

**BEFORE THE MAHARASHTRA REAL ESTATE
APPELLATE TRIBUNAL, MUMBAI**

**MISC. APPLICATION NO. 439 OF 2022
(Arrest Warrant against R-2 & R-3)
WITH
MISC. APPLICATION NO. 507 OF 2022
IN
EXECUTION APPLICATION NO. 19 OF 2021
IN
APPEAL NO. AT006000000031769 OF 2019**

Ms. Smita Bhikaji Kaskar

...Applicant.

Vs.

- 1] Nirmal Lifestyle Ltd.
- 2] Mr. Dharmesh Jain
- 3] Mr. Rajeev Jain

...Non-Applicants

Adv. Mr. Nitin Kaskar for Applicant.

Adv. Mr. Dharam Jumanji for Non-Applicants.

**CORAM : SHRIRAM R. JAGTAP, MEMBER (J) &
DR. K. SHIVAJI, MEMBER (A)**

DATE : 30th August, 2023.

(THROUGH VIDEO CONFERENCING)

ORDER

[PER: SHRIRAM R. JAGTAP, MEMBER (J.)

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The applicant, who is an allottee, has moved Misc. Application

No.439 of 2022 for issuance of warrant of arrest against non-applicant nos.2 and 3 namely Mr. Dharmesh Jain and Mr. Rajeev Jain respectively for the purpose of detaining them in civil prison on the grounds enumerated in the application, mainly on the ground that the non-applicant nos.2 and 3 being judgment debtors having sufficient means to pay the amount of the decree or some substantial part thereof, refused or neglected to pay the same. The applicant has also moved Misc. Application No.507 of 2022 seeking relief of declaration to the effect that the judgment debtors have failed to comply with order of this Tribunal and MahaRERA be directed to file a complaint before the concerned Metropolitan Magistrate for an offence punishable under Section 64 read with Section 69 of RERA.

2] For the sake of convenience the parties to the execution proceedings will hereinafter be referred to as decree holder and judgment debtors.

3] By the order dated 4th May 2022, notice to show cause against judgment debtors in terms of clauses (a) and (b) of the application was issued. Pursuant thereto, the judgment debtors have filed affidavit-in-reply on 19.10.2022 (Pages 227 to 233) contending therein that the parties to the execution proceedings have mutually agreed to amicably

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resolve the subject matter and settlement has been arrived at between the parties (in relation to payment of amount ordered by this Tribunal). According to the judgment debtors total compensation to be paid, in full and final settlement (including delay in interest/costs/penalty) to the decree holder is Rs.60.00 lakhs as per order of this Tribunal. The judgment debtors have agreed and accepted the said compensation amount and are ready and willing to honour the same as per schedule annexed thereto as Annexure-A. An amount of Rs.20,34,000/- to be received from the decree holder towards consideration of the subject flat is adjusted/appropriated and a receipt of Rs.20,34,000/- has been handed over to the decree holder on 11.10.2022. Thus, no further payment remains due and payable by the decree holder to the judgment debtors in relation to the subject flat towards balance consideration, but the same has been waived off by the judgment debtors in the form of compensation/penalty and interest towards delay in handing over possession of the subject flat. The judgment debtors have acting upon settlement arrived at between the parties and made payment of first instalment of Rs.5.00 lakhs to the decree holder.

4] It is further contention of the judgment debtors that they have given undertaking to comply with the order passed by this Tribunal in the



manner amicably agreed between the parties. The judgment debtors have further contended that they have various monetary obligations but not limited to project in which the subject flat is part of and hence, it requires a stagger time period to pay off the moneys to the decree holder. It would be extremely difficult for the judgment debtors to comply with the same within 30-60 days. It is only for these reasons the judgment debtors had offered the same and decree holder while acknowledging difficulties on the part of the judgment debtors has agreed to the same.

With these contentions, the judgment debtors have prayed not to take coercive action against them.

5] We have heard arguments of learned Advocate Mr. Nitin Kaskar for the applicant (decree holder) and the learned Advocate Mr. Dharam Jumani for the non-applicants (judgment debtors).

6] An abridgement of learned Advocate Mr. Dharam Jumani for the judgment debtors is that the present application has been filed to seek recovery of Rs.42,10,883/-. However, by purshis dated 4.3.2023 the decree holder sought to recover excess amounts which are not prayed for in the Execution Application. The applicant cannot be permitted to seek recovery of the amounts which are beyond the scope of Ex.Appliction or beyond the prayers made therein. Apart from this the judgment debtors

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cannot be arrested for non-compliance of order passed by this Tribunal. The application filed by decree holder seeking for arrest of the judgment debtors and detaining them in Civil prison does not demonstrates the factors that are required to be satisfied under the provisions of the Code of Civil Procedure. The Misc. Application No.439 of 2022 is baseless, devoid of merit and liable to be rejected outrightly.

7] It is the specific contention of the learned Advocate for the judgment debtors that the judgment debtors have now fully complied with undertaking given in the affidavit dated 18.10.2022 to this Tribunal. The payments due for October and November of 2022 were duly made and delay in making payment of amounts due on 31.12.2022 and 31.1.2023 were on account of the intervening initiation of CIRP as against the judgment debtors by NCLT vide order dated 20.12.2022.

8] The learned Advocate has invited our attention to the affidavit dated 18.10.2022 and sorely submitted that the decree holder and the judgment debtors had mutually agreed to amicably resolve their respective disputes, differences and claims, as a result thereof the settlement had been arrived between the parties as per schedule annexed to the said affidavit as "Annexure-A". It was specifically agreed between the parties that the total compensation to be paid to the applicant/decreedee

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holder in full and final settlement of the amounts due under the order dated 5.3.2021 to the decree holder was Rs.60,40,000/-. Out of Rs.60,40,000/-, an amount of Rs.40,06,000/- was to be paid to the applicant in installments and the credit adjustment of Rs.20,34,000/- was to be provided to the applicant against the amount due from her in respect of the subject flat. This was confirmed and agreed to by and/or behalf of the applicant on 11.10.2022, as can be seen from the letter dated 11.10.2022 (page-250).

9] The learned Advocate has strenuously submitted that on 11.10.2022 the judgment debtors have immediately issued a credit note for an amount of Rs.20,08,808/- and also issued receipt confirming the payment of the entire sale consideration agreed to against booking of the subject flat in the project in question. Both credit notes and the receipts were duly received and acknowledged by the decree holder on 11.10.2022 itself. During the period from 11.10.2022 to 4.3.2023, the applicant did not dispute the said credit/adjustment and therefore cannot now be permitted to dispute/resile from the same.

10] The learned Advocate has further submitted that the applicant has received entire benefit of the settlement as recorded in the affidavit and no dispute whatsoever was raised by the applicant at earlier point of

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time. The applicant thus estopped in law from contending that there was no settlement, and/or the amount agreed to be paid was not in full and final settlement and/or she does not want benefit of credit note/adjustment and that instead she should be paid the amount of the same. The affidavit filed by the applicant shows that after receiving full benefit of settlement, the applicant is now seeking to resile from it and seeking to extort more money from the judgment debtors. The learned Advocate has placed reliance on the following citations

- (1) **Cauvery Coffee Traders Vs. Hornor Resources (International Company Ltd.)**
[(2011) 10 SCC 420]
- (2) **Lakshmi Ammal Ammayi Ammal Vs. Madras Court.** [Second Appeal No.337 of 2012.
- (3) **Order 23 Rule 3 of the Code of Civil Procedure.**
- (4) **R. Rajanna Vs. S.R. Venkataswamy**
[(2014) 15 SCC 471]
- (5) **New India Assurance Vs. Vankata Parmavathi**
[(2000) 10 SCC 334]
- (6) **Tushar Kanti Roy Vs. Eight Industrial Tribunal**
[(2012) SCC OnLine Cal 11669]
- (7) **Paritosh Kumar Vs. IDOCL Kalinga Iron Works Ltd.** [(2017) SCC Online]

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- (8) **Bharatlal Amratlal Kothiari & Anr. Vs. Dosukhan Samadkhan Sindhi & Ors.**
[(2010) 1 SCC 234]
- (9) **Bachhaj Nahar Vs. Nilima Nandlal & Anr.**
[(2008) 17 SCC 491]

11] The learned Advocate has submitted that the law on the matter in issue stands crystalised to the effect that, in case the final settlement has been reached amicably between the parties even by making certain adjustments and without any mis-representation or fraud or coercion then acceptance of money as full and final settlement/issuance of receipt or vouchers etc. would conclude the controversy and it is not upon either of the parties to lay any claim/demand against the other party. Once settlement deed is acted upon, the applicant cannot opt out of the settlement and once a party accepts payments in full and final settlement, the same is binding on the party and a subsequent adverse stand with regards to the settlement must be taken as an afterthought. The learned Advocate has further submitted that a party who does not raise objection when receiving the payment induces payer to believe that payment is being made full and final settlement, party is hit by principal of estoppel. In the instant case also the applicant has received credit note and receipt

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without raising any objection, this conduct of the applicant is sufficient to arrive at conclusion that there was amicable settlement between the parties. The learned Advocate has further submitted that both applications are devoid of merits and therefore both applications are liable to be rejected. Since the judgment debtors have paid Rs.40,06,000/- and issued credit note for an amount of Rs.20,08,808/-, the present Execution Application is also liable to be dismissed.

12] Epitome of argument of learned Advocate Mr. Nitin Kaskar for applicant/decreed holder is that the record clearly indicates that despite having sufficient means the judgment debtors have deliberately and willfully neglected to pay the decretal amount to the decree holder, as a result thereof by order dated 6.10.2022 a notice was to be issued to the judgment debtors to show cause as to why warrant of arrest should not be issued against them. Pursuant thereto the judgment debtors have filed affidavit and put forth lame excuses. The judgment debtors claimed that the matter has been amicably settled between the parties and tried to depict the picture that the applicant/decreed holder agreed to amicably resolved the dispute, differences and claims. However, the applicant has never authorised any person including her Advocate to meet the judgment debtors to enter into settlement talks on her behalf. The judgment debtors

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have not produced cogent material on record to show that the parties to the execution proceedings have amicably settled their dispute whereby the applicant agreed that the total compensation to be received from the judgment debtors in full and final settlement of the amounts was Rs.60,40,000/-.

13] The learned Advocate has further submitted that Rule 2 of Order 21 of the Code of Civil Procedure talks about adjustment when any amount is sought to be adjusted by the judgment debtors with decree holder. The receipt and so-called papers are received by the applicant from the judgment debtors with an endorsement that the applicant has received those papers without prejudice to her rights. There is no specific mention in those papers that the parties to the application are arrived at compromise and agreed to settle the dispute. No settlement deed is produced on record by the judgment debtors, therefore, the applications filed by the applicant be allowed.

14] The learned Advocate has further submitted that till date the applicant has not received possession of the subject flat, therefore, the judgment debtors be directed to make payment of remaining due compensation from 1.3.2018 to 31.10.2022 which is Rs.20,08,880/-. The judgment debtors be further directed to pay Rs.6,46,290/- which is

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monthly compensation towards delayed possession from November 2022 to April 2023. Besides, warrant of arrest be issued against the judgment debtor nos.2 and 3 and they be detained in civil prison as per rule.

With these contentions, the learned Advocate Mr. Kaskar has submitted that Misc. Application Nos.439 of 2022 and 507 of 2022 be allowed.

15] We have given thoughtful consideration to the submissions advanced by the learned Advocates appearing for respective parties. After considering the submissions advanced by the learned counsel for respective parties and material on record, only pivotal question falls for our consideration is whether the judgment debtors have established that the parties to the execution proceedings have amicably settled their dispute as alleged by the judgment debtors? Our answer to the point is in the negative for the reasons to follow.

REASONS

16] It is specific contention of the judgment debtors that the parties to the execution proceedings had mutually agreed to amicably resolve the subject matter and thereby agreed that the total compensation to be paid in full and final settlement to the decree holder is Rs.60,00,000/-. It was further agreed by the parties that an amount of

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Rs.20,34,000/- to be received from the decree holder towards the balance consideration of subject flat is to be adjusted/appropriated. Accordingly, the judgment debtors have paid Rs.40,06,000/- to the applicant. The judgment debtors have adjusted an amount of Rs.20,08,808/- payable by decree holder to the judgment debtors by issuing credit note. The applicant has accepted the credit note, this conduct of the applicant/decreed holder strengthen the contention of the judgment debtors that the parties to the execution proceedings have amicably settled their dispute. We do not find substance in the contentions of the judgment debtors. A perusal of receipt (Annexure-B page-235) and credit note (Annexure-C at page-236) would show that there is an endorsement of decree holder that she has received those documents from the judgment debtors subject to keeping all contentions and rights open. There is no specific mention in those documents that parties have amicably settled their dispute. On the contrary, endorsement of the allottee on these documents clearly indicates that there was no settlement between the parties.

17] It is significant to note that the decree holder by filing affidavit has specifically denied the amicable settlement. She has specifically contended in her affidavit that she has not authorised any

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person including her Advocate on record to meet the judgment debtors on her behalf to enter into any kind of settlement talks. It is worthy to note that the decree holder has further specifically mentioned in her affidavit that she never met the judgment debtors at any point of time for the purpose of any kind of settlement with respect to instant execution application. Under the circumstances it is expected of judgment debtors to produce cogent material on record to substantiate their contentions. However, bare assertion made in the affidavit-in-reply to show cause notice, there is no material on record to show that the parties to the execution proceedings have amicably settled their dispute. On the contrary it is seen from the record that despite having sufficient means the judgment debtors have failed to pay decretal amount to the decree holder. Moreover, by raising false plea of settlement the judgment debtors have tried to depict the picture that the applicant/decreet holder has filed baseless and frivolous applications against them.

18] In the absence of cogent material on record, we are of the view that there is no amicable settlement between the parties and the judgment debtors have willfully neglected to pay the decretal amount to the decree holder. For the foregoing reasons, we have come to the conclusion that the judgment debtors are liable to pay the decretal



amount to the decree holder as per order passed by this Tribunal. Considering peculiar circumstances of the case, we are of the view that following order would meet the ends of justice-

ORDER

- 1]** Misc. Application No.439 of 2022 is allowed. Misc. Application No. 507 of 2022 is partly allowed.
- 2]** The judgment debtor Nos.2 and 3 shall pay Rs.20,08,808/- to the decree holder.
- 3]** The judgment debtor nos.2 and 3 shall pay Rs.6,46,290/- to the decree holder as sought by her in her affidavit dated 14.4.2023.
- 4]** The judgment debtor nos.2 and 3 shall pay the aforesaid amounts to decree holder within 8 days from the date of uploading of this order, failing which warrant of arrest shall be issued against the judgment debtor nos.2 and 3 on depositing subsistence allowance by the applicant as per Order 21 Rule 39 of the Code of Civil Procedure.
- 5]** In case the judgment debtors make default in making payments as above, the applicant/decreed holder shall deposit subsistence allowance in the Tribunal and upon depositing the same by applicant, the Registry is directed to issue warrant of arrest against the judgment debtor nos.2 and 3 for their detention in civil prison for a period of three months.

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The warrant of arrest be sent to the City Civil Court, Mumbai for its execution.



(DR. K. SHIVAJI)

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(SHRIRAM R. JAGTAP)