Vivek Singhal and Others Vs. Manali Singhal and Another

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Court : Delhi

Decided On : Apr-22-2016

Judge : S. Ravindra Bhat &Amp; The Honourable Ms. Justice Deepa Sharma

Appeal No. : EFA (OS) No. 30 of 2012

Appellant : Vivek Singhal and Others

Respondent : Manali Singhal and Another

Judgement :

S. Ravindra Bhat, J.

1. The judgment debtor appeals an order of the learned Single Judge who declined his objections to the attachment and sale of land.

2. This case has a complicated and chequered litigation history, recounted hereafter. The respondent (hereafter called "decree holder" and individually as "Manali" and "the daughter"-to describe the first and second respondents in the course of this judgment) applied for execution of the interim order dated 28.10.1998 of this Court (in I.A. Nos.11261/1997, 2634 and 2635/1998 in Suit No.2583/1997) The order directed, the appellant inter alia, to provide a residence to the respondent/decree holder in accordance with the family settlement agreement dated 04.11.1994 (the settlement) entered into between the parties. In terms of the settlement, a direction was made to deposit school fee and other

charges in connection with studies of Decree Holder No.2 (hereafter the daughter) and maintenance at the rate of Rs. 40,000/- per month. Extracts of the order are as follows:

"37. The plaintiffs are thus entitled to succeed. The interim maintenance is fixed at Rs. 40,000/- per month in view of the settlement dated November 4,1994. The defendants are liable to pay the maintenance fixed at the abovesaid rate from January 1, 1997 onwards. The defendants are directed to clear the arrears of maintenance for the period from January 1, 1997 to September 30, 1998 at the rate of Rs. 40,000/- per month amounting to Rs. 8,40,000/- within two months from today.

38. The defendants are further directed to pay future maintenance, month by month, at the rate of Rs. 40,000/- per month, on or before the 5th day of every English calendar month.

39. The defendants would also pay and deposit the school fees and other charges in connection with the studies of plaintiff no.2 straightaway with the school wherever she might be studying.

40. The defendants are further directed to provide a residence to the plaintiffs as agreed upon in the family settlement dated November 4, 1994 (vide clause 4) without two months from today."

3. The facts, to the extent relevant, are that on 10.02.1989, the first respondent Manali, and the second appellant (hereafter Ravi Singhal) got married. Their daughter (Decree holder No. 2) was born in 1991. The three of them lived at Vasant Vihar till November 1994. They used to live in a joint family with Ravi Singhal s father, mother and younger brother. Manali had to accompany her ailing mother abroad for treatment; she returned to India on 31.10.1994. According to Manali, when her mother was very seriously ill, Ravi Singhal said that he did not want to continue with the marital relationship. He told her that he had moved out of the marital home at Vasant Vihar. In these circumstances, Manali and her daughter left the matrimonial home -at Vasant Vihar and went to stay with her parents. After some talks between the couple s family members, on 04.11.1994

the Settlement between the parties was arrived at. Its relevant conditions are outlined below:

(i), Ravi Singhal agreed to provide a residential house to the Manali and his daughter in South Delhi (Clause (i)).

(ii) Ravi Singhal and the other defendants were to pay a monthly maintenance amount of Rs. 40,000/- to Manali and her daughter (Clause (ii)). .

(iii) The daughter was to be in Manali s custody (a condition rendered irrelevant now, since the daughter is well over 18)

(iv) A house was to be provided to Manali within 3 months by the defendants; it was to be chosen by her (Clause (iv)).

(v) Ravi Singhal agreed to provide Manali and the daughter a new car every 3 years for their use

(vi) Expenses of school and college education of the daughter was to be borne by Ravi Singhal. In the event the daughter was to be educated abroad then Ravi was to bear all the necessary expenses.

(vii) Ravi agreed to provide fully paid First class vacation once a year for a period of 30 days to Manali and his daughter.

(viii) Ravi Singhal agreed to bear all the necessary medical expenses whether in India or abroad of his daughter and Manali.

(ix) Ravi Singhal agreed to provide at the time of marriage of daughter all the necessary expenses.

4. A Suit, No. 2583/1997 alleging that the defendants (including Ravi Singhal) failed to discharge their obligations in accordance with the Settlement was preferred on the file of this Court. On 28.10.1998, the Court made a detailed order, the operative part of which was reproduced earlier. The Division Bench rejected an appeal being FAO (OS) 9/1999 of this Court by order dated 28.07.2000. In these circumstances, the decree holder (Manali and her daughter) moved for

enforcement of the order dated 28.10.1998. On 14.11.2000, in execution proceedings, warrants of attachment of the farmlands at Samalkha Village, Delhi, measuring 21 Bighas 20 Biswas as shown in item No.1 in the second schedule were issued. These were objected to under Section 60/Order XXI, Rule 58 CPC (E.A. No.77/2001) by Ravi Singhal. It was argued that the attached agricultural land of the judgment debtors could not be sold. The second judgment debtor, Saurabh Singhal, s/o Vivek Singhal (Judgment Debtor No. 2 hereafter referred to by name) filed another application, E.A. No.76/2001 to recall the attachment. It was urged that the land in question could not be divided or partitioned in execution of the decree without the consent of the owner; he was one of the owners of the said land and is not a party to the suit.

5. In the meanwhile, being aggrieved by the order of the Division Bench (in FAO(OS) 9/1999), the judgment debtors preferred a special leave petition (SLP (C) No. 3455-56/2001) before the Supreme Court. Leave was granted and the appeals were numbered as Civil Appeal Nos. 6955-6956 of 2001. These appeals were disposed of by the Supreme Court vide order dated 01.10.2001 after recording the submissions of the parties. The Supreme Court, however, recorded its observations in the order. Another application, E.A. No.167/2002 for rejection of the execution petition was filed. On 02.04.2002, an order of proclamation was passed. This stated that interim order passed on 28th October 1998 was not complied with by the judgment debtors. Finalization of the proclamation was ordered and the Registry was asked to prepare a proclamation of sale in accordance with law and place it for approval before the Court on 10.04.2002 for final execution of the proclamation of sale and for processing the matter further. This order was appealed against (FAO(OS) No.130/2002). The Division Bench dismissed this appeal on 25.05.2004. The Court observed as follows:

"6. It is pertinent to notice that during the pendency of these appeals, the appellants have complied with the order dated 28th October, 1998 in regard to the maintenance by paying the arrears of maintenance etc. However, so far as the compliance of the order in regard to the provision of a residential house in terms of clause (4) of the family settlement dated 4th November, 1994 is concerned, the parties could not reach unanimity inasmuch as the houses offered by the

appellants are not acceptable to the respondent for one or the other reason while those indicated by the respondents is stated to be beyond the financial capacity of the appellants. As would be evident from the first ever order dated 14th November, 2000 passed in Execution No.209/2001 (supra), the question as to whether the decree holder is entitled to claim the arrears of rent from January, 1995 till August, 2000 @ Rs.50,000/- amounting to Rs.34 lacs, is still sub-judice before the learned Single Judge and the liability to pay this amount or any other amount by the judgment debtor on his failure to provide a house to the respondents within the stipulated period as envisaged by the order dated 28th October, 1998 is yet to be answered. We say so because the Court had issued notice to the judgment debtors on this aspect and had ordered the issuance of warrants of attachment of the property of the judgment debtors only in respect of the amount of Rs.14,14,061/- which was stated to be due as arrears of maintenance and medical expenses etc.

7. Mr. Narula next contended before us that the order dated 28th October, 1998 was incapable of execution through execution proceedings as it was passed on certain interim applications and was largely based on the family settlement dated 4th November, 1994 which settlement itself is in question in the suit. We see absolutely no merit in this contention because it is well settled legal proposition that even interim orders passed by the Courts are capable of execution by resorting to the provisions of Order XXI CPC."

6. The appellants again approached the Supreme Court, by special leave, against the order of the Division Bench. On 16.09.2005, a statement was made on their behalf, by learned counsel that a house/flat in Safdarjung Development Area would be given to the decree holders in terms of the interim order. The decree holder, however, declined the offer, stating that these premises were not appropriate, as it did not have adequate facilities. The petition was listed again on 17.07.2006 when the judgment debtors offered other premises, which too were declined by the decree holders as unsuitable keeping the status of the parties. Ravi Singhal was directed to give further offers, which were reasonable and in accordance with the interim order passed, within three weeks. However, when the matter was listed on 20.04.2007, the judgment debtors sought and were granted

leave to withdraw the Special Leave Petition. Like in the previous instance, the order dated 02.04.2002 was also challenged by Saurabh Singhal; as joint owner of the property. His appeal before the Division Bench was numbered as EFA (OS) No.5/2002. He urged that the single judge could not have ordered issuance of sale proclamation without deciding his objections filed under Order XXI, Rule 58 CPC. The agricultural land/property was purchased by six different sale deeds of which he was one of the joint owners only in respect of the properties covered under two sale deeds executed on 16.12.1985 and 10.01.1986.

7. The said appeal was disposed of on 26.04.2010 inter alia on the following reasoning:

"4. During arguments, it transpired that aforesaid farm land property was purchased by six different sale deeds and the appellant Saurabh Singhal is the joint owner only in respect of the properties covered under the sale deeds executed on 16.12.1985 and 10.01.1986. Thus, the objections of the appellant, inter alia, are confined to the extent of the land covered by the aforesaid two sale deeds conferring co- ownership rights on the appellant. Faced with this situation, learned counsel for respondents No.4 and 5, on instructions, submitted that without prejudice to the rights and contentions of respondent Nos.4 and 5, they for the time being, have no objection if the area covered by the aforesaid two sale deeds is excluded from attachment as well as sale proclamation subject to the rights of respondents No.4 and 5 to seek attachment, if occasion arises. This course of action is accepted by the learned counsel for the appellant who, on instructions of the appellant, submits that this is without prejudice to the rights of the appellant to object to the attachment in respect of the aforesaid land in which he has co-ownership rights if at a later stage, respondents No.4 and 5 press for attachment of the said property. We may note that learned counsel for the appellant has produced a copy of Aks-Shajra which indicate demarcation of lands covered by different sale deeds which is taken on record."

8. After disposal of the above appeal, on 4th May, 2010, both parties agreed in Court that the decree holder would identify property comparable to matrimonial home. The decree holder was asked file the proposal with regard to the said

property within two weeks and the matter was adjourned to 13.07.2010. On the said date, the judgment debtors sought some time to examine the proposal given by the decree holder and for instructions. Thereafter, the judgment debtors filed another E.A. 529/2010 for dismissal of the execution petition.

9. The judgment debtor/appellants urged that the order dated 28.10.1998 could not be read in isolation and had to be read along with the order dated 01.10.2001 of the Supreme Court. That order required the judgment debtors to provide the residence to the decree holders. It is merely an interim order. The orders of the Single Bench and Division Bench were also interim orders. Both the orders stood merged with the Supreme Court s order and have been modified. It was highlighted that no execution proceeding in terms of the Supreme Court s order was ever filed. The pending execution petition was, therefore, not maintainable, as the implementation of the order of the Supreme Court is not an execution of the decree which may or may not be passed in the suit after trial.

10. It was also urged that as regards identification of the premises by Manali, that demand was beyond the means of the judgment debtors, as the value of each house is between Rs. 45 to Rs. 60 crores. The judgment debtors denied that the properties details of which were furnished by Manali- belonged to them. They asserted that they lived in a house in Vasant Vihar constructed on a plot of land measuring 1500 sq. yards. The judgment debtor- appellants further argued that the order (dated 28.10.1998) was only an interim order without the direction that they would buy a house for the residence of the decree holders. The orders in question did not contain any description of the residential accommodation. It was urged that the order of the Supreme Court directs that the judgment debtors should make the provision for residence of the decree holders without stipulating any details about the accommodation and the judgment debtors are still willing to settle the entire dispute between the parties with regard to the residential accommodation who have already offered a residential accommodation comprising of four bed rooms, living room, servant room, two car parking in Safdarjung Development Area on the second floor of the property constructed on 500 Sq. Yards land with full roof rights, in compliance with the interim order in question. The refusal of the decree holders to accept the said premises shows the

compliance of orders. Manali s conduct disentitled her to any further relief claimed in the execution.

11. It was argued further by the judgment debtors that order of specific performance or that of injunction is to be executed under Order XXI, Rule 32 CPC, and under that provision, the Court has to first decide as to whether the order in question can at all be complied with by the judgment debtors, keeping in view their financial capacities. In case, the judgment debtors offer to comply with the order, the Executing Court would consider the offer and if it concludes that compliance is not bona fide or that it is not in terms of the Supreme Court s order or of the Division Bench or the Single Judge, the Court would then proceed to decide the issue with regard to the means of the judgment debtors and also it would decide as to whether the order is an executable order or not. The said question would be decided after trial in the execution or in the main suit. Therefore, no orders were required to be passed in the matter.

The impugned judgment

12. By the impugned judgment, the learned Single Judge firstly held that the monthly amount of Rs. 40,000/- would continue to be paid by the judgment debtors; for the second issue, i.e. arrears of fees and expenses payable for the daughter s education, the judgment debtor s arguments were overruled and it was held that the sums claimed in the affidavit of the decree holder (dated 15.03.2011) had to be paid.

13. The mainstay of the judgment debtor s argument was that the order of the Supreme Court modified the interim order of the Single Judge and the Division Bench. It was sought to be highlighted that the reference to residence of the respondent decree holder s choice was altered or modified to a reference to separate residence . This argument and the submission with respect to merger of the orders of the Single Judge and Division bench were rejected, in the following terms:

39. In case, the entire order passed by the Supreme Court is read in a meaningful manner, it appears that the Supreme Court, in fact, affirmed the order of the

Division Bench which had refused to interfere with the order of the Single Judge. Any of the directions issued by the Single Judge in his order dated 28th October, 1998 is not modified/set-aside. No doubt, while describing the details of the interim arrangement as mentioned in the order dated 28th October, 1998, it was mentioned as one of the directions as providing a separate residence instead of residence to the decree-holders as agreed upon in the family settlement dated 4th November, 1998. Nowhere, in the entire order, there is even one reference that the said direction is modified or set-aside. Even the said reference is mentioned in the order by explaining the order passed by the Single Judge and not an independent view was taken by the Supreme Court. In the same para, the Supreme Court has observed as under:-

".....Having regard to the fact that the order under challenge is an interim order, without expressing any opinion on merits, we would only say that the discretionary power exercised by the court cannot be said to be perverse or irrational so as to warrant interference by this court....."

The above-said observations clearly indicate that none of the directions mentioned in the order dated 28th October, 1998 has been modified or changed.

40. There is no dispute that in the order, it was mentioned that the appellants/judgment-debtors raised certain serious contentions which require consideration. However, in the same sentence, it was mentioned that the same required consideration at the hands of the Single Judge before whom the matter would come up for trial, and the observation was made for expeditious trial and also for amicable settlement with the help of friends and well-wishers. In the last portion of the order, it is clearly mentioned that any observation made by this Court or the High Court shall not have any persuasive effect when the matter is finally considered by the Court.

41. In view of the above-said, it cannot be said that the orders of the trial Court were modified or set-aside. The contention of the learned counsel for the judgment-debtors is without any merit that in the order dated 1st October, 2001, the Apex Court has modified the order with regard to the residence. As a matter of fact, the Special Leave Petitions were filed from the interim orders passed in the

suit, therefore, in the order, it was mentioned that the appellants have raised serious contentions which would require consideration at the hands of the trial Court before whom the matter would come up for trial. Similarly, in the last portion of the order, it was mentioned that any observation made by the Supreme Court or the High Court shall not have any persuasive effect when the matter is finally considered by the Court.

42. In the present case admittedly the Court is deciding the matter for the purpose of enforcement of the order and the execution has been filed by the decree-holders for alleged non-compliance of the directions issued by the Court in the interim arrangement. At present, this Court is not considering the fate of the trial, nor deciding the suit finally. Actually, the observations made by the Supreme Court require consideration at the time of trial which is yet to be commenced in the main suit and at the appropriate stage, all the objections and defences raised by the judgment-debtors in the suit have to be considered. Hence, the contention of the judgment-debtors has also no force that after passing of the order by the Supreme Court, there can be no execution of the order of the Single Judge, thus, the execution is not maintainable.

43. It appears to this Court that the said argument of the judgment-debtors is technical in nature as it is settled law that even if the order to be executed is that of an Appellate Court, the execution petition filed on the basis of the order of the trial Court does not become incompetent. The Executing Court has merely to record the factum of dismissal of the appeal and if necessary, amend the execution petition. In the present case, the decree-holders have already filed an application bringing on record the factum of dismissal of the SLP, being E.A. No.543/2001. Since the order of the trial Court has not been interfered by the higher Court, therefore, this Court is of the opinion that no amendment is necessary as the hearing in the matter is already delayed for more than thirteen years.

44. For the aforesaid reasons, I am of the view that even if doctrine of merger is applied in the matter, the objections raised by the judgment-debtors cannot help their case in any manner, as the order of the interim arrangement passed in the suit has not been interfered with any of the higher Courts and the factum of the

orders passed by the higher Courts is already placed on record. As far as the decisions referred by the learned counsels for the parties are concerned, the said proposition of laws laid down in the said decisions cannot be disputed, but, the contention of the judgment- debtors cannot be accepted, as the facts in the present case are materially different.

14. The single judge then went on to reject the judgment debtor s argument that the offer of a flat at Safdarjung Development Area was in full compliance with the orders of the Court. He also rejected the plea that the attachment and proclamation were not justified or appropriate and held that:

53. In the order dated 4th May, 2010, it was recorded that the decree-holder No.1 shall identify the immovable property which is comparable to the marital house in which she lived with her daughter prior to separation. The decree-holder No.1 already filed the details of the said houses. The judgment-debtors in their reply have submitted that the value of the property offered to the decree-holders is in crores of rupees. Further, the judgment-debtors do not have the means to satisfy the demand of decree-holder No.1. Under these circumstances, the procedure of Order XXI, Rule 32 CPC to be complied with, by which the Court has to first decide, as to whether the order in execution can at all to be complied with by the judgment- debtors keeping in view of their financial capacity. In case, the Court comes to the conclusion that the compliance is not bonafide or that the offer is not as per the order of the Court, therefore, the Court is to decide the issue with regard to the means of the judgment-debtors, and for the said purpose, the Court should put the parties to trial in the execution and in the main suit which is pending before the Court.

54. In a way, the judgment-debtors are trying to inform the Court that the third direction issued by the Court to provide a residence to the decree-holders as agreed upon in the family settlement dated 4th November, 1994 cannot be complied with keeping in view of their financial capacity and there is no bonafide on the part of decree-holder No.1 to accept the offer given by the judgment-debtors.

On the other hand, the said direction indicates that the judgment-debtors have to provide a residence to the decree-holders as per the choice of decree-holder No.1 who has already in terms of the order dated 4th May, 2010 identified the immovable properties which are comparable to the marital house in which she lived with her daughter prior to separation. Thus, the judgment-debtors are not agreeable to provide the accommodation as per the choice of decree- holder No.1.

55. The trial in the suit is yet to be commenced despite of the order of the Supreme Court for expeditious trial in the year 2001. There is hardly any progress in the suit proceedings.

56. It is true that in the family settlement, the size of the residence and the value of the property, and the area in which the property is to be provided, are not mentioned. However, the fact of the matter is that the identified properties by the decree-holder No.1 are somehow comparable to the marital house in which she lived with her daughter prior to separation. Admittedly, the order of the compliance was passed on 28th October, 1998, i.e. more than 13 years ago and the immovable properties in the areas which are identified by the decree-holder No.1 are quite expensive. Judgment debtors have not shown any interest to buy the property in the area chosen by decree holder No.1 and want to bargain with her, in any manner, to purchase the same on a piece of land in less area except the offer of property, i.e., at Second Floor of Safdarjung Development Area, though admitting the said property is also worth crores of rupees.

57. Decree-holder No.1 in her affidavit has also provided the details of properties owned by judgment debtors, the details are mentioned in para-33 of my order, judgment-debtors have not property-wise denied their any interest in the said properties except vague reply is given.

58. Under these circumstances, this Court has no option, but to pass the order of proclamation. The attachment order of one of the properties is already passed by the Court on 14th November, 2000. The order of attachment and proclamation of sale of the attached property was also challenged by the judgment-debtors up to the Supreme Court and the same was upheld, except the Division Bench of this Court by order dated 26th April, 2010 passed in EFA(OS) No.5/2012 and E.A.

No.10295/2004, the appeal filed by Mr. Saurabh Singhal son of Vivek Singhal, who was not a party and challenged the order of attachment and proclamation of sale. The said order was modified to the extent that the land covered in the aforesaid two properties in which Mr. Saurabh Singhal is the co-owner, shall be excluded from the sale proclamation and the share of Mr. Saurabh Singhal in respect of the said property covered by the two sale deeds is released from the said attachment.

59. At present, the Registry is directed to prepare the fresh proclamation of sale in terms of the order dated 2nd April, 2002 in terms of attachment order dated 16th November, 2000 and modified order dated 26th April, 2011 thereby excluding the share of Mr. Saurabh Singhal which covered in the said two sale deeds and the same is released from the attachment. The Registry shall prepare the proclamation of sale in accordance with law and under these directions and shall place before Court for approval on the next date.

60. Mr. Akshay Makhija, Advocate is appointed as a Receiver in the matter in regard to the properties as per details mentioned earlier as well as for the purpose of compliance of enforcement of decree of remaining part of the order dated 28th October, 1998. The Receiver is directed to receive the amount from the sale of the said property and after the compliance of order dated 28th October, 1998, he shall submit his report within the period of three months after finalizing the proclamation of sale. He shall follow the procedure of Order XXI, Rules 64 and 66 CPC. He shall be paid a sum of Rs.25,000/- per meeting by decree-holder No.1.

Contention of the parties in appeal

15. Mr. Y.P. Narula, learned senior counsel for the appellants, reiterated the submissions and grounds urged in the appeal on the issue of merger and highlighted that the wording of the order of the Supreme Court is significant. It was argued that the doctrine of merger is based on the principles of propriety in the hierarchy of the justice delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The doctrine postulates that there cannot be more than one operative order governing the issue at any one point of time. He

relied on the judgment of the Supreme Court in Kunhayammed and Others Vs. State of Kerala and Another [(2000) 6 SCC 359]. Counsel relied on the following observations:

41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.

42. "To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol. LVII, pp. 1067-68).

43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage."

Learned counsel also relied on a subsequent decision of the Supreme Court in Om Prakash Verma v State of A.P 2010 (13) SCC 158, where it was observed that ..Whatever may be, it is clear that once special leave has been granted, any order passed by this Court thereafter, would be an appellate order and would attract the applicability of the doctrine of merger.

16. Mr. Narula argued that basic objection to the executability of the interim order was not addressed by the learned Single Judge. At best the directions given were only interim; the Supreme Court clarified it to be so reserving the rights of parties. In these circumstances, the appellant could not have been placed in an irrevocable situation as would inevitably happen, if the property were put to auction.

17. It was contended that provisions of Order XXI Rule 32 CPC were mandatory and could not have been ignored. Mr. Narula here argued that the statute i.e. the CPC required execution of a decree of specific performance in one form; the court, however, could not ignore that provision and proceed to execute the interim order in an altogether different manner. He argued that under Order XXI, Rule 32 CPC, the Court should first decide if the order in question can at all be complied with by the judgment debtors, keeping in view their financial capacities. If the judgment debtors offer to comply with the order, the executing Court would consider it and if it concludes that compliance lacks bona fide or that the offer does not comply the order of the Supreme Court or of the Division Bench or the Single Judge, then a decision in respect of the question regarding the means of the judgment debtors and whether the order sought to be executed is executable or not is to be made. This can be decided through trial in the execution or in the main suit. Learned counsel relied on the decisions reported as Jai Narain Ram Lundia v Kedar Nath Khetan and Ors AIR 1956 AIR 359; Ambati Narasayya v M. Subba Rao 1989 Supp (2) SCC 337 and Arjuna Gounder v Govindaraju Reddiar (1990) 2 MLJ 411.

Decree Holders Arguments

18. Ms. Pinki Anand, learned Senior counsel appearing for the decree holders argued that execution of an interim order, is claimed; it is executable by the Court in terms Section 36 of the Code of Civil Procedure, 1908 (the CPC), as the

judgment debtors failed to comply with the interim direction dated 28.10.1998. She submits that Section 51 CPC empowers the Executing Court, to execute in such manner as the nature of relief granted may require. It was argued further that since the said order was in the nature of injunction, it was another mode of execution in Order XXI Rule 32 CPC. Under the said provision, in case of failure to comply with the decree, the property of the judgment debtor is liable to be attached and sold, read with the provision of Order XXI Rule 54 which requires attachment by an order prohibiting the judgment debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or change. Order XXI Rule 54 also requires the judgment debtor to attend court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale; it has to be done by following the procedure prescribed in the CPC for the sale of property. This is under Order XXI, Rules 64 and 66. Learned counsel emphasized that the order dated 02.04.2001 was upheld by the Supreme Court and in spite of repeated chances and opportunities granted, judgment debtors (after the order of attachment and order of proclamation of sale) failed to comply with the orders.

19. The decree holders refuted submissions of the appellant that the doctrine of merger applied in the facts of this case. It was submitted that both the Division Bench and the Supreme Court sustained the interim order of 1998. The over-emphasis of a solitary term in the Supreme Court s order by the appellant/judgment debtors was in the circumstances, unjustified. Here it was argued that the Supreme Court never indicated that the meaning and plain words of the learned Single Judge s order (in turn based on the express agreement in the Family Settlement) was being replaced with an altogether different direction. In the circumstances, the reliance on the doctrine of merger was not justified.

Analysis and Conclusions

20. The decree holder sought implementation of the interim order of 28.10.1998 which had directed firstly payment of future maintenance to them at Rs. 40,000/- per month; secondly paying and depositing of school fees and other charges in connection with the studies of the daughter and lastly, to provide a residence to

the plaintiffs as agreed upon in the family settlement dated November 4, 1994. No orders were made by the learned single judge in respect of the first issue, i.e. payment of Rs. 40,000/- per month in view of an undertaking by the appellants. As regards the second question, the learned Single Judge noticed that the details of amounts due were mentioned in the affidavit filed on 15.03.2011 by Manali; a total sum of Rs. 15,67,238/- was due from the period of 2009 to March, 2011 after adjustment of the amount already paid by the judgment debtors. The court noticed the order of 28.10.1998 and that school fee and education expenses of the daughter had to be deposited by the appellant. The appellant did not dispute that the expenses for the academic year 2009 till March, 2011 were not paid. The decree holders furnished details along with proof. Consequently the learned Single Judge directed the appellants to pay to the decree holders the amount mentioned in the affidavit dated 15.03.2011. This court discerns no infirmity with the said direction.

21. So far as the third issue agitated principally in the appeal goes, the Court notices that the order dated 28.10.1998 granted the judgment debtors two months time to provide the residence to the decree holders as agreed upon in the family settlement dated 04.11.1994. That the family settlement was entered into voluntarily was undisputed. On 04.05.2010, the decree holder was asked to identify immovable properties. Manali, accordingly filed an affidavit containing details of the properties, which she identified. In her affidavit, she stated that the judgment debtors are a well-known and wealthy family of Delhi controlling several businesses and prime properties all over Delhi, Mumbai, Udaipur etc. The details of some properties were listed in the affidavit. They are as follows:-

(i) Property in Vasant Vihar (24, Olof Palme Marg, Vasant Vihar, New Delhi, measuring approx. 2500 Sq. Yards). (Matrimonial home of the decree- holder) Built up area 2 floors and a basement - approx. Rs. 140 crore.

(ii) 7 storeyed building situated at 2 Local Shopping Centres, Masjid Moth and G.K. II (near Savitri Cinema), (approx. price Rs. 25,000/Sq. ft.)

(iii) Farm land at Samalka Village, Delhi, measuring 5.6 acres (which is under attachment) approx. Rs. 45 crore.

(iv) Office at Mittal Chambers, Nariman Point, Mumbai, approx. Rs. 45,000-50,000/- per sq. ft.

(v) Flat in Jolly Maker-II, Cuffe Parade, Mumbai.

(vi) Flat in Jolly Maker-III, Cuffe Parade, Mumbai.

(vii) Flat in Jolly Maker-II, Cuffe Parade, Mumbai.

(viii) Flat in NISHIT Building, Malad, Mumbai.

(ix) Flat in SANDEEP Building, Malad, Mumbai.

(x) Flat in NISHIT Building, Malad, Mumbai.

(xi) Flat in VIRAL Building, Malad, Mumbai.

(xii) Flat in SUNITA Building, Malad, Mumbai.

(xiii) Noble House, Swarup Sagar, Udaipur.

(xiv) Factories in Noida.

(xv) Flat in Safdarjung Enclave, New Delhi.

The appellant s arguments regarding inexecutability of the order (of 28.10.1998) hinge on their interpretation of the Supreme Court s order that they should provide a separate residence to the decree- holders and that this may not be in terms of the family settlement. The judgment debtors offered a second floor accommodation at Safdarjung Development Area and contended that they complied with the order. That accommodation comprises a four bed room flat built on a piece of land measuring 500 Sq. Yards with dedicated lift and full roof rights and two car parking with the premises.

22. The Supreme Court s order of 01.10.2001 is as under:

"4. The respondents filed a suit in 1998 alleging that the appellants failed to discharge their obligations under the Memorandum of Settlement and in the suit

the Memorandum of Settlement was sought to be specifically enforced..... By this interim order, the appellants were also directed to provide a house to the respondents in terms of clause (4) of the Memo of Settlement. Some other prayers sought for by the respondents were declined to be granted as interim arrangement for the respondents.

6. We heard the matter at great length. The counsel on either side brought to our notice series of decisions relevant to the points raised by the parties in the proceedings, but we do not propose to go into such disputed questions as the appeals now before us are only against an interim order. Any observation made by this Court may have great persuasive effect with regard to the matter which may be agitated finally in the suit.

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10. The counsel for the appellants vehemently contended that the Memorandum of Settlement was signed by the appellants under special circumstances and the first appellant is financially not in a position to meet the alleged obligations under the agreement. The counsel argued that by the impugned judgment, the plaintiff-respondents have been given virtually the entire relief sought for in the suit and the appellants are unduly burdened with financial liabilities which are incapable of being performed by the first appellant. We notice the force in this contention, but at the same time it is to be borne in mind that this is only an interim order passed by the court in exercise of the discretionary power vested in it in such family proceedings. Further, the interim arrangement made under the order only covers payment of interim maintenance, arrears and current, deposit of school fees of the child and providing a separate residence From the impugned judgment, it is clear that there was a long and elaborate debate by the counsel on either side regarding the financial capability of the appellants. Having regard to the fact that the order under challenge is an interim order, without expressing any opinion on merits we would only say that the discretionary power exercised by the court cannot be said to be perverse or irrational so as to warrant interference by this court."

The appellants leitmotif hinges on the separate residence which according to them modifies the order of the learned Single Judge. The Supreme Court, by the same

order, later clarified that the learned Single Judge s order (and of the Division Bench) does not warrant inference by this Court . The learned Single Judge read the entire order of the Supreme Court and held that it confirms an affirmation of the order of the Division Bench which had, in turn, refused to interfere with the order of the learned Single Judge. It is also pertinent to mention that an expression used in the order "separate residence to the decree holders" cannot be given a conclusion that it amounts to modify the order of Single Judge and it did set-aside the term of the family settlement to provide a residence as per the choice of decree holder No.1, otherwise specific order in this regard would have been passed by the Apex Court. This approach and reasoning is not only sound, but in our view, eminently reasonable. No one single sentence or expression in a judgment or order ought to be torn out of its context. Arguendo if indeed, this court were to accept the appellant s argument that the learned Single Judge (and the Division Bench s) order with regard to providing Manali, a residence commensurate with the status of the judgment debtor who lived in a particular kind of house, whilst in the matrimonial home, there is absolutely no discussion. This Court would be in fact rendering the order of the Supreme Court entirely stipulative, and attributing to it the intention of displacing in effect, the terms of the family settlement which were drawn with some deliberation by the parties, with their own volition. Judgments are not to read as provisions of statutes (Ref. Haryana State Financial Corporation v M/s Jagdamba Oil Mills 2002 (3) SCC 496 that "Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statues, they do not interpret judgments.") Therefore, the stray expression "separate residence" cannot be given such overbearing meaning so as to infer that the Court overrode the learned Single Judge's direction (confirmed by the Division Bench)- that the terms of the settlement which required providing to Manali and her daughter, a residential accommodation of her choice, given the status that she occupied while living in the matrimonial home (a house constructed on a 1500 sq yard Vasant Vihar plot), could not have been jettisoned.

The learned Single Judge correctly noticed that the Supreme Court, in fact, affirmed the order of the Division Bench which had refused to interfere with the order of the Single Judge.

23. The submission with regard to applicability of the doctrine of merger, in our opinion has no relevance. Granted, where an appellate or higher court makes orders varying or substituting the directions or decree of a lower court, the order of the appellate court prevails, though it is narrower in scope. That is inherent in the nature of the hierarchal court structure. In such case, an inconsistent order of the lower court, which cannot stand with the order or particular directions of the appellate court, "merges" with the latter. In other words, there is no separate existence of the lower court's order. As the argument goes, there is no manner of dispute that such is the nature of the doctrine of merger. However, that discourse has no relevance here. The circumstance that the decree holders were entitled to a separate residence, given the nature of the admitted family settlement, was and is a fact. The Supreme Court merely iterated it in its order. However, its order nowhere indicates that the separate residence which has to be provided by the appellant is to be qualitatively different from the one agreed in the family settlement, which was directed by the learned Single Judge and Division Bench. Neither text, nor context bear out this argument, which can at best be charitably described as a dis-ingenious exercise. For these reasons, the argument is rejected. This court also finds the argument of the appellant that a fresh execution proceeding had to be instituted and that in its absence the previously instituted execution was not competent, devoid of merit. A suitor or litigant might seek execution of a decree; pending its satisfaction, an appeal might be decided. If there is modification of the decree, only the decree as sustained by the appellate court is executable; it cannot be said that the decree holder is driven to a fresh execution proceeding. In other words, the decree would be satisfied if it is complied in the manner required by the appellate court. Here, however, no modification took place. The submission that previously instituted execution proceedings being rendered incompetent is, therefore, misplaced.

24. As to the executability of the order of 28.10.1998, this court is of opinion that there cannot be any doubt as to its validity for that purpose. On 4th May, 2010 the

parties counsel agreed that "the decree holder shall identify an immovable property which is comparable to the marital house in which the decree holder lived with her daughter prior to separation." This is a consent order. This was preceded by the order of the Division Bench, dated 25.05.2004, dismissing EA 167/2002. In the said appeal, the order of proclamation dated 02.04.2002 was upheld. The special leave petition against the said order (of the Division Bench) was withdrawn on 20.04.2007.

25. The next question is whether the judgment debtor had actually complied with the order of the Court, which mandated that provision for residence of the first decree holder's choice had to be made. At this stage, a few stipulations in the family settlement are relevant; they read as under:

"AND WHEREAS the husband, grand-father and grand- mother in discharge of their duty and in settlement of claims of the wife and the daughter agree to provide a residential house and maintenance consistent and comparable with the living standards of the wife and daughter they had at 24, Olof Palme Marg, Vasant Vihar, New Delhi, which was the marital house of the husband and wife, as detailed below, and also look after the maintenance of the daughter.

That in discharge of filial obligations and other liabilities the husband as also the grand-father and grand-mother (including their HUF) agreed to provide a residential house in South Delhi consisting of a drawing-room, dining room, three bed-rooms, a servant quarter and a garage to the wife and the daughter in which the wife could have a life interest and corpus would belong to the daughter. The house maintenance and running expenses will also be provided by them. The maintenance of the house which has been provided include electricity, water and general maintenance including property tax.

That the house will be provided within a period of three months and it will be chosen by the wife and will be to her satisfaction and the maintenance will be provided from month to month from this date."

26. The clear allusion that the residence "it will be chosen by the wife" points to the willingness of the decree holder, to accept or reject the offer made by the

judgment debtor. The kind of the house has also been dealt with as being a house "consistent and comparable with the living standards of the wife and the daughter they had at 24, Olof Palme Marg, Vasant Vihar, New Delhi". The offer of the flat does not conform to either of these stipulations. The appellant's clear understanding that the house which they had to offer had to be "comparable to the marital house in which the decree holder lived with her daughter prior to separation is evident from the statement of his counsel on 4th May, 2010. The learned Single Judge noticed that the Safdarjung Development Area house was mentioned in the SLP filed by the judgment debtors against the order of attachment. The Supreme Court in order dated 16.09.2005 recorded the said offer. Counsel for the decree holders made a statement that the said house (flat) did not have adequate facilities and the building was to be valued by any one of the known valuers of the city to discern whether it fulfilled requirements of the residence agreed to be provided by the judgment debtors. The matter was thereafter adjourned twice, and on 20.04.2007, the judgment debtors sought permission to withdraw the Special Leave Petition which was dismissed as withdrawn without prejudice to the rights of the parties to seek appropriate remedies, if any. The order dated 4th May, 2010 passed in the execution petition, granted the first decree- holder time to identify immovable property comparable to the marital house in which she lived with her daughter before separation. Manali filed the affidavit which identified the following properties:

(i) 71, Poorvi Marg, Vasant Vihar, 800 Sq. Yards, approx. Rs.45 crore.

(ii) B4/6, Vasant Vihar, 640 Sq. Yards, approx.Rs.45 crore.

(iii) 57, Paschimi Marg, 1000 Sq. Yards, approx.Rs.60 crore.

(iv) 53, Jor Bag, 626 Sq. Yards, approx. Rs.65 crore.

(v) H-15, Maharani Bagh, 800 Sq. Yards, approx.Rs.46 crore.

27. The power of the Court under Section 51 CPC, to direct sale of the property without ordering its attachment is relevant. In the claim made by execution motion, the decree holders sought for residential accommodation- a direction which

remained unimplemented for more than 13 years despite various opportunities granted to the judgment debtor. The learned Single Judge found that the offer of second floor residential accommodation at Safdarjung Development Area was unacceptable to the decree holders, and held that the judgment debtors have failed to comply the direction strictly in terms of the order dated 28.10.1998 which mandated provision of a residence as agreed upon in the family settlement. In the circumstances, the procedure of Order XXI, Rule 54 CPC was applied and by order dated 14.11.2000, warrants of attachment of the farm land at Smalkha Village, Delhi were issued for recovery of certain amount. This order was upheld up to the Supreme Court.

28. The learned Single Judge noted that the judgment debtors urged that the provision for a residence to the decree holders as agreed upon in the family settlement dated 04.11.1994 could not be complied with in view of their financial capacity and there was no bona fides on Manali's part to not accept the offer given by the judgment debtors. The impugned order then held that:

"On the other hand, the said direction indicates that the judgment-debtors have to provide a residence to the decree holders as per the choice of decree holder No.1 who has already in terms of the order dated 4th May, 2010 identified the immovable properties which are comparable to the marital house in which she lived with her daughter prior to separation. Thus, the judgment-debtors are not agreeable to provide the accommodation as per the choice of decree- holder No.1.

55. The trial in the suit is yet to be commenced despite of the order of the Supreme Court for expeditious trial in the year 2001. There is hardly any progress in the suit proceedings.

56. It is true that in the family settlement, the size of the residence and the value of the property, and the area in which the property is to be provided, are not mentioned. However, the fact of the matter is that the identified properties by the decree-holder No.1 are somehow comparable to the marital house in which she lived with her daughter prior to separation. Admittedly, the order of the compliance was passed on 28th October, 1998, i.e. more than 13 years ago and the immovable properties in the areas which are identified by the decree-holder No.1

are quite expensive. Judgment debtors have not shown any interest to buy the property in the area chosen by decree holder No.1 and want to bargain with her, in any manner, to purchase the same on a piece of land in less area except the offer of property, i.e., at Second Floor of Safdarjung Development Area, though admitting the said property is also worth crores of rupees.

57. Decree-holder No.1 in her affidavit has also provided the details of properties owned by judgment debtors, the details are mentioned in para-33 of my order, judgment-debtors have not property-wise denied their any interest in the said properties except vague reply is given.

58. Under these circumstances, this Court has no option, but to pass the order of proclamation. The attachment order of one of the properties is already passed by the Court on 14th November, 2000. The order of attachment and proclamation of sale of the attached property was also challenged by the judgment-debtors up to the Supreme Court and the same was upheld, except the Division Bench of this Court by order dated 26th April, 2010 passed in EFA(OS) No.5/2012 and E.A. No.10295/2004, the appeal filed by Mr. Saurabh Singhal son of Vivek Singhal, who was not a party and challenged the order of attachment and proclamation of sale. The said order was modified to the extent that the land covered in the aforesaid two properties in which Mr. Saurabh Singhal is the co-owner, shall be excluded from the sale proclamation and the share of Mr. Saurabh Singhal in respect of the said property covered by the two sale deeds is released from the said attachment."

29. If one keeps the entire background of the orders made, the above findings are in consonance with provisions of the family settlement which was to be implemented through order of Court. The attempt to have it executed in terms of the Court's direction was unproductive, because the judgment debtor did not - for reasons best known to them, ensure to the decree holder a flat or residence comparable to the one occupied by her when she lived in her matrimonial home. The Court clearly had given occasion to the appellant to comply with the terms of the decree, under Order XXI Rule 32. It is only because there was no compliance that the proclamation of sale was issued. We are of opinion that the learned Single

Judge could not have been faulted in issuing the impugned judgment. The rights of the other co-owners too were secured because of a previous order of this Court.

30. In view of the above discussion, it is held that the appeal is devoid of merits; it is accordingly dismissed without order on costs.