
(1998) 05 AP CK 0001

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 3372 of 1996

M. Vemanarayana

APPELLANT

Vs

Sakku Bai and Another

RESPONDENT

Date of Decision : 01-05-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 30, Order 21 Rule 37, 151, 51, 58(1)

Constitution of India, 1950 — Article 21

Citation : (1999) 4 ALT 422 : (1999) 2 APLJ 113

Hon'ble Judges : J. Chelameswar, J

Bench : Single Bench

Advocate : P.S. Narayana, for the Appellant; S. Srinivasa Bhatt, for the Respondent

Judgement

J. Chelameswar, J.—This Civil Revision Petition arises out of an order in O.E.P.No. 7 of 1992 in O.S. No. 88 of 1984 dated 6-7-1996 on the file of the learned Subordinate Judge, Madanapalle.

2. The respondents herein filed the abovementioned O.E.P., under Order 21 Rules 11, 37 and 38 of the Code of Civil Procedure, praying for the arrest of the petitioner-judgment-debtor for the realisation of the arrears of the maintenance amount awarded in O.S. No. 88 of 1984. The respondents happened to be the wife and the minor child of the petitioner herein who obtained a maintenance decree against the petitioner. The abovementioned O.E.P., was ordered and the petitioner herein was directed to be arrested and committed to the Civil Prison. Aggrieved by the said order and decree, the present Civil Revision Petition is filed.

3. The respondents in support of their petition filed certain documents marked as Exs.A-1 to A-19 which are the revenue records pertaining to certain Survey Nos. of land which according to the respondents, are the joint family properties of the petitioner herein alongwith the other coparceners; therefore they submitted that the petitioner is possessed of necessary means to satisfy the decretal obligation,

but he mala fidely and wilfully evaded to discharge the decretal amount.

4. The petitioner herein, however, submitted that he does not possess any property; therefore he has no means to satisfy the decretal obligation, hence he could not be arrested and committed to Civil Prison in pursuance of the execution of the abovementioned decree.

5. The executing Court rejected the contentions raised by the petitioner

6. The learned Counsel for the petitioner made two principal submissions before this Court; firstly, that the executing Court came to the conclusion that the petitioner has necessary means to satisfy the decretal obligation without any material on record; and secondly, in the absence of any specific stipulation as to the term of "imprisonment", the order is illegal on the ground that there is a non-application of mind on the part of the executing Court.

7. In support of his contentions, the learned Counsel for the petitioner relied upon a judgment of the Supreme Court reported in Jolly George Varghese and Another Vs. The Bank of Cochin, wherein Justice Krishna Iyer speaking for the Bench held as follows (at paras 8 to 10)

"8. Indeed, the Central Law Commission, in the Fifty-Fourth Report, did cognise the covenant, while dealing with Section 51, C.P.C.,

The question to be considered is, whether this mode of execution should be retained on the statute book, particularly in view of the provision in the International Covenant on Civil and Political Rights prohibiting imprisonment for a mere non-performance of contract.

The Law Commission, in its unanimous report, quoted the key passages from the Kerala ruling referred to above and endorsed its ratio. "We agree with this view" said the Law Commission and adopting that meaning as the correct one did not recommend further change on this facet of the Section. It is important to notice that, interpretationally speaking, the Law Commission accepted the dynamics of the changed circumstances of the debtor.

However, if he once had the means but now has not, or if he has money now on which there are other pressing claims, it is violative of the spirit of Article 11 to arrest and confine him in jail so as to coerce him into payment.

This is reiterated by the Commission:

Imprisonment is not to be ordered merely because, like Shylock, the creditor says:

"I crave the law, the penalty and forfeit of my bond."

The law does recognise the principle that "Mercy is reasonable in the time of affliction, as clouds of rain in the time of drought."

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 Arts. 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 v. Delhi Administration*, AIR 1978 SC 1675, AIR 1979 745 (SC) and *Sunil Batra v. Delhi Administration*, W.P. No. 1009 of 1979 dated 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 Art.21 unless there is proof of the minimal fairness of this wilful failure to pay inspite 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. Unreaosnableness 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 strike down the provision, as how interpreted."

After enunciating the law as above, the Supreme Court was pleased to set aside the order of the executing Court directing the arrest of the judgment- debtor therein and ordered de novo enquiry into the means of the judgment- debtor to discharge the decree, as on the facts of that case, the Supreme Court was convinced.

".....In the present case, the debtors are in distress because of the blanket distraint of their properties. Whatever, might have been their means once, that finding has become absolute in view of later happenings."

8. The question in the present case is slightly different. It is not the case of the petitioner that he had means to satisfy the decree at the relevant point of time and now is deprived of such means. His case is one of total denial of the existence of means to satisfy the decree. The executing Court on the basis of the material placed before it, came to the conclusion that the petitioner has the necessary means to satisfy the decree.

9. Apart from that the pronouncement of the Supreme Court in folly *George Varghese's* case (1st supra), in my view, may not apply to the present case for another reason. Their Lordships of the Supreme Court were considering the constitutionality of Section 51, Order 21, Rules 37 and 38 of the CPC in the context of the fundamental right of personal liberty provided under Article 21 of the Constitution of India. In the background of Article 11 of the International

Covenant on Civil and Political Rights, the Supreme Court interpreted the abovementioned provisions in connosance with the said declaration to save the same from the challenge from Article 21 of the Constitution of India. In Jolly George Varghese's case (1st supra), the basic question was whether a person could be sent to Civil Prison for non-compliance with the contractual obligation, whereas in the present case, it is not a contractual obligation, but is a personal obligation. It was held so by the Division Bench of this Court in Chandramma v. Venkata Reddy 1958 ALT 256 (D.B.) after a detailed discussion as to the nature of the obligation of a Hindu husband/father, approving an earlier judgment of this Court reported in Manikyam v. Venkayamma 1956 An.W.R. 1021 wherein Justice Viswanatha Sastry held as follows:

"This right to separate maintenance which was previously based on texts and decisions is now expressly conferred by statute under Act, XIX of 1946. It is true that the husband or father is under a personal obligation to maintain his wife or infant children. This does not mean that the obligation could be enforced only by sending him to jail in case of default and that the wife or infant children have no right to be maintained out of the property of the husband or the father as the case may be. The rule as to personal obligation only emphasises the legal and imperative duty of the husband to maintain his wife and minor children irrespective of the possession of any property."

From the above, it can be seen that the obligation of the husband to maintain the wife and children is not a matter of contractual obligation; it is a personal obligation which has to be discharged whether the husband has any property or not. If the husband happens to own some property, the wife has a subordinate interest in her husband's property and can enforce that personal obligation by creating a charge on the said property whether it is self acquired or ancestral.

10. A decree for maintenance is a decree for payment of money. Under Order 21 Rule 30 of the Code of Civil Procedure, such a decree may be executed by detention in the Civil Prison of the judgment-debtor or by the attachment and sale of his property or by both. Rule 37 deals with the procedure, when a decree-holder for money seeks to execute his decree by way of detention of the judgment-debtor in the civil prison. This Rule 37 is only a complimentary provision to Section 51 Proviso of the Code of Civil Procedure.

11. Section 51 of the CPC enumerates arrest and detention in prison as one of the modes of executing the decree. However, the proviso to the said Section creates a safeguard in favour of the judgment- debtor when the said mode is invoked. The safeguard is that the judgment- debtor must be given an opportunity to show as to why he should not be committed to prison. The proviso further enumerates the various factors which ought to be taken into consideration by the Court before ordering execution by arrest and detention. Those factors are:

"(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."

From the scheme of Section 51, it is clear that when the Court is satisfied that one of the factors mentioned in clauses (a) to (c) of the proviso exists or believed to be existing, by the Court, then only, the Court would be justified in passing an order for the arrest and detention of the judgment-debtor.

12. From the pleadings in the present case, it is not the case either the petitioner or the respondents that the factors mentioned in clauses (a) and (c) referred to above are present in the case. On the other hand, the decree- holder's case is that the judgment-debtor has the necessary means to pay the decretal amount and neglected to pay the same thereby attracting clause (b) referred to above and the judgment-debtor denies the existence of any means.

13. But the said clause (b) to proviso to Section 51 may have to be read in the light of the Division Bench judgment of this Court referred to earlier, which declared that the personal obligation to maintain the wife and the children is an imperative duty of the husband whether he has the possession of any property or not. I am therefore of the opinion that in the matter of a maintenance decree by the wife and/or children, an enquiry into the means and the intention of the judgment-debtor either husband or father, as the case may be, is totally irrelevant and has no place. The limitations on the decree- holder's right to have the judgment-debtor arrested in accordance with the provisions of Section 51 as adumbrated by the Supreme Court in *George Varghese's* case (1st supra) are based on Article 21 of the Constitution of India, which guaranteed the life and liberty of every person who is amenable to the jurisdiction of the "State". The expression "liberty" has been interpreted by the Supreme Court to mean living with the human dignity. If that is the philosophical foundation for reading limitations into Section 51 of the Code of Civil Procedure, it would stand the test of logic to say that unlike other money decrees, a decree for maintenance either by the wife or children or both, is a matter which is in furtherance of a fundamental right guaranteed under Article 21 of the Constitution of India, of such decree-holders. Permitting the judgment-debtor to raise issues which lead to another round of protracted litigation as to whether he has sufficient means to satisfy the decretal obligation and reading a further legal obligation on the part

of the decree-holders to establish that the judgment-debtor has the necessary means to fulfil the decretal obligation would be a complete negation of Article 21 of the Constitution of India as far as the decree-holders i.e., the wife and/or the children, are concerned.

14. For the abovementioned reasons, the first submission of the petitioner must fail.

15. Coming to the second submission, the learned Counsel for the petitioner relied upon a judgment of this Court reported in T. Dora Swamy Reddy v. K. Kodanda Naidu 1997 (3) An.W.R. 47 This Court while dealing with the matter wherein the executing Court ordered execution of the money decree by arrest of the judgment-debtor held as follows:

"This has to be read along with Section 58 of the Code. Sub-section (1) of Section 58 of the Code provides, inter alia, that every person detained in the civil prison in execution of a decree shall be detained "where the decree is for the payment of a sum of money exceeding one thousand rupees, for a period of not exceeding three months.....". This provision gives discretion to the Court to fix the period for which the judgment-debtor should be detained in a civil prison, the maximum period for which the judgment-debtor could be detained being three months. It is obvious from this that while directing arrest under sub-rule (3) of Rule 40 of Order 21 of the Code, the Court will have to fix the period for which the judgment-debtor should be kept under detention. The learned 1st Additional District Munsif has not specified the period for which the judgment-debtor should be kept in detention, which shows that he has not applied his mind in this regard. See the decision of the High Court of Bombay in Pundik Nazire Vs. Maharashtra State Farming Corporation,

16. No doubt in the present case also the lower Court did not stipulate the period of detention except directing that:

"Hence the application is allowed. Issue arrest warrant for realisation of the decretal amount returnable by 19-9-1996."

17. In my view, such a mistake need not necessarily result the setting aside of the order under revision. This Court in exercise of its power u/s 151 of the CPC can rectify such a mistake. Accordingly I direct that the petitioner be sent to prison for a period of two months.

18. The C.R.P. is accordingly disposed off. No costs.