fees for their children and for payment of liability incurred through trading at NSE, and these payments were not made in bad faith or with a view to avoid paying the decreetal debt of Rs.246 crores. The applicant – decree holder chose not to file any affidavit of rejoinder disputing this statement.

(xiv) The respondents affidavits dated 26 February 2026, which disclosed that they have post passing of award of 2019 continued to advance almost Rs.7 crores by way of loans to their group companies and firms. These loans and advances were made to diverse associate companies and firms in the usual course of business. These amounts were not advanced clandestinely or with any dishonest intent to defeat the claim of the decree holder in the present proceedings and these loans were also included in the affidavit of disclosure filed by

the respondents. The absence of any bad faith, dishonesty or clandestine design in making such loan is also apparent from the fact that they aggregated to approximate Rs.7 crores as against the award/decree for a sum of Rs.246 crores. The respondents have not filed any response or counter affidavit even alleging that these advances post 2019 have either dishonest or made in bad faith to avoid paying the decreetal amount. He submitted that these loans are to be re-paid.

(xv) Accordingly Mr.Chinoy submitted that the decree holder has not made out a requisite strong prima facie case that the respondents are “liable to be arrested” in the context of Section 51, proviso (a)(ii) and (b) and that the application for issuance of Notice under Order XXI Rule 37(1) should be dismissed.

5) Mr. Andhyarujina Ld. Sr. Counsel in rejoinder submitted that as the decree holders did not want to waste further time in execution. Hence, they did not file any rejoinder to the reply filed by the judgment debtors and on the basis of the denial to the affidavit of reply, they have proceeded to argue this present application.

(i) He showed Rule 30 of Order XXI and sub-rule (1) of Rule 11. He submitted that there is no bar on the decree holder to seek

relief of arrest and detention of the judgment debtor and the attachment of his property, simultaneously.

(ii) He thereafter showed paragraph no.5 of the judgment of Bombay High Court in the judgment of ***Chitale*** (supra). He submitted that in proviso a(ii) of Section 51, as far as the words 'some simultaneous part thereof' is concerned, the judgment debtor has to pay to the decree holder whatever funds are available with them. He submitted that the said amount can be a drop in the ocean. However, even that amount has to be paid otherwise it is a matter of common sense that when the words 'some sufficient part thereof' is mentioned, whatever is possible to the judgment debtor, that amount has to be paid. He submitted that it can't be argued that the substantial amount means 50% or 40% of the total decreetal amount. He submitted that if under the provisions of Order XXI Rule 11, only on oral application, the judgment debtor can be arrested while the decree is being passed in Court, then for issuance of show cause notice under Order XXI Rule 37, there can't be any impediment.

(iii) He thereafter showed the judgment of Supreme Court in case of ***Rahul Shah*** (supra). He harped on paragraph no.42 and more particularly para no.42.6 which refers to the provisions of Rule 11 of

Order XXI where the words 'must' has been used and there is no choice left to this Court. He further submitted that the decree holder can simultaneously move both the proceedings against the property of the judgment debtor and against his body.

(iv) To buttress his submissions, he relied upon following judgments :-

(a) ***Subrata Roy Sahara Vs. Union of India, (2014) 8 SCC 470***

(b) ***Shyam Singh Vs. Collector, District Hamirpur, U.P., 1993 Supp.1 SCC 693***

(c) ***A. K. Subramania Chettiar Vs. A. Ponnuswami Chettair, 1956 SCC OnLine Mad 1215.***

(d) ***K. Ravi Kumar Reddy Vs. M/s. I.C.D.S.Ltd., 2012 SCC OnLine AP 35***

(e) ***Ibram Sha Vs. Lakshmi Prabha Chit Funds (P) Ltd., 2009 SCC OnLine Mad 1215***

(f) ***P.G.Rangaratha Padayachi Vs. The Mayavaram Financial Corporation Ltd., 1973 SCC OnLine Mad 9***

(g) ***George Mathew Vs. Gracy George, CRP NO. 1949 of 2003, order dated 11 July, 2007*** *passed by Kerala High Court.*

(h) ***Rustam Phiroze Mehta Vs. State of Maharashtra, Writ Petition (St) No. 3221 of 2020*** *judgment dt. 15 July, 2021 passed by* Division Bench of Bombay High Court.

(i) ***Hargobind Kishanchand Vs. Hakim Singh, 1925 SCC OnLine Lah 313.***

(j) ***Subhash Agarwal Vs. Abhishek Andley, 2019 SCC OnLine Del 11048.***

(v) He submitted that 1936 amendment to the C.P.C. will have no effect in the present proceedings.

(vi) He thereafter referred to page no.5 of judgment debtors' written submissions and paragraph no.5 therein, which mentions about the judgment of Bombay High Court in ***Chitale*** (supra) matter, which refers to the issuance of notice under the provisions of Order XXI Rule 37(1).

(vii) He submitted that the judgment debtors have disclosed assets. There is reference of Rs.130 crores as per the balance-sheet, out of which Rs.115 crores loan has been given by the judgment debtors to their intra companies. He submitted that the award when was passed was Rs.235 crores and alongwith interest, as of now has gone beyond Rs.526 crores. He submitted that the judgment debtors had means to pay but however chose not to pay the judgment creditor. He submitted that atleast Rs.9 crores amount has been paid as loan by the judgment debtors to their own companies after the award is passed in the month of May 2019. He submitted that there is

attachment of only Rs.17 crores of the assets of judgment debtors. He submitted that out of the amount given as loan to the intra companies, there is a repayment only by M/s. Terraform Nest Pvt. Ltd. of an amount of Rs.15 crores and the said amount has been used by the said company to invest further in lands in New Delhi. The said fund could have been repaid by the judgment debtors. The judgment debtors have not taken any steps to recover the loan amount. He submitted that monies were available, but it was deployed elsewhere. He submitted that the argument of the judgment debtors that only because it was a large amount of a decree, whatever was available with the judgment debtors, was not paid, is no good an argument, and the judgment creditor can't be penalized for that. He submitted that arrest is a ordinary mode of execution.

(viii) He submitted that the *bona fide* of the parties has to be looked into in every execution proceedings. He submitted that there is no merits in the submissions made on behalf of the judgment debtors.

(ix) He further submitted that all the citations/judgments referred by the learned counsel appearing for the judgment debtors are regarding a position where the matter pertaining to the arrest and

detention and not at the stage of "show cause notice" to be issued or not. Therefore, the judgments referred on behalf of the judgment debtors will not be relevant at this stage in the present proceedings.

6) Mr.Chinoy, Ld. Sr. Counsel in sur-rejoinder submitted that :-

(i) The burden is always on the decree holder. The judgments relied by the decree holder of the Lahore High Court will not be applicable because the said judgment is pre 1936 amendment to the C.P.C.. Rule 11 of Order XXI has to be read with Rule 37 of the Order XXI. A show cause notice can be issued only when it is satisfied by the decree holder that the judgment debtor is liable to be arrested.

(ii) He thereafter referred to the paragraph no.93 of the judgment of ***Sahara*** (supra) where it has been clearly stated that the judgment debtor should have means to pay. He submitted that out of the amount of Rs.130 crores mentioned by the decree holder, Rs.15 crores are the loans given to its group companies and around Rs.15 crores has already been attached by the decree holder. Rest of the amount cannot be liquidated by way of cash. He submitted that the decree holder has to show that the amount allegedly owned by the judgment debtor should be realizable. He harped on the provisions of

Section 51 proviso (a) sub-section (ii). He submitted that as far loans are given, it has been given to the group companies. They are subject matter of litigation and if the decree holder wishes and he feels the amount are available, he should start with garnishee proceedings. He submitted that as a matter of fact to the reply filed by the judgment debtors, the decree holder chose not to file rejoinder. He submitted that as far as ***Chitale*** (supra) judgment is concerned, since the judgment debtor was not appearing, therefore an arrest warrant was issued.

(iii) He submitted that the judgment debtors would be liable to be arrested only when there is likelihood that they will abscond. Hence there is no merits in the Interim Application and the same needs to be rejected.

ANALYSIS & CONCLUSION.

7) In the Interim Application filed by Judgment Debtors seeking stay in Arbitration Petition filed under Section 34, challenging the Award, the learned Single Judge by Order dated 14 December 2020, directed the Judgment Debtors to deposit the entire amount as granted by Arbitral Tribunal in Award. Paragraph nos. 56 to 59 of the said order reads as under :-

> 56. I return to this argument of 'take-out money'. Put

simply, it seems to be a figure to which the Shahs claimed they were entitled, free and clear, with no requirement of an explanation or accounting. It was theirs to keep. The amount was not small: Rs. 102 crores.

57. The arbitral tribunal too considered this 'take-out money' plea. The Shahs relied on some Term Sheet that pre-dated the 2008 SSA and SHA. The arbitral tribunal rightly rejected the validity or continuance of any such term sheet provision after the 2008 Agreements (with their 'entire agreement' clause) came into play. It also rejected the argument that the 'real' agreement was in the Term Sheet — and of this, perhaps the less said the better, in view, among other things, of the Evidence Act. This is how the arbitral tribunal dealt with the take-out money submission:

> 5.8 The Respondents have urged (vide para viii, at page 11 of SoD) that the Claimants had included clause 2.2.10 (d) in the draft of the Subscription Agreement despite full knowledge that sums had already been paid over towards take out moneys in the period between October 2007 to July 2008. Respondent No.4 had paid the same over to the Promoter Group Entities as per the Term Sheet and the Agreements executed in October 2007 pursuant to the agreed structure between the parties. The Claimants requested for clause 2.2.10(d) and similar terms citing internal accounting reasons and legal and tax advice. The said clause and other similar clauses contained in the SSA and SHA are clearly inoperative and void as the stipulations therein seek to deal with takeout moneys of Rs.102 crores which had already been paid by the Claimants pursuant to earlier structure and documents and utilized for the agreed end i.e. as take out moneys'.

[(Comment by the Tribunal):-There are two terms used by the Promoter Respondents which are 'tax effective planning' and 'take out monies'. These two terms are not explained in the pleadings of the Respondents, not even in evidence. Till the end of the hearing, these terms, especially 'take out money' have remained shrouded in mystery. This will be discussed more at an appropriate place].

58. There follows, in paragraph 15 a detailed discussion of the take-out money theory. I do not see the point in extracting the whole of that discussion. It covers the pleadings, the evidence, and the rival submissions. Perhaps all that is needed is to extract the utterly delightful heading to this section of the Award.

'Take Out Money'; a mystery!

Sometimes, a mere caption says it all.

59. Urban put Rs. 110.39 into the project. Of this, the record shows, about Rs.8.8 crores went into project expenses. What of the rest? This, it seems, is the mysterious 'take out money'. Now the Shahs say the Award is perverse because it takes the amount of Rs.110.39 to compute interest, although this was not — according to the Shahs, and never mind that they said exactly the opposite on oath — 'funding' under the 2008 SHA and SSA.

7.1) The order dated 14 December 2020 passed by this Court was challenged by the judgment debtors before the Supreme Court

and the said S.L.P. was dismissed on 2 March, 2021.

7.2) The judgment debtors affidavit dated 26 February 2026 with reference of M/s.Terrafirm Construction Pvt. Ltd. there is mention of the judgment debtor no.2 advancing a loan for amount of Rs.79,94,500/- and the said firm used the said amount for settling dispute with the land owners. The said land was sold between 2023 to 2025 for Rs.31.36 crores, out of the said amount, Rs.25 crores was received by M/s.Terrafirm Construction Pvt. Ltd. Thereafter, there is a reference that the company M/s.Terrafirm Construction Pvt. Ltd. invested Rs.20 crores in a project at New Delhi. Why M/s.Terrafirm Construction Pvt. Ltd. after receiving Rs.25 crores between 2023 to 2025, did not return the loan amount to Judgment Debtors, which amount the present applicant would have paid to the part satisfaction of the award amount, has not been explained.

7.3) Similarly, in the additional affidavit of the judgment debtor no.3, in paragraph no.2, there is reference of debts due from the group companies Schedule – 8. In sub-paragraph no.(a) of paragraph no.2, there is reference of M/s. Money Magnum Nest Private Limited and there is mention that after 2019, an amount of Rs.2,15,41,717/- has been advanced by the judgment debtor no.2 to

M/s. Money Magnum Nest Private Limited. The award in the present proceedings was passed in the month of May 2019. there is a reference to an amount of Rs. 3.43 cores advanced by the judgment debtor no.2 from the period 2019 to 2021 to M/s.Terraform Construction Pvt. Ltd. to enable it to repay its loan taken from the Money Magnum Nest Private Limited.

7.4) Similarly, in the company M/s.Terrafirm Construction Pvt. Ltd., there is a reference in the said paragraph that in the period 2012 to 2019, the judgment debtor no.3 advanced an amount of Rs.5.21 crores to the company to enable repayment of the loan given by Everest Fincap Private Limited for acquiring parcel of land at Pune. There is a reference to an amount of Rs.3.43 cores advanced by the judgment debtor no.2 from the period 2019 to 2021 to M/s.Terraform Construction Pvt. Ltd. to enable it to repay its loan taken from the Money Magnum Nest Private Limited.

7.5) As regards M/s. Terrafirm Softtech Pvt.Ltd. after passing of the award till November 2021, the judgment debtor no.3 has advanced loan of Rs.69,35,000/- to the said company. The said amount was used for acquiring land in industrial area at Airoli, Navi Mumbai.

In the affidavit-in-reply dt 27 September 2019 of the judgment debtors, filed in section 9 Arbitration proceedings, they have solemnly averred that in any event, the financial position of them is sound and denied that their financial position is “frail”.

7.6) In short, from April 2012, when the arbitration proceedings were initiated, till the passing of the Award in May 2019, Respondents had advanced loans aggregating to approximately ₹52,56,46,069/- (Rupees Fifty-Two Crore Fifty-Six Lakh Forty-Six Thousand and Sixty-Nine Only). And after passing of the Award, between May 2019 and November 2021, they further advanced loans of approximately ₹8,11,47,908/- (Rupees Eight Crore Eleven Lakh Forty-Seven Thousand Nine Hundred and Eight Only), out of which substantial amounts were received back, approximately ₹3,53,65,000/-(Rupees Three Crore Fifty-Three Lakh Sixty-Five Thousand Only). There is no explanation whatsoever as to how or for what purpose the amount received as repayment was thereafter utilised by Respondents.

7.7) The Judgment Debtors Nos. 1, 2 and 3’s affidavit of disclosure dt. 5 November 2020 together have disclosed their assets worth 130 Crores.

7.8) The decree holder has attached few bank accounts of the judgment debtors, the total value of the same as on October 2020 is **Rs.10,73,63,025/-** (Rupees Ten Crores Seventy Three Lakhs Sixty Three Thousand Twenty Five only).

7.9) The Code of Civil Procedure is mainly divided into two parts/segments, namely Sections and Orders. While the main principles contained in the Sections, the detailed procedures with regard to the matters dealt with by the Sections are specified in the Orders. The Sections are divided into XI parts. Part-II deals with Execution. The Execution is further divided into different heads. Section 51 to 54 come under the heads "Procedure in Execution". Section 51 which comes under this head reads as under:

> **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.

(emphasis supplied)

7.10) Section 51 gives power to the Execution Court for ordering execution of the decree to pass order for arrest and detention in prison, provided the judgment debtor is given an opportunity to show cause *"why"* he should not be committed to prison. Once the Court is satisfied that the judgment debtor with the object of obstructing the execution of the decree has after institution of the suit in which decree has been passed by an act of bad faith, dishonestly transferred, concealed or removed any part of his property or has since the date of the decree, "means to pay" the amount of decree or "**some substantial part thereof"**, and refused or neglected to pay or now neglects to pay.

7.11) The intention of the legislature after reading Section 51, proviso (b) to the same, which uses the words very carefully "means to pay the amount of the decree" or "**some substantial part thereof"** or refused to pay or neglect to pay the same.

7.12) In my view, the word "**some"** has a great importance, since the legislature is not only used the words "means to pay the amount of decree", which will means the entire amount of the decree, but has further used the words **"or some substantial part thereof"**, the use of word **"some"** before the words "substantial part thereof", in my view, would mean any percentage of the decreetal amount which might be 99% of the decreetal amount or even 1% of the decreetal amount.

7.13) The Supreme Court in the judgment of ***Jolly George Varghese*** (supra) has specifically used the words that "if there is a decree against the person and if there is dire use of funds like medical necessity for ailment of cancer, in such situation, the judgment debtor can use the money which he has for making payment of medical expenses. One cannot compare medical need with that of expenses incurred towards, gifts and donations.

7.14) In the present proceeding, it is the case of the judgment debtors that the amount which they have spent towards higher education of their children and towards gifts given to their relatives and towards donations, is quite negligent in comparison to the decreetal amount which is running in around 400 to 500 crores. In my

view, when the decree was passed, it was roughly around 106.61 crores, which has now ballooned upto 400 to 500 crores. It is not the case of the judgment debtors that for extravagant higher educational expenses of their children, they have borrowed loan. The funds which they had, was used by them for education of their children. In my view, even this amount and the amount which they had used for giving gifts to their sisters and for donations could have been either paid to the decree holder or else they could have volunteered themselves to deposit that amount in this Court in the execution proceedings. That amount though could have been a small percentage as compared to the decreetal amount, still then it could have fell under the definition of **"some substantial part thereof".**

7.15) Admittedly, the present judgment debtors have transferred funds before passing of the decree/award or after passing of the decree/award to the accounts of their group companies. Such a situation of the company transferring the amounts to his group companies have been dealt with by the Division Bench of this Court in the judgment of ***Rustam Phoroze Mehta*** (supra). In para nos. 18.15 to 18.16 read as under :-

> 18.15 As regards the prayer for injunction against the group companies, it is clear from the material placed before us that the Marvel Group has held itself out to be a

> single economic unit and that its projects are owned and operated or developed by various entities within the group. There has been no dispute that the various other entities that have been referred to in the Affidavits of Disclosure are indeed group entities of Respondent No. 4. This Court's approach in seeking disclosure of even group companies' assets has been approved by the Supreme Court. It is common for developers to set up different companies or special purpose vehicles to undertake projects as part of the development business of the group as a whole.
>
> 18.16. Prima facie we are of the view that recovery of monies under the Recovery Certificate, would in the facts and circumstances of the present case, also be permissible against the assets of group companies, especially if the non-payment of a clear undisputed amount is being illegally and dishonestly avoided, whilst at the same time very large sums of money are being raised and spent by the same group for carrying on large real estate development projects. To allow such persons to defeat and frustrate the recovery of monies by individual purchasers and at the same time, permit them to carry on their business as usual, would clearly undermine the rule of law and shake the confidence of the public at large.
>
> (Emphasis supplied)

7.16) Order XXI Rule 11, sub-rule (2) mentions about the written application to be preferred by the decree holder for execution of a decree. Clause (j) (iii) of sub-rule (2) mentions about the arrest and detention in prison of a judgment debtor. Similarly, Order XXI Rule 30 mentions about the decree to be executed by attachment or sale of the property and even by execution by detention in civil prison of the judgment debtor. Both can be done simultaneously. Rule 30 of Order XXI reads as under:-

> **30. Decree for payment of money.** - Every decree for the payment

> of money, including a 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 judgement-debtor, or by the attachment and sale of his property, or by both.
>
> (Emphasis supplied)

7.17) Discretion has been given to the Execution Court to refuse execution at the same time of attachment of property and detention of the judgment debtors. It will always be a case to case basis, wherein the Courts are required to exercise their discretionary powers in light of the facts and circumstances of each case.

7.18) Section 60 of the CPC which also falls under Part (II) of Execution, mentions about properties which are liable to be attached and sold in execution which mentions that even those properties which are held by another person in trust for judgment debtor or on his behalf.

7.19) Order XXI, Rule 37 lays down the detailed procedure as regards the detention in prison of the judgment debtor which follows the main principles as contained in Section 51 of the CPC.

7.20) Order XXI, Rule 37 mandates issuance of a show cause notice to the judgment debtor as to why he should not be committed to the civil prison.

7.21) Section 60 of the CPC reads as under :-

> **60. Property liable to attachment and sale in execution of decree.-**
>
> (1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf:

7.22) Supreme Court in case of ***Rahul Shah*** (supra) paragraph nos. 41 and 42.11 held as under :-

> 41. Having regard to the above background, wherein there is urgent need to reduce delays in the execution proceedings we deem it appropriate to issue few directions to do complete justice. These directions are in exercise of our jurisdiction under Article 142 read with Article 141 and Article 144 of the Constitution of India in larger public interest to subserve the process of justice so as to bring to an end the unnecessary ordeal of litigation faced by parties awaiting fruits of decree and in larger perspective affecting the faith of the litigants in the process of law.
>
> 42.11 Under Section 60 CPC the term "… in name of the judgment-debtor or by another person in trust for him or on his behalf" should be read liberally to incorporate any other person from whom he may have the ability to derive share, profit or property.

7.23) Supreme Court in the judgment of ***Shyam Singh vs. Collector, District Hamirpur U.P. & Ors., 1993 Supp (1) SCC 693,*** in paragraph nos. 10 to 14, held as under :-

10. From time to time this question has been examined in connection with Section 51 of the Code of Civil Procedure (hereinafter referred to as 'the Code'). Section 51 of the Code provides that, subject to such conditions and limitations as may be prescribed, on application of the decree-holder the Court may order execution of the decree by different modes mentioned in the said section including

"(*a*) by delivery of any property specifically decreed;

(*b*) by attachment and sale or by sale without attachment of any property; and

(*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;"

11. 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 person 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, including a 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".

12. In the case of *Padrauna Rajkrishna Sugar Works Ltd.* v. *Land Reforms Commissioner, U.P.* [(1969) 1 SCC 485 : AIR 1969 SC 897] in connection with realisation of the income tax dues, sugarcane cess and the price of the sugarcane, treating them as arrears of land revenue, in accordance with the procedure prescribed by Section 279 of U.P. Zamindari Abolition and Land Reforms Act aforesaid itself, it was said by this Court: (SCC pp. 489-90, para 9)

"The power exercisable by the Collector in recovering arrears of income tax which are recoverable as arrears of land revenue are, it is clear, not restricted to the Land Revenue Code: the Collector is entitled to exercise all the powers of a Civil Court for the purpose of recovery of an

amount due under a decree under the Code of Civil Procedure, and the Code of Civil Procedure imposes no obligation to recover the dues by sale of movables or by arrest and detention of the defaulter before immovable property may be attached ….

By virtue of Order 21, Rule 30(*e*) of the Code of Civil Procedure simultaneous execution both against the property and person of the judgment-debtor is allowed."

But still the discretion in the Court to order simultaneous execution must be exercised in a judicial manner. Order 21, Rule 21 of the Code itself provides that "the Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor".

13. While upholding the power of the Court to execute a decree for payment of money by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both, in the case of *Padrauna Rajkrishna Sugar Works Ltd.* v. *Land Reforms Commissioner, U.P.* [(1969) 1 SCC 485 : AIR 1969 SC 897] itself it was said by this Court: (SCC pp. 490-91, para 11)

"It was urged in the alternative that after selling the immovable property which realized more than Rs 23,50,000 the Collector should not have sold the movable property, for the claim for which the properties of the Company were put up for sale was only Rs 8,38,176-13-0. At first blush there is force in this argument. Why the Collector thought it necessary to sell the movables after the immovable property was knocked down to the Cawnpore Sugar Works Ltd., for Rs 23,50,000 was never explained. After the immovable property belonging to the Company was knocked down to the purchasers for an amount of Rs 23,50,000 it was apparently not necessary to hold the auction for sale of moveables valued at Rs 7,64,817 and to accept a bid of only Rs 2,75,000."

It was pointed out by Sulaiman, C.J., in a Full Bench judgment, in the case of *Anadilal* v. *Ram Sarup* [AIR 1936 All 495 : 1936 ALJ 605] :

"… all the various modes mentioned in Section 51 are not open to an executing court in every case; it is to be guided by the procedure laid down in the schedule, and must resort to the method appropriate to each case."

14. In the case of *Mono Mohan* v. *Upendra Mohan Pal*

[AIR 1935 Cal 127 : 154 IC 606] it was said:

> "It is quite true that in Section 51 of the Code the remedies open to a judgment-creditor are detailed in the five clauses (*a*) to (*e*) to that section and it is also true that where the holder of a decree for money comes before the court and wants process against the person of a judgment-debtor for his arrest, and if there are no special circumstances present, it is not open to the court to say that the decree-holder must proceed against the properties of the judgment-debtor before applying for warrant of arrest against him …. But we are clearly of opinion that there may be circumstances present in a case which would not only justify a refusal to allow the decree-holder to have process for the arrest and detention of the judgment-debtor, but, we are prepared to go further and say that there may be circumstances which would demand such a refusal."

(Emphasis supplied)

7.24) Therefore, considering the law as laid down in the above judgment, I am of the view that in a execution application, where there is no stay to the decree, the Court can pass an order of attaching the assets of the judgment debtors and can simultaneously issue warrant of arrest and detention of the judgment debtors.

7.25) Learned Single Judge of the Andhra Pradesh High Court in case of ***K.Ravi Kumar Reddy*** (supra) decided in the year 2012 considered the provisions of execution and also considered the judgment of Supreme Court passed in the case of ***Jolly George*** (supra).

7.26) Similarly, learned Single Judge of Madras High Court in case of ***A.K.Subramanian Chettiar*** has held that in execution,

simultaneously, steps against the property and person – judgment debtor is allowed under the provisions of Order XXI Rule 30 of the CPC.

7.27) He thereafter referred to the judgment of Kerala High Court at Ernakulam passed in the matter of ***George Mathew & Anr. vs. Gracy George in CRP NO. 1949 OF 2003(B)***. Paragraph no.3 of the said judgment reads as under :-

> 3. A conjoint reading of Rules 37 and 40 of Order XXI and Section 51 will show that the Code envisages only one inquiry regarding the judgment debtor's liability for detention in civil prison in execution of a money decree. The inquiry can be either when objections are filed by the judgment debtor in response to a show cause notice against arrest issued to him under Rule 37 or when he is arrested and brought before CRP No. 1949 OF 2003 court before holding any inquiry regarding his liability for arrest. The inquiry referred to in Sub-rule (3) of Rule 40 of Order XXI is that inquiry. It is such an inquiry which has been conducted in this case against the petitioners. The words "the court shall proceed to hear the decree holder" appearing in Sub-rule (1) of Rule 40 only refer to the initial hearing regarding necessity of holding an inquiry and it is pursuant to such a hearing that the decree holder adduced evidence in this case. The permission granted by the execution court to the judgment debtors for adducing counter evidence actually amounts to "opportunity for showing cause" against arrest. Sub-rule (3) of Rule 40 makes the position free of all doubts and it is clear that the execution court is not under any obligation to grant a further opportunity to a judgment debtor to show cause against arrest once an inquiry under Rule 40 in response to arrest notice under Rule 37 has been completed with the participation of the judgment debtor.

7.28) He thereafter referred to the judgment passed by the Division Bench of the Madras High Court in the matter of ***P. G.***

Ranganatha Padayachi vs. The Mayavaram Financial Corporation Ltd., 1973 SCC OnLine Mad 9. Paragraph nos. 1, 2 and 4 of the said judgment read as under :-

> 1. N.S.RAMASWAMY, J. : This Civil Miscellaneous Appeal is against the order of arrest parsed by the learned Subordinate Judge, Cuddalore in execution of a money decree. There are two judgment-debtors and both were ordered to be arrested by the order dated 19th March 1968. The 2nd judgment-debtor is challenging the said order in this Civil Miscellaneous Appeal. The point taken by the learned counsel for the appellant is that the order of the executing Court is one without jurisdiction in as much as the court has not recorded its reasons for ordering arrest after giving an opportunity to the appellant for showing cause as to why he should not be arrested n execution. Reliance is placed on the proviso to S. 51 of the C.P.C. But we are of opinion that there is no merit in the point taken by the learned counsel.
>
> 2. It is no doubt true that the order of the executing Court is a one line order and it says
>
> "No payment made. Arrest D.1 and D.2 by 9th April 1968. Batta after a week." The executing Court has not recorded any reason for ordering arrest except saying that no payment had been made. But a perusal of the relevant provisions of the Code of Civil Procedure would show that the proviso to S. 51, which makes it obligatory on the part of the executing Court to give an opportunity to the judgment-debtor to show cause and record its reasons, applies not for ordering arrest of the judgment-debtor, but only for committing him to prison. In other words, only before the executing Court orders the judgment-debtor to be detained in civil prison, it has necessarily to give an opportunity to the Judgment-debtor to show cause against such an order and the court should also record its reason in writing for committing the judgment-debtor to prison.
>
> 4. The same Section, viz., S. 51, provides arrest and detention in prison as one of the modes of executing a decree. In the present case, the decree-holder has sought execution of the decree by arrest and detention of the judgment-debtor on the ground that the judgment-debtor has means to pay the decree amount (or a substantial part

> thereof) and refuses or neglects or has refused or neglected to pay the same as contemplated under Cl. (b) of the proviso to S. 51. As per that terms of the proviso, the decree-holder has necessarily to prove: (1) that the judgment-debtor has, or has had since the date of the decree, the means to pay the decree amount or some substantial part thereof and (2) that the judgment-debtor refuses or neglects or has refused or neglected to pay the same. This proof should be adduced before ever the judgment-debtor could be committed to prison and only after the judgment-debtor had been given an opportunity to show cause against such detention and after the executing Court recorded its reasons in support of its order.

7.29) Supreme Court in the judgment of ***Subrata Roy Sahara vs. Union of India & Ors., (2014) 8 SCC 470*** held that one has to see the lifestyle of the judgment debtor. If the judgment debtor is living a posh life and there is no change in his lifestyle after the decree was passed against him, then order of his arrest and detention can be passed. Paragraph no. 93 read as under :-

> **93.** Having perused the judgment rendered by this Court in *Jolly George Varghese case* [*Jolly George Varghese* v. *Bank of Cochin*, (1980) 2 SCC 360] , we are of the view that the conclusions recorded therein have a pointed and definite reference to the ability of a judgment-debtor to pay off his debt. The conclusion drawn in the above judgment was with respect to a judgment-debtor who was unable to pay off his debt. Accordingly it was felt that an order of detention in prison should not be adopted to effectuate the execution of the decree. While dealing with the preconditions expressed in the proviso to Section 51 CPC, we have already concluded that the Sahara Group has enormous assets with a huge market and marketable value. It is also clear that after 5-12-2012, the two Companies have not deposited a single paisa in furtherance of the compliance with this Court's orders (dated 31-8-2012 [*Sahara India Real Estate Corpn. Ltd.* v. *SEBI*, (2013) 1 SCC 1 : (2013) 1 SCC (Civ) 1 : (2013) 1 SCC (Cri) 257] and 5-12-2012 [*Sahara India Real Estate Corpn. Ltd.* v. *SEBI*,

> (2013) 2 SCC 733 : (2013) 1 SCC (Civ) 1259 : (2013) 1 SCC (Cri) 1152 : (2013) 1 SCC (L&S) 452]). It is therefore clear that despite the petitioner (and the other Companies) having means to pay they have unfairly and wilfully failed to pay. It is, therefore also clear that the petitioner in the present case is not similarly situated as the petitioner in *Jolly George Varghese case* [*Jolly George Varghese* v. *Bank of Cochin*, (1980) 2 SCC 360] . Accordingly reliance placed by the learned counsel for the petitioner on the above judgment is wholly misconceived.
>
> (Emphasis supplied)

7.30) Single Judge of Delhi High Court in judgment of ***Subhash Agarwal vs. Abhishek Andley & Ors., 2019 SCC OnLine Del 11048*** referring to the Supreme Court judgment of ***Subrata Roy Sahara*** (supra) and ***Anand Agrochem*** (supra) held that it has to be seen how the judgment debtor is living his lifestyle and his family members' lifestyle. Paragraph nos. 6, 7, 8, 13 and 16 read as under :-

> 6. Thus, as per the above order, the Court noted that Defendant No. 1 was living in a posh colony of Safdarjung Development Area in New Delhi. He has two sons, one of whom is settled in the U.S. His daughter-in-law works as the Deputy Director in DERC. The other partner, i.e., Defendant No. 3 lives in Panchsheel Park. His son is in the business of auto-parts and lives in Greater Kailash. Thus, the Court did not accept the stand of the Defendants that they do not have the wherewithal or capacity to pay. Accordingly, the Defendants were directed to pay the decretal amount or face arrest for thirty days.
>
> 7. Subsequent to this order, Defendant No. 2, i.e., the second partner, agreed to pay his share of the liability, amounting to Rs. 7.5 lakhs. However, Defendant No. 1 continued to take the stand that he is unable to pay the amount. Thus, a direction was issued for taking all steps, in terms of the order dated 17th May, 2019, including for arrest of Defendant No. 1.
>
> 8. The submission of ld. counsel for Defendant No. 1 is that a reading of Section 51 and Order XXI, Rule 37 CPC

> shows that an enquiry has to be conducted as to whether Defendant No. 1 has the capacity to pay or not. The order of arrest cannot be passed in a routine manner. The Court would have to satisfy itself as to whether Defendant No. 1 had the capacity and means to pay and has refused/neglected to pay.
>
> 13. From the above two judgments of the Supreme Court, it is clear that the principles laid down in *Jolly George Varghese* (supra) were in a case where the Judgment Debtor was unable to pay of his debt. The Supreme Court in *Anand Agro Chem India Ltd.* (supra) considered the assets of the Judgment Debtor and came to a conclusion that an assumption cannot be made that there is financial distress either because the Judgment Debtors immovable property has been attached or if funds are not readily available. If the Judgement Debtors have the means to pay the debt, then *Jolly George Varghese* (supra) would not apply as per these two judgements of the Supreme Court.
>
> 16. In response thereto, Defendant No. 1 filed an affidavit disclosing his assets in terms of the requirements under Form 16A of Appendix E of the CPC. A perusal of the affidavit shows that he admits to jointly owning the immovable property being C-1/66, Safdarjung Development Area, New Delhi-110016. Defendant No. 1 owns 1/4th share in the said property. He also has two saving bank accounts - one in the State Bank of India and one in the Bank of India, which he claims are not operational for more than the last three years. He also lists various debts which are due to be paid by him. After making these disclosures, it is simply submitted that the proceedings be adjourned *sine die*. The affidavit filed on 8th October, 2018 shows that Defendant No. 1's partnership firm - M/s. Precision Castings also had immovable property which was auctioned by the State Bank of India.
>
> (Emphasis supplied)

7.31) The judgment referred by the learned Senior Counsel Mr.Aspi Chinoy are all on the point of at the stage of arrest and detention and even the judgment of ***Jolly George*** (supra), is passed at

the stage of arrest and detention.

7.32) In ***Jolly George*** (supra) the judgment debtor was individual against whom a decree was passed. In ***Subrata Roy Sahara*** (supra), it was the case of the big business entity. The judgment debtors in the present case can also be called as big business entities, who have various projects going on in the City of Mumbai.

7.33) Similarly, in the judgment of ***Subhash Agarwal*** (supra), the Supreme Court in paragraph no.17 held that it is the judgment debtor who has to explain why they did not raise funds to pay off the debt of the plaintiff in order to satisfy the decree.

Though Mr.Aspi Chinoy has shown me judgments of Allahabad High Court, Orissa High Court and two judgments of Chennai High Court, one has to see the facts of each case. It is pertinent to note that in Chitale's judgment, it was a Rent Act proceedings where eviction decree was passed and not a money decree.

7.34) In **Harpal Singh** (supra) the Division Bench of the Allahabad High Court held that before issuing a warrant of arrest under Order XXI Rule 37 CPC, the circumstances rendering the Judgment Debtor liable to arrest must be specifically pleaded in the execution application or by a separate application/affidavit. The

decision thus concerns the procedural requirement of placing such circumstances before the Executing Court and does not preclude the Court from examining the Judgment Debtor's conduct or ordering arrest once the requisite circumstances are pleaded and supported by the record.

7.35) In **Mayadhar Bhoi** (supra) the learned Single Judge of the Orissa High Court, which considered the amendment to Order XXI Rule 37 CPC substituting "may" with "shall", thereby making issuance of notice to the Judgment Debtor, before proceeding to arrest him under the ordinary procedure, mandatory. The decision further emphasises that, having regard to the serious consequences of arrest and detention upon personal liberty and dignity, the Executing Court must not proceed mechanically but must first satisfy itself that the statutory requirements for arrest are duly made out.

7.35) In **Mukh Ram** (supra) the learned Single Judge of the Rajasthan High Court was dealing with an order of detention for non-payment of the decretal amount was under challenge. The said decision, however, turns on materially different facts: the Decree Holder alleged that the Judgment Debtor had income from land belonging to his deceased father, while the Judgment Debtor claimed

that such income was shared with his four sisters and, therefore, he lacked the means to satisfy the decree. The Court rejected that explanation as unconvincing and, finding that the Judgment Debtor had the capacity to pay, upheld the order of detention. Thus factual foundation being entirely different, it has no application to the present proceedings.

7.36) In **A. Mani** (supra) the learned Single Judge of the Madras High Court, while setting aside the order of arrest for want of the requisite finding under the proviso to Section 51 CPC, the Court held, following *Jolly George*, that even before ordering arrest, the Executing Court must be satisfied that the Judgment Debtor had the means to pay and had nevertheless refused or neglected to do so; mere non-payment or absence from a hearing is insufficient.

7.37) In **Senthil Kumar** (supra) the Madras High Court, Single Judge dealt with the necessity of the Executing Court complying with the statutory requirements before passing an order of arrest and recording its satisfaction, which satisfaction must find expression in the order passed by the Court. However, the said judgment has no application to the present proceedings, as the present proceedings

have not yet reached the stage where an order of arrest is sought to be passed against the Judgment Debtor. The requirement of recording reasons and satisfaction would arise at the appropriate stage, if and when the Executing Court proceeds to consider the issuance of an order of arrest. Accordingly, it does not govern or determine the issue presently before this Court.

7.38) In **Ramasamy** (supra) the Madras High Court in a revision challenged an order of arrest and detention for failure to satisfy a decretal debt. The Judgment Debtor was a voluntarily retired clerk of the Food Corporation of India, whose sole regular income was a modest pension, out of which he was maintaining his entire family and meeting his basic needs. The Court, having regard to his financial circumstances, found that he lacked the means to discharge the decretal debt. The facts of this case is materially distinct from those in the present proceedings.

7.39) In the present proceedings, which arises out of a commercial execution application filed under the provisions of Commercial Courts Act. The Commercial Courts Act is inacted in the year 2015. The question in the present proceedings would be in the

commercial transaction when after hearing the parties and an award has been passed by the Tribunal consisting of three Ex-Judges of the Supreme Court, award being challenged under Section 34, conditional order being passed by the High Court to deposit the amount, amount not deposited, carried till Supreme Court. The Supreme Court rejecting the application and now in commercial execution application, when an interim application is preferred seeking that a show cause notice be issued under the provisions of Order XXI Rule 37, in my view, a case is made out to issue a show cause notice considering the facts of the present proceedings.

7.40) It will be pertinent to note that in the present proceedings, the judgment debtors has many ongoing projects as a developer in the City of Mumbai either of his own or as partners of a firm or director of a development company. They are residing in city of Mumbai in a building of ground plus two floors which on paper is in the name of their spouses, the entire building is occupied by them as their home in the city of Mumbai.

7.41) It will be also be necessary to look into the wordings of sub-section (b) of the proviso to section 51 and if the sub-section is divided into parts, one part says ‘means to pay the amount of the

decree' and the further part says 'or some substantial part thereof'. The words used are "some substantial part thereof". With the insertion of the word **"some"** it makes a difference in the sub-section because it is not substantial part thereof as argued on behalf of the judgment debtors, because the substantial part thereof in a decree which as of now stands to around Rs.700 crores would be a big amount, may be atleast 30% to 50% of the decreetal amount which would be around Rs.200 crores and above. But the word used in the sub-section is "some substantial part thereof". By insertion of the word '**some**' means from if substantial amount is taken as Rs.200 crores for example, then some substantial would be some amount out of that Rs.200 crores which may even mean an amount of Rs.5 crores. Admittedly, the judgment debtor has not even paid that amount. Therefore it can be called as judgment debtors have refused or neglected paying even some substantial part amount of the decreetal amount. Therefore, in my view a case is made out to issue show cause notice.

As of today, I am not issuing a warrant of arrest or detaining the judgment debtors. All that is sought is to issue a show cause notice why the judgment debtor should not be detained. They will be given a

chance to respond the same.

8) I am of the view that the judgment debtors had means to pay at least some substantial part of the award amount. However, they have refused to pay that amount or deposit that amount in this Court. Therefore, a case is made out for issuance of show cause notice to judgment debtors.

9) Issue Show Cause Notice to the judgment debtors/respondent nos. 1, 2 and 3, under the provisions of Order XXI, Rule 37 of the CPC, as to why they should not be committed to the civil prison, returnable on 27 October 2026.

(Rajesh S. Patil, J.)

10) At this stage, Ms. Etika Shrivastava, on behalf of respondent Nos.1, 2 and 3, seeks stay to the execution of this judgment for a period of four weeks, as issuance of the “show cause notice” will have a great impact on respondent Nos.1, 2 and 3.

11) Senior Counsel Mr. Zal Andhyarujina, along with Senior Counsel Mr. Sharan Jagtiani appearing for the applicants opposed the request made by Ms. Etika Shrivastava on the ground that no

prejudice would be caused to respondent Nos.1, 2 and 3, as only a show cause notice has been issued.

12) On the request made by Ms. Shrivastava, the execution of this judgment is stayed for a period of four weeks.

(Rajesh S. Patil, J.)