

(2009) 12 KAR CK 0107
In the Karnataka High Court
Case No : Writ Petition No. 5958 of 2007

B.S. Ashok Setty

APPELLANT

Vs

The Investment Trust of India Ltd.

RESPONDENT

Date of Decision : 18-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 37, Order 21 Rule 40, 50, 51, 52

Citation : (2010) 2 KCCR 822

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Advocate : Halaswamy, for Anant Mandgi and B. Prasad, for the Appellant; D.R. Sundaresha, for the Respondent

Final Decision : Allowed

Judgement

Aravind Kumar, J.—This writ petition by the judgment debtor whose personal freedom and liberty is in jeopardy on account of a warrant issued against him for being arrested for non payment of the amount due under the decree dated 31-3-2003 is knocking at the doors of this Court questioning the correctness and legality of the order dated 05.03.2007 passed in Execution Petition No. 1118/2005 by the 15th Addl. City Civil and Sessions Judge, Bangalore City (CCCH-3) by raising several contentions.

2. The facts leading to the filing of this petition are as follows:

(i) respondents herein instituted a suit in O.S. No. 2317/86 for a judgement and decree for recovery of money and for charge on the suit schedule property and other reliefs. During the pendency of suit, the petitioner's father who had been arrayed as 2nd defendant died on 9-7-1993 and the legal representatives of the deceased 2nd defendant had been brought on record. Petitioner herein has been arrayed as defendant No. 2(a).

(ii) The said suit on contest came to be decreed vide judgement and decree dated 31.3.2003. In order to execute the said decree, the plaintiff i.e., the

respondent herein instituted execution proceedings by filing Execution Petition No. 1118/05 against the petitioner and seven others. On service of notice, the petitioner and others have entered appearance in the execution petition. During the pendency of the execution petition, the decree holder sought for an order of arrest against the petitioner herein and in support of the said prayer, an affidavit came to be filed by decree holder. The petitioner herein resisted the said prayer by filing objections contending his portion of the suit schedule property allotted under partition dated 1-12-1993 was not under his ownership since it was further partitioned and on 6-7-1998 under which his share was allotted to his wife & children and as such, he did not possess any right, title or interest over the same and sought for dismissal of the execution petition. The court below on consideration of the pleas advanced by Decree Holder and Judgment Debtor formulated the following question for consideration;

Whether the arrest warrant can be issued against the judgment debtor?

(iii) On consideration of the rival contentions, the court below answered the point in affirmative and ordered for issue of arrest warrant against the judgement debtor 2(a) after the decree holder deposits into the office of the Court, a sum of Rs. 500/- for the subsistence of the judgement debtor. It is this order dated 5-3-2007, which is now questioned in this writ petition.

3. I have heard Sri. Halaswamy, learned Counsel appearing for Sri Anant Mandagi for the petitioner and Sri. D. R. Sundaresha, learned Counsel appearing for the respondent.

4. Learned Counsel for the petitioner would contend that court below was in error in ordering the arrest of the JDR on the basis of a bald statement made in the affidavit. It is contended by the petitioner's counsel that the petitioner was not the defendant before the Court below and he is only a legal representative and as such the claim against the legal representative would be only to the extent of property of the deceased which has not been duly disposed of against which decree can be executed. It is also contended that no separate application has been filed for issue of arrest warrant. It was also contended that under Order 21 Rule 40, an enquiry is to be held and this aspect has not been considered by executing Court, the order of the Court below is erroneous & liable to be set aside. He would also submit that decree in question cannot be enforced against the petitioner as Section 50 of CPC is attracted. It is also contended that decree has to be executed against the firm and that too only when there is limited liability of the partner of the firm and the decree holder cannot enforce the decree for recovering the same only against the petitioner herein. In support of this submission, he relies upon the Order 21 Rule 50(2) of the C.P.C. He would also submit that rent receivable by other judgment debtors has already been attached and as such the decree being in the process of being satisfied there is no need or necessity to arrest the Writ Petitioner. In support of these submissions made, the learned Counsel for the petitioner has relied upon the following Judgments:

- (i) Jolly George Varghese and Another Vs. The Bank of Cochin,
- (ii) D. Viswanathan and Another Vs. The Karnataka Bank Ltd.,
- (iii) K. Karunakar Shetty Vs. Syndicate Bank, Manipal,
- (iv) T.S. Ranganathan Vs. P.R. Mohan Ram,

5. Per contra, Sri D.R. Sundaresha would contend that execution petition is filed under order 21 Rule 11 of CPC which itself provides for the execution of the decree by the modes enumerated and Decree Holder has sought for arrest of the Judgment Debtor which is one of the mode and as such, submits there is no requirement for filing a separate and independent application. It is further submitted by him that what is contemplated under Order 21 Rule 37 is that court which intends to issue warrant of arrest is vested with the power to permit the Judgment Debtor to show cause as to why he should not be detained in prison and to consider this prayer of the Judgment Debtor a notice has to be issued before ordering for arrest and admittedly, in the instant case, notice having been issued and the cause given by the Judgment Debtor having been considered, the Court below was fully justified in issuing the warrant of arrest and accordingly, seeks for dismissal of the writ petition. He would also submit that during pendency of the present writ petition, this Court had by order dated 24.06.2009, had directed the respondent herein to file an affidavit specifying the details of the rents attached and accordingly, an affidavit dated 3-7-2009 has been filed specifying all the details and submits that there is no impediment for this Court to dismiss the writ petition. Elaborating his submission Sri. D. R. Sundaresha would contend that though the rents receivable by the Judgment Debtor 2(b) has been attached and the garnishee has been remitting the said amounts regularly to the executing Court it does not prevent the Decree Holder to claim the balance amount from the Judgment Debtor 2(a) i.e., the petitioner herein and the decree holder need not necessarily first proceed against the property charged and after exhausting that remedy alone he may proceed personally against the Judgment Debtor 2(a) and in support of his submission he relies upon the judgment in the case of Satish Minocha Vs. Punjab National Bank and Another, by drawing the attention of the Court to paragraphs 4 and 5 in the said judgment.

6. In reply, the counsel for the petitioner would submit that calculation done in the execution petition itself is erroneous since the judgement debtor has claimed interest at 18% from 13.06.86 which is contrary to the decree namely in the decree what has been decreed with regard to the interest is from the date of decree i.e., prospectively by specifically stating in the decree as "with cost and future interest at a contractual rate till the date of realisation" and accordingly submits that amount claimed by way of interest from the date of suit is contrary to the decree and this clearly shows that there has been total non-application of mind by the Court below and thus seeks for allowing the writ petition.

7. On hearing the learned Counsel for the parties the following point arises for determination.

Whether the Court below was correct in issuing warrant of arrest of J. Dr 2(a)?

8. In order to consider the contentions raised by the respective counsels it would be necessary to extract the relevant provisions of CPC which has also been pressed into service by the learned Advocates appearing for the parties, namely Sections 50, 51, 52, Order 21 Rule 37 and Order 21 Rule 40 Civil Procedure Code. The same reads as follows:

Section 50 Legal Representative

(1) Where a judgment debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the court executing the decree may, of its own motion or on the application of the decree holder, compel such legal representative to produce such accounts as it thinks fit.

Section: 51. Powers to 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 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.

Explanation: in the calculation of the means of the judgment debtor for the purposes of clause{b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

Section :-52. Enforcement of decree against legal representative

(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment debtor and he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment debtor to the extent of the property in respect of which he has failed so to satisfy the court in the same manner as if the decree had been against him personally.

Order 21 Rule 37

Discretionary power to permit judgment debtor to show cause against detention in prison;

(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment debtor who is liable to be arrested in pursuance of the application, the court shall, instead of issuing a warrant for his arrest, issue a notice calling upon on him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to the civil prison;

PROVIDED that such notice shall not be necessary if the court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment debtor is likely to abscond or leave the local limits of the jurisdiction of the court.

(2) Where appearance is not made in obedience to the notice, the court shall, if the decree holder so requires, issue a warrant for the arrest of the judgment debtor.

Order 21 Rule 40

40. Proceedings on appearance of judgment debtor in obedience to notice or after arrest

(1) When a judgment debtor appears before the court in obedience to a notice issued under Rule 37, or is brought before the court after being arrested in execution of a decree for the payment of money, the court shall proceed to hear the decree holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment debtor an opportunity of showing cause why he should not be committed to the civil prison.

(2) Pending the conclusion of the inquiry under Sub-rule (1) the court may, in its discretion, order the judgment debtor to be detained in the custody of an officer of the court or release him on his furnishing security to the satisfaction of the court for his appearance when required.

(3) Upon the conclusion of the inquiry under Sub-rule (1) the court may, subject to the provisions of Section 51 and to the other provisions of this Code, make an order for the detention of the judgment debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:

PROVIDED that in order to give the judgment debtor an opportunity of satisfying the decree, the court may, before making the order of detention, leave the judgment debtor in the custody of an officer of the court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

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

(5) When the court does not make an order of detention under Sub-rule (3), it shall disallow the application and, if the judgment debtor is under arrest, direct his release.

9. The respondent herein (decree holder) filed a suit in O.S. 2317/1986 against M/s. Tribhuvan Chemi Colour Corporation, the partnership firm consisting of defendants 2 to 5. During the pendency of the suit second defendant i.e., B. Subbarama Setty expired on 9-7-1993. The petitioner and his brother were brought on record as the legal representative representing the estate of the deceased B. Subbarama Shetty as per the order dated 25-11-1994 passed in O.S. No. 2317/1986. On contest the said suit came to be decreed by judgment and decree dated 31-3-2003. The operative portion of the judgment reads as under:

The plaintiff's suit is decreed for a sum of Rs. 15,45,834.32 paise with future interest, at a contractual rate, till the date of realisation.

There shall be a charge on the plaint schedule property, till the entire suit claim is realised.

The plaintiff's entitled for the cost of the suit.

The plaintiff shall pay the scheduled court fee if not paid already.

10. The decree holder in order to have the fruits of the decree filed execution petition No. 1118/2005 and for recovery of Rs. 65.95,273/- with costs and interest said to have been calculated based on the decree passed in O.S. No. 2317/1986 dated 31-3-2003 referred to supra. It is pertinent to note at this juncture that in the execution petition the decree holder had sought for arrest of the judgment debtor 2(a) i.e., the petitioner herein by filing an affidavit dated 14-8-2006 which came to be filed in Court on 18-9-2006 contending there under that there was a charge created over the property scheduled to the execution petition and by way of fraudulent transaction the judgment debtor is attempting to defeat the decree and on such premise sought for the arrest of the J.Dr No. 2(a). The said prayer was resisted by the J.Dr by filing objections contending that on 6-7-1998 itself there was family partition and 1/9th share of J.Dr 2(a) had been allotted in favour of his wife and children and sought for rejection of the execution petition itself.

11. One another aspect required to be noticed is that an application came to be filed by the decree holder under Order 21 Rule 46 seeking an order of attachment of rents due and payable to judgment debtor 2(b) by the garnishee i.e., M/s Metlife Insurance Company (private) Limited and direction to remit the monthly rents before the Executing Court. The Executing Court on consideration of the said prayer by its order dated 29-3-2008 has directed the Garnishee M/s Metlife Insurance Company Private Limited to remit the rentals payable to J.Dr 2(b) i.e., B.S. Sanjay to the executing Court. The order dated 29-3-2008 reads as hereunder:

Garnishee M/s Metlife Insurance Company (private) Limited is hereby directed to send the said rentals payable to J.Dr 2(b) B.S. Sanjay to the court by Demand Draft Till the payment of entire decretal amount of Rs. 64,95,273/- or until further orders.

It is submitted at the bar that the said order has been complied by the Garnishee and the rents are being deposited by the Garnishee before the executing Court. This fact has also been reiterated by the Decree Holder in the affidavit dated 3-7-2009 filed before this Court on 9-7-2009.

12. It is at that stage of execution proceedings the Decree Holder simultaneously sought for arrest of Judgment Debtor 2(a) by filing an affidavit in support of the prayer for arrest of J.Dr 2(a). The contents of the said affidavit which was pressed into service reads as follows:

4. I submit that the Judgment Debtor No. 2(a) is one of the co-owners to the petition Schedule Property and has got undivided interest and title over the same as it is an ancestral property. Apart from that, the Judgment Debtor No. 2(a) is doing business and having own house and capable of discharging the petition claim in one lumpsum and now he has secreted all his assets both moveables and immovables beyond the reach of the Decree Holder with sole intention of defeating the claim of the Decree Holder. Further, the Judgment Debtor No. 2(a)

has created certain documents purporting to have given up a share in favour of his wife and children in anticipation of being attached by the Decree Holder and it is a fraudulent transaction to defeat the Judgment Debtor No. 2(a) is residing with his family in an unknown place now having vacated the house where he was residing earlier to avoid the attachment of moveables and his arrest.

5. I submit that, this Hon'ble Court by its Judgment dated 31.03.2003 has created a charge over the Petition Schedule Property and any fraudulent transaction entered among the family members with a design to defeat the decree of the Decree Holder cannot bind the Decree Holder and hence an order of arrest may kindly be ordered against the Judgment Debtor No. 2(a) as he own number of properties both moveables and immovables in and around city of Bangalore.

13. The contents of the said affidavit was repelled by the J.Dr 2(a) by filing objections to the said affidavit. It is to be noted that J.Dr 2(a) has not whispered a word about the Decree Holder's contention of avoiding the decree being executed against him. It is also not contended in the objection statement as to whether there is any means to satisfy the decree. In fact the affidavit of the decree holder is also silent as to the secreting of the assets by the J.Dr in order to avoid the decree being executed against J.Dr 2(a).

14. On consideration of the said contentions, the Court below by its order dated 5-3-2007 ordered for issue of arrest warrant. The operative portion of the said order reads as under:

Issue arrest warrant of Judgment Debtor 2(a) Sri. B.S. Ashok son of late B. Subbarama Setty, Hindu, aged about 56 years, residing at "Sesha Mahal". Vani Vilas Road, Basavanagudi, Bangalore - 560 004, after the decree holder pays into the office of the Court a sum of Rs. 500/- for the subsistence of the judgment debtor at the time of arrest until he can be brought before the court, returnable by 28/3/2007.

In this back ground the landmark judgment of the Hon'ble Supreme Court in the case of Jolly George Varghese and Another Vs. The Bank of Cochin, is required to be looked into for the purpose of examination of the contentions raised by the writ petitioner in the instant case. The paragraphs relevant for considering the contention of the parties read as under;

9. We concur with the Law Commission in its construction of Section 51, C.P.C. It follows that quondam affluence and current indigence without intervening dishonesty or bad faith in liquidating his liability can be consistent with Article 11 of the Covenant, because then no detention is permissible u/s 51, C.P.C.

10. Equally meaningful is the import of Article 21 of the Constitution in the context of imprisonment for non-payment: of debts. The high value of human dignity and the worth of the human person enshrined in Article 21, read with Articles 14 and 19, obligates the State not to incarcerate except under law which

is fair, just and reasonable in its procedural essence. Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, as developed further in Sunil Batra Vs. Delhi Administration and Others etc., , AIR 1979 745 (SC) and Sunil Batra v. Delhi Administration W.P. No. 1009 of 1979, D/- 20.12.1979 (SC) lays down the proposition. It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of Daridra Narayana (land of poverty) is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Article 11 of the Covenant. But this is precisely the interpretation. We have put on the Proviso to Section 51, C.P.C and the lethal blow of Article 21 cannot strike down the provision, as now interpreted.

11. The words which hurt are "or has had since the date of the decree, the means to pay the amount of the decree." This implies superficially read, that if at any time after the passing of an old decree the judgment-debtor had come by some resources and had not discharged the decree, he could be detained in prison even though at that later point of time he was found to be penniless. This is not a sound position apart from being inhuman going by the standards of Article 11 (of the Covenant) and Article 21 (of the Constitution). The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or reculant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and straitened circumstances will play prominently. We would have, by this construction, sauced law with justice, harmonised Section 51 with the Covenant and the Constitution.

It is to be examined whether said judgement would be applicable to the facts of the case and if so to what extent. It is to be noted that the decree holder has taken a specific contention that in the Judgment and decree dated 31-3-2003 itself it has been specifically ordered that there will be a charge on the suit schedule property i.e., the property known and called as "Sesha Mahal", situated in Vani Vilas Road, Basavanagudi, Bangalore - 560 004. Thus, prima facie the claim of Decree-Holder is in tact and secured and now comes the executability of the said decree. It is in this background the claim of Decree Holder for arresting the JDr. 2(a) is to be scrutinised and examined in its legal exactness with precision.

15. In so far as the first contention of the Judgment Debtor regarding the executability of the decree against the legal representative is concerned it is to

be noted that the original defendant expired during the pendency of the suit and the present writ petitioner has not been brought on record in the execution proceedings but in the original proceedings itself. Hence, as per Section 52 the Decree Holder would be entitled to execute the decree for the payment of money from out of the property of the deceased both by attachment and sale of such property. Admittedly in the instant case the deceased defendant No. 2 Subbarama Shetty i.e., the father of the writ petitioner had 1/3rd share in the suit schedule property and a charge has been created under the judgment and decree dated 31-3-2003 on the said property. Thus, the Decree Holder in executing the said decree against the L.Rs of the deceased person is bound to proceed for recovery of the money out of the property of the deceased and when the judgment debtor is able to satisfy the Court that he has duly applied the property of the deceased which came into his possession the decree cannot be executed against the J.Dr to the extent of the property in respect of which if he fails to do so or fails to satisfy the executing Court the decree can execute to the extent of the property of the deceased. Hence, the contention of the J.Dr that decree cannot be executed against him is liable to be rejected.

16. In so far as Section 51 is concerned it starts with the words : "Subject to such conditions and limitations as may be prescribed" in effect it is a non-obstante clause the limitations and prescriptions are prescribed in the Code as schedule -1 namely the relevant Order/Rules. The relevant provision which is required to be considered and examined is Order 21 Rule 37. The executing Court is vested with the discretionary Power to allow the J.Dr to show-cause as to why he should not be detained in prison before ordering for detention. The executing Court mandatorily is required to issue a notice calling upon the Judgment debtor to appear before the Court and show-cause as to why he should not be committed to Civil Prison. On appearance of the J.Dr in obedience to the notice issued under Rule 37 the executing Court is to proceed to hear the decree holder and take all such necessary evidence as may be produced by him in respect of his application or prayer for execution of money decree and thereafter an opportunity should be given to the J.Dr to show-cause as to why he should not be committed to the Civil Prison. These two conditions and limitations are prescribed under Order 21 Rule 37 and Order 21 Rule 40(1).

17. The Hon'ble Supreme Court in the case of Jolly George referred to supra has held as follows:

The simple default to discharge the decree, is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recalcitrant disposition in the past or alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal as demand verging on dishonest disowning of the obligation under the decree.

Keeping the principles enunciated by their Lordships in Jolly George case, the facts of the present case are required to be examined. On perusal of the records

it is seen that the decree holder has filed an affidavit in support of his prayer for issuance of arrest warrant to J.Dr 2(a). A bare perusal of the said affidavit discloses that the ingredients contemplated under Order 21 Rule 37 for issue of arrest warrant are conspicuously absent. The mandate of Sub-rule (1) of order 40 is when the J.Dr appears before the Court in obedience to the notice issued under Rule 37 or when J.Dr is brought before the Court after being arrested, the executing Court should proceed to hear the decree holder and take all such evidence as may be produced by him in support of his application and thereafterwards a duty is cast on the executing Court to give the judgment debtor an opportunity of showing cause as to why he should not be committed to the Civil prison.

18. It is seen from the impugned order that neither the decree holder has been called upon to place evidence as to the necessity for the J.Dr being detained in a civil prison nor the J.Dr has been given an opportunity for showing cause as to why he should not be detained in civil prison on the basis of material placed by Decree Holder. The enquiry prescribed under Sub-rule (1) is not an empty formality inasmuch as the liberty of an individual will be at stakes. On surmises and conjectures or on the self serving testimony of Decree Holder a person cannot be committed to the Civil prison. There is a mandatory duty cast on the D.Hr to establish as to the incapability of the J.Dr to pay the decretal amount and to establish of intentional evasion of J.Dr to satisfy the decree. The affidavit filed by the Decree Holder, objections filed by the J.Dr and the impugned order passed by the Court below will have to be looked into in the background the judgment in the case of Seth Shamsunder & Co., by J. Shamlal and two Ors. v. T. Mamu reported in ILR 1958 Mysore 164 where it is held as follows:

On the other hand, the provisions of Rule 40 of Order XXI clearly show that before the judgment-debtor can be committed to civil prison a further procedure has got to be followed by the lower Court. It is required under Sub-rule (1) that when the judgment-debtor either appears before the Court in obedience to a notice issued by the Court under Rule 37 or is brought before the Court after being arrested, the Court should proceed to hear the decree-holder and take such evidence as may be produced by him in support of his application for execution and then give an opportunity to the judgment-debtor to show cause why he should not be committed to the civil prison. It is, therefore, seen that under Sub-rule (1) of Rule 40, the Court should proceed to hear the decree-holder and take such evidence as he may adduce and is required to give the judgment-debtor an opportunity to show cause why he should not be committed to civil prison. The obligation on the part of the Court to follow this procedure is in no way dependent on as to whether the judgment-debtor has or has not shown cause in response to a notice issued under Rule 37.

Thus, it can be seen under Rule 40 that sufficient checks and balances are contemplated which cannot be construed as a regulatory procedure. The said Rule will have to be construed strictly and any miniscule violation ought not to be

eschewed since the liberty of an individual would be curtailed by virtue of committing the said individual to prison.

19. The object lying behind the checks and balances as stated in the above referred decisions of this Court is to ascertain from the evidence/enquiry whether the J.Dr has sufficient means to pay the debt or some substantial part thereof. Thus, I am of the opinion that in deciding whether detention of any person should or should not be ordered the Courts should apply the tests provided in provisions of Clauses (a) to (d) of Section 51 r/w Order 21 Rule 40 as no J.Dr can be sent to prison unless the Court is satisfied that any of the conditions detailed in the proviso to that section/order are satisfied. The burden of proving the existence of such circumstances has been mandatorily placed on the Decree Holder. From the perusal of the order impugned in the writ petition it is seen that the Court below was swayed away by the affidavit of the Decree Holder in preference to the objections of the J.Dr. A cursory look of the impugned order also shows that the statement of objection filed by J.Dr-2(a) to the affidavit of Decree Holder is brushed aside by the executing Court on the premise that it is not rebutted by a counter affidavit and proceeded erroneously on the footing that claim of the Decree Holder is by way of an affidavit and as such it deserves due recognition. This reasoning of the executing Court is palpably erroneous and is not only contrary to the provisions of Order 21 Rule 37, Order 21 Rule 40, but also against the canons of considering the pleadings. The Court below has neither conducted an enquiry nor collected any information from the Decree Holder in order to hold and satisfy itself that ingredients of both Section 51 and Order 21 Rule 37 are complied.

20. It is observed by the Court below in paragraph 9 of its judgment that J.Dr 2(a) is doing business, having own house and capable of discharging the decretal claim in one lumpsum and in order to defeat claim of the Decree Holder he has secreted of his asset both moveable and immovable beyond the reach of the Decree Holder. It has also come to a conclusion that the J.Dr 2(a) has created documents to evade the attachment of his properties and to defeat the claim of the Decree Holder. All these reasoning is arrived at by the Court below on the basis of the affidavit filed. It is no doubt true that the J.Dr 2(a) in his objection to the affidavit of the Decree Holder has not specifically traversed the same by denying it. However, the objections filed by J.Dr did not fall for consideration by the Court below only on the ground that it is not by way of an affidavit. The obligation that is cast on the Court below is to conduct an enquiry by enquiring into the contention raised by the decree holder in his application or affidavit seeking the prayer for arrest warrant and if only the Executing Court was satisfied that J.Dr is to be arrested then it has to call upon the J.Dr to show-cause by giving opportunity. Admittedly this exercise has not been carried out by the Court below. The initial burden which is cast on the decree holder is required to be satisfied and then only the later portion of Sub-rule (1) comes to forefront namely to give the J.Dr an opportunity of showing cause. By the perusal of the order impugned in this writ petition particularly paragraph 9, it is seen that the

Court below arrived at the conclusion to issue warrant of arrest only on the ground that the averments made by the decree holder in the affidavit is not traversed by the J.Dr in toto and it is not supported by an affidavit. This reasoning of the Court below not only suffers from erroneous understanding of Sub-rule (1) of Order 40 but also erroneous application of the same. Hence, the order of the Court below issuing the warrant of arrest against J.Dr. suffers from legal infirmities.

21. In the case of Mukh Ram and Another Vs. Hardeepsingh, case the Hon''ble Rajasthan High Court has held as follows:

The mere non-payment of the decretal amount does not necessarily amount to a refusal or neglect to pay but it requires some intentional act on the part of the judgment-debtors, which may give rise to an inference that they are refusing or neglecting to pay the decretal amount. Refusal implies that a request was made to the judgment-debtor at the time when he had the means to pay and yet the judgment-debtor did not pay and declined to make any payment. Negligence to pay also connotes that when the judgment-debtor could have paid he just omitted to pay due to his negligence or carelessness because it may be that the judgment-debtors may have other claims to satisfy or other more urgent necessities to meet. Looking to all these circumstances, in the absence of a clear finding to this effect that the judgment-debtors having means to pay have neglected or refused to pay the decretal amount, the learned Munsif could not have directed them to be detained in civil prison. At the same time, it does appear that the judgment-debtors have also not come forward with sufficient explanation why having owned agricultural land to the extent of 1 Murabba, they have not been able to pay a single penny to the decree-holder and, therefore, looking to these circumstances, I am of the opinion that the matter requires a further probe.

5. It may be useful to point out that the law casts a duty on the executing Court to be very careful and circumspect in directing detention of judgment-debtors in civil prison. With this view in mind, the Legislature has provided certain guidelines and checks. Section 51 lays down the conditions on the fulfilment of which a judgment-debtor can be sent to civil prison. The present case attracts the Clause (c) with the proviso (b) and before directing the detention of the judgment-debtor to be detained in civil prison, the Court must be satisfied that the judgment-debtors have means to pay the amount of the decree or some substantial part thereof and refused or neglected to pay the same. Then Order 21, Rule 11A provides that where an application is made for the arrest and detention in prison of the judgment-debtor, it shall state, or be accompanied by an affidavit stating, the ground on which arrest is applied for. This provision, therefore, requires that in the application itself a clear statement should be made with regard to the grounds on which the detention of the judgment-debtor is prayed for and a mere prayer to that effect is not sufficient. If the ground are not clearly and fully mentioned in the application itself, then an affidavit has to be

filed along with it giving those grounds. Then Order 21, Rule 37 requires that before issuing warrant of arrest, a notice shall be issued to the judgment-debtor calling upon him to appear before the Court on a date to be specified in the notice to show cause why he should not be committed to the Civil prison and before issuing such a notice, the Court must be satisfied *prima facie* that the judgment-debtor is liable to arrest in pursuance of an application for execution. In the present case, it does appear that the executing Court has not properly applied its mind to all these provisions and has directed the detention of the judgment-debtor in civil prison in a routine manner, which cannot be sustained.

In the case of *Wehengbam Menjor Singh v. Adweta Debota* reported in AIR 1973 Gau 84, the Hon"ble High Court of Gauhati has held as follows:

In the instant case, as already pointed out the petitioner appeared before the Court in obedience to the notice issued to him under Rule 37(1). That being so, there is no scope to issue any warrant of arrest under Sub-rule (2) of Rule 37. There is also no scope to cause the petitioner to be arrested under Sub-rule (3) of Rule 40 as the enquiry contemplated in the said rule was admittedly not made. On appearance of the petitioner judgment debtor before the Court, in obedience to the notice issued to him under Sub-rule (1) of Rule 37 the proper course for the Court was to proceed with the enquiry as contemplated in Sub-rule (1) of Rule 40 and to make an appropriate order under Sub-rules (3) to (5) subject to the provisions of Section 51 and other provisions of the Code such as those of Sections 55 and 59. In utter disregard of this procedure the Court adopted a curious procedure, unknown to law in ordering the issue of warrant for the arrest of the petitioner even after he made an appearance in Court in obedience to the notice to Rule 37(1) and without any enquiry under Rule 48.

In the above circumstances of the case, the impugned order cannot be sustained and must be set aside. The revision petition is allowed and the rule is made absolute. In the circumstances of the case, I leave the parties to bear their own costs.

22. In view of the principles enunciated by various Courts as referred to above, I am of the considered opinion that a duty is cast on the executing Court to hold an enquiry which is mandatory in nature and cannot be brushed aside particularly in the back drop of an individuals freedom being at stake as enshrined in Article 21 of the Constitution and thus the legislature in their wisdom have thought fit to have all fetters placed in order to protect gullible J.Dr. becoming a prey. But that does not give right to the J.Drs to raise frivolous pleas. In these circumstances, I am of the opinion that the Court below has proceeded on an erroneous footing by giving a complete go by to the mandatory provision of Order 21 Rule 40. Thus, the same is required to be set aside and accordingly the order of the Court below is hereby set aside.

23. One another factor required to be noticed as canvassed by the learned Counsel for the petitioner is the fact that in the execution petition the decree

holder has claimed interest for the period 13-6-1986 till the date of filing of the execution petition i.e., 3-6-2005 at the rate of 18% per annum. On perusal of the decree it is seen that the Court below has granted future interest i.e., from, the date of decree and the pendente lite interest is not granted in favour of the decree holder. Be that as it may. The Hon"ble Kerala High Court in the case of Thangal Vs. State of Kerala, has observed that if a mistake has been committed in calculating the figure it is open to the J.Dr to take appropriate proceedings in Court to see that the mistake is rectified and that by itself does not make the warrant illegal. The said principle enunciated in Tangal's case is squarely applicable to the facts of the present case. However, in view of my finding that warrant of arrest is required to be set aside on the ground discussed herein above, this issue raised by the J.Dr does not call for interference in the hands of this Court. It is left open to the parties to work out their remedies before the executing Court in so far as the issue of interest is concerned.

24. Even otherwise it is seen that the executing Court has already attached the rent receivable by J.Dr 2(b) through the Garnishee and as per the affidavit filed by the decree holder before this Court on 9-7-2009 the said rents at the rate of Rs. 57,475/- is being credited to the executing Court regularly. Hence, the apprehension and the fear of the decree holder expressed in the affidavit supporting the prayer for warrant of arrest remains misapprehension and particularly when there is a charge on property in question, all such fears expressed by the decree holder recedes to the back ground. The other judgments referred to by respective advocates does not require examination in view of Jolly George's Case, In view of the above discussion the following order is passed:

ORDER

(a) The writ petition is allowed order dated 5-3-2007 passed in execution petition No. 1118/2005 by the XV Additional City Civil and Sessions Judge, Bangalore (C.H. No. 3) as per Annexure "G" is hereby set aside.

(b) The Court below is directed to hold an enquiry as required under Order 21 Rule 40 CPC and then pass orders on prayer for issue of arrest warrant against J.Dr 2(a).

(c) The said enquiry shall be completed within a period of three months from the date of receipt of this order.

(d) The J.Dr is at liberty to seek such prayers with regard to the interest calculated by the decree holder in the execution petition.

(e) In the peculiar facts and circumstances of the case the parties are directed bear their respective costs.