
(1985) 08 GAU CK 0004
In the Gauhati High Court
Case No : Civil Revision No. 229/85

Magna Kurmi and Others

APPELLANT

Vs

Dholai Tea Company Pvt. Ltd.

RESPONDENT

Date of Decision : 06-08-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 37, 115, 51
Constitution of India, 1950 — Article 14, 19, 21, 51

Citation : (1985) 2 GLR 323

Hon'ble Judges : K. Lahiri, Acting C.J.

Bench : Single Bench

Advocate : K.P. Sen and A. Mannan, for the Appellant; None, for the Respondent

Judgement

K. Lahiri, A.C.J.

1. This is an application u/s 115 of the CPC directed against the order dated 18.7.85 passed by Munsiff No. 1, Hailakandi, in Money Execution Case No. 2 of 1985 stemming from Money Suit No. 42 of 1984.

2. The Petitioners are workmen of M/s. Dholai Tea Company Limited-opposite party-Plaintiff. The Plaintiff-opposite party instituted Money Suit No 42 of 1984 in the Court of Munsiff No. 1, Hailakandi, against the Petitioners and others claiming damages to the tune of Rs. 6,000/-. On conclusion of the trial, learned Munsiff decreed the suit for Rs. 4,000/-. The decree was drawn up on 8.5.1983 following the judgment. The management-Plaintiff immediately put the decree into execution and the decree-holder stated in the petition that the judgment-debtor had no immovable property to satisfy the decree, so they should be detained in civil prison. The judgment-debtors raised objection before the trial Court stating, inter alia, that they should not put into civil prison forthwith for the simple reason that they were indigent persons. They claimed that they were bonafide unable to pay their debts. In short, they claimed that the order of detention would be violative of all canons of law including Article 21 of the Constitution if they were detained merely because they are indigent. Learned

Munsiff rejected the prayer presumably on the ground that Section 51 and Order 21, Rule 37 of the CPC permit the Court to put a person in civil prison, if he cannot satisfy the decretal amount. Learned Munsiff considered that inability to pay-off debts by itself was sufficient to throw indigent person in civil prison.

3. Are the provisions contained in Section 51 proviso, and Order 21, Rule 37 of the CPC violative of Article 21 of the Constitution as well as the spirit of Article 11 of the International Covenant on Civil and Political Right? What constructions should be put to the provisions contained, in Section 51 and Order 21, Rule 37 of the Code. From the point of view of International Law, the question is whether it is just, human and fair procedure to enforce a contractual liability by imprisoning the debtor in the teeth of Article 11 of the International Covenant on Civil and Political Rights. Article 11 is extracted hereinbelow:

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

(Emphasis added.)

4. The conspectus of Article 21 of the Constitution of India opens up the question whether it is a fair procedure to deprive a person of his "personal liberty" merely because he is indigent and unable to discharge his contractual obligation. The Supreme Court has expounded in *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, and expanded in *Sunil Batra Vs. Delhi Administration and Others etc.*, : AIR 1979 745 (SC); *Sunil Batra Vs. Delhi Administration and Others etc.*, etc. what is "fair procedure" then the question of deprivation of personal liberty crops up. The contents of Article 21 of the Constitution should be meaningful even in the context of the imprisonment for non-payment of debt. We value human dignity and the worth of human person and these are enshrined in the Preamble to the Constitution, The provisions of Articles 14, 19 and 21 oblige the State not to incarcerate a person except under law which is just, fair and reasonable in its procedural essence. It is too obvious that to throw a person in prison because of his poverty and consequential inability to meet his contractual liability is dismal, shocking and appalling. To be poor is no crime and to recover debts by the procedure of putting one in prison may be flagrant violation of Article 21 unless there is material to show his wilful failure to pay inspite of his sufficient means. It may be that having some means a person may have pressing claims on his means for medical treatment or other grave illness, like cancer, heart disease etc. Human dignity and personal liberty are not merely wishful thoughts imprinted in our Constitution. The time has come when procedural laws should be viewed with its enlightened significance. Some say, human meaning should be attributed to Section 51 and Order 21, Rule 37. I say that just and fair construction of the provisions should be given bearing in mind the whole conspectus of the Constitutional Law and International Law, upholding human dignity and the worth of human persons.

5. In the instant case, there was no investigation by the Executing Court

regarding the current ability of the judgment-debtor to clear off the debts or existence of any mala fide in not making the payment. If Section 51, Order 21, Rule 37 of the Code are tested on the touchstone of "fair procedure" under Article 21 of the Constitution and Article 11 of the International Covenant, the true meaning and import of the provisions can be extracted. When a decree-holder attempts to obtain an order of arrest and detention of a judgment-debtor in prison, execution by detention in prison shall not be ordered unless an opportunity is given to the judgment-debtor to show cause why he should not be committed to prison and upon hearing the causes shown the Court must record the reasons in writing of his satisfaction that a judgment-debtor "with the object or effect of obstructing or delaying the execution of decree" is likely to abscond or dishonestly concealed, transferred or removed any part of his property or the judgment-debtor having had means to pay the amount refuses or neglects to pay the same. Similarly, Order 21, Rule 37 provides for issuance of notice calling upon judgment-debtor to show cause why he should not be committed to Civil prison, however, such a notice may not be issued if the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court. Only upon hearing the judgment-debtor, an order to commit him to prison is permitted. As such, it appears to me that the Court is to consider whether it is just, proper and fair to detain the judgment-debtor. If we turn to the International Covenant, we find that it bans imprisonment merely for non-payment of the decree debts. It is seen that in the absence of any vice or "mens rea" the International Law bans his detention in civil prison, it is a known fact that India is now a signatory to the Covenant and Article 51(C) of the Constitution obligates the State "to foster respect for International Law and Treaty obligations...." But until the municipal law is charged in line with the International Covenant, the Court is bound by the municipal law. However, I respectfully agree with the view expressed by A.H. Robertson in "Human Right in national and International Law" (Page 13) that International Conventional Law must run through and merge with the municipal law before the International Law becomes internal law. In *Xavier v. Canara Bank Ltd.* 1969 KLT 927, the observations made are so just and humane that I cannot but extract the excerpts thereof;

The march of civilization has been story of progressive subordination of property rights to personal freedom; and a by-product of this subordination finds noble expression in the declaration that-" No one shall be imprisoned, merely on the ground of inability to fulfill a contractual obligation". This revolutionary change in the regard for the human person is scanned by the possible shock that a resuscitated Shylock would suffer if a modern Daniel were to cope to judgment when the former asks the pound of flesh from Antonio's bosom according to the tenor of the bond, by flatly refusing the mayhem on the debtor, because the inability of an impecunious obligee shall not imperil his liberty or person under the new dispensation proclaimed by the Universal Declaration of Human Rights. Viewed in this progressive perspective we may examine whether there is any conflict between Section 51, CPC and Article 11 of the International Covenants

quoted above. As already indicated by me, this latter provision only interdicts imprisonment if that is sought solely on the ground of inability to fulfill the obligation. Section 51 also declare that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith he incurs the liability to imprisonment u/s 51 of the Code, but this does not violate the mandate of Article 11. 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....

6. In *Xavier* (supra), the High Court dealt with the effect of International law on municipal law and eloquently pleaded for law reforms. The Law Commission took note of the observations in *Xavier* (supra) in its 54th Report while dealing with Section 51 of the Code and quoted the key passages from the judgment endorsed its ratio and recommended for amendment of Section 51 of the CPC in accordance with the spirit of Article 11 of the Covenant. The Law Commission also expressed weighty opinion where it has said that if a debtor has the means but currently does not have it or if he has money now on which there are other "pressing claims" it would be violative of the spirit of Article 11 of the Covenant to arrest and confine him in jail so as to coerce him into payment. Spent out affluence, current indigents, de hors dishonesty or bad faith to clear off a decree debt is compatible with Article 11 of the Covenant for then no detention would be permissible u/s 51 of the Code. The day is not far when the question may squarely arise whether the proviso to Section 51 read with Order 21 Rule 37 is in excess of the mandate contained in Article 21 of the Constitution and partially bad.

7. I wonder why notwithstanding recommendation of the Law Commission the illuminating judgment in *Xavier* (supra) and the law laid down by the Supreme Court in *Jolly George Varghese and Anr. v. Bank of Cochin* (1930) 2 SCC 360, the provisions of Section 51 and Order 21, Rule 37, have not been appropriately amended incorporating the spirit of the Covenant into the provisions.

8. However, in the instant case no notice has been given as required u/s 51 of the Code. No enquiry has been made. The Executing Court must re-adjudicate on the present means of the judgment-debtor along with the present pressure of their indebtedness, consider whether they have had the ability to pay but have improperly avoided or postponing the payment dishonestly and in bad faith. While considering the question, the Court shall also take note of the other honest and urgent pressure on the income and the assets. Only upon adjudication of the factors set out above, if the executing Court finds dishonesty or mala fide they may proceed u/s 51 otherwise not. I do not set out the order but direct the Executing Court to consider suo moto the means of the judgment-debtor to discharge the decree in the light of the observations made above and in those decisions just alluded. The decision of the Supreme Court is binding on us as well as the Court below. I also direct the Petitioner to make an appropriate application

before the trial judge within 15 days from today pointing out the law laid down by the Supreme Court in Jolly George (Supra) and the Executing Court shall consider the decision and adjudicate the questions in the light of the observations made by their Lordships and pass necessary orders as deemed fit and proper. In the mean time, the Petitioner need not be put into civil prison.

9. As the observations have been made which may go against the opposite party, it is granted liberty to ask for amendment, alteration or cancellation of the order if it is so advised.

10. In the result, the petition is disposed of with the above directions and observations.

Send a copy of the order to the Executing Court.