
(1997) 08 RAJ CK 0056
In the Rajasthan High Court
Case No : Civil Revision No. 470 of 1997

Panna Lal

APPELLANT

Vs

S.B.S. Automobiles

RESPONDENT

Date of Decision : 04-08-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 38, 39, 51

Criminal Procedure Code, 1973 (CrPC) — Section 115, 38, 39, 42, 51

Citation : (1997) 2 RLW 1330 : (1998) 1 WLC 220 : (1997) 2 WLN 144

Hon'ble Judges : A.S. Godara, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.S. Godara, J.—This Revision Petition has been preferred u/s 115, CPC (for short "the Code") against the order dated 28.4.97 whereby the learned Addl. District Judge, Jodhpur in Execution case No. 36/96 ordered for issuance of a warrant of arrest in exercise of powers under Order 21 Rule 37(2) of the Code.

2. Briefly stated, the facts relevant for disposal of the present petition, as also alleged by the petitioner are that the petitioner (JD) is resident of Merta City, He is carrying on business at Merta City in the name and under the title of M/s Merta Motors, Merta City, as a sole proprietor. Non-petitioner (DH) is resident of Jodhpur and he is also carrying on business of automobiles under the name and title of M/s S.B.S. Automobiles, Chopasani Road, Jodhpur and Mangal Singh is its sole Proprietor. The decree-holder (non-petitioner) instituted a Civil Original Suit No. 121/94 (No. 79/88) in the court of District Judge, Jodhpur who, in turn assigned the same to the court of Addl. District Judge, Jodhpur who, after a full-fledged trial, passed a decree for principal amount of Rs. 10030/- along with interest, on 3.6.95. Since the petitioner (JD) did not satisfy the decree and, as a result, the decree-holder filed an application under Order 21, Rule 11 of the Code for realisation of Principal and interest aggregating to Rs. 25525/- and also requested that the amount may be realised by way of attachment of movable

and immovable property. Alternatively, it was also requested that the judgment-debtor may be detained in civil prison by way of initiation of proceedings under Order 21 Rule 37 of the Code. An affidavit in support thereof was also sworn by Bhagwat Singh Proprietor of the decree-holder-firm.

3. During the course of execution proceedings "the learned Presiding Officer of the Executing Court ordered for issuance of notice under the provisions of Order 21, Rule 37 (i) of the Code against the judgment-debtor and, consequently, on 4.4.97, an objection was raised from the side of the judgment-debtor before the trial court that since the properties of the judgment-debtor were not situated within the territorial jurisdiction of the executing court and, besides, the judgment-debtor himself was also living at Merta City falling within the jurisdiction of Merta judgeship and, as a result, the executing court had had no territorial jurisdiction to execute the decree and to detain the judgment-debtor in civil prison and, after hearing both the sides, on 7.4.97, the executing court repelled all the contentions raised on behalf of the judgment-debtor and, accordingly, ordered for presence/production of the judgment-debtor personally before the court failing which it was also ordered that a warrant of arrest pursuant to Sub-rule (2) of Rule 37 of Order 21 of the Code be issued and, on his appearance/production, an enquiry shall be resorted to as warranted by the provisions of Section 51 of the Code read with Order 21, Rule 40 of the Code. However, the judgment-debtor did not appear before the court and, on 28.4.97, the executing court observed that the judgment-debtor, in compliance of the order dated 7.4.97, inspite of clear order, did not appear before the court and, accordingly, it was ordered that the judgment-debtor be arrested under a warrant of arrest to be so issued and, on his production, enquiry as already observed above and so also warranted by law, shall be gone into and the next date of hearing was fixed for 29.5.97.

4. Being aggrieved, the present petition has been moved on the ground that the executing court, in the aforesaid circumstances, had had no territorial jurisdiction to have embarked upon issuance of warrant of arrest in execution proceedings and, besides, the executing court committed an illegality and serious irregularity while overlooking the mandatory provisions of Sections 38, 39 and 51 as well as Order 21, Rule 37 of the Code and, instead, it was incumbent on the executing court to have transferred execution application for execution to the District Judge, Merta and, in the circumstances, it was also further alleged that the learned trial Judge has also flouted the dictum laid down in Jolly George Varghese and Another Vs. The Bank of Cochin,

5. The petitioner had represented before the court that he had had no means to satisfy the decree and before the non-petitioner was called upon to establish that the petitioner had sufficient grounds to pay the amount of the decree or substantial part thereof and has refused or neglected to pay the same and, therefore, issuance of warrant of arrest and consequential detention, if any, is also unauthorised and illegal.

6. I have heard learned Counsel appearing for the parties. The learned Counsel for the petitioner has vehemently reinforced contentions raised in the petition. The learned Counsel for the non-petitioner has maintained that the executing court, also being the trial court which passed decree under execution, was legally within its competence to have, specially after the defendant refused/neglected to pay the decretal amount and, in the circumstances, the executing court in exercise of powers vested u/s 51 read with Order 21 Rule 37 of the Code, did not commit any illegality or irregularity while issuing warrant of arrest against the petitioner. Besides, so far as the detention of the petitioner in the civil prison is concerned, an enquiry as envisaged by Rule 40 of Order 21 is yet to be gone into and, therefore, objection raised there against by the petitioner is premature. As a result, his submission is that this petition is wholly devoid of any merit and has been moved with an ulterior motive to defeat execution of the decree against the petitioner.

7. As regards the facts leading to the present controversy, there is no dispute about it. The executing court itself passed the decree under execution. As a result, Section 38 of the Code prescribes that a decree may be executed either by the court which passed it or by the court to which it is sent for execution. Section 39 of the Code further prescribes that the court which passed a decree, may on the application of the decree-holder, send it for execution to another court in the circumstances mentioned thereunder in Clauses (a) to (d). Sub-section (2) of this Section further enables the court which passed the decree to send it for execution to any subordinate court of competent jurisdiction on its own motion as well. Section 42 of the Code further lays down that the court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. Section 51 lays down the procedure in execution of decrees and further says that subject to such conditions and limitations as may be prescribed, the court may on the application of the decree-holder, order for execution of the decree in the manner prescribed in Clauses (a) to (e). A proviso appended thereunder provides 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.

8. Rule 37 of Order 21 of the Code reads as follows:

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 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.

9. Now, reverting to the case in hand, the non-petitioner instituted money suit and obtained a money decree and, thereafter, filed an application under Order 21, Rule 11 of the Code with a request that the movable as well as immovable properties of the petitioner be attached and the decretal amount be realized there from. Besides, it has also been requested that the provisions of Order 21, Rule 37 of the Code be also resorted to since, in the aforesaid circumstances, he has, inspite of means, refused or neglected to pay the decretal amount. The executing court, in exercise of powers vested under Sub-rule (1) of Rule 37 of Order 21 of the Code, instead of issuing a warrant for the arrest of the petitioner, issued a notice calling upon him to appear before the court on a date fixed therefore to show cause why he should not be committed to the civil prison and, apparently, inspite of service of notice on the petitioner, he did not appear before the executing court on 4.4.97 and instead his counsel appeared before the court and questioned the jurisdiction of the executing court to issue warrant of arrest against the petitioner. The executing court vide its order dated 7.4.97 rejected the objections raised on behalf of the petitioner and instead ordered that the petitioner be kept present before the executing court on the next date of hearing failing which a warrant of arrest as permitted by Sub-rule (2) of Rule 37 of Order 21 of the Code shall be issued against the petitioner. However, the petitioner did not comply with this order on 21.4.97 and one more opportunity was granted to appear and show cause, if any, against his arrest in civil prison on 28.4.97. The petitioner again did not appear before the trial court and instead his counsel appeared before the court. The learned Judge of the Executing Court passed the impugned order thereby ordering for issuance of a warrant of arrest against the petitioner and it was further ordered that on, either appearance or production of the petitioner before the court, an enquiry pursuant to the provisions of Section 51 read With Order 21, Rule 37 of the Code will be made before detention of the petitioner in a civil prison and thereafter appropriate order would be passed.

10. The learned Counsel for the petitioner has throughout maintained and laboured hard to submit that since the petitioner was not residing nor carrying on his business nor working for gain within the local limits of the jurisdiction of the executing court of Jodhpur and, besides, his movable as well as immovable properties fell within the jurisdiction of Merta City and, therefore, the executing court of Jodhpur was not empowered to have proceeded further for execution of the decree by way of resorting to the stringent and compulsive measures as provided under Order 21, Rules 37 to 40 of the Code.

11. As discussed and the provisions of Section 38 as well as Section 39 of the Code referred to above, money decrees passed by the competent civil court can be executed either by the court which passed it or by the court to which it was sent for execution under the provisions of Section 39 of the Code and not otherwise. Therefore, the mandatory provisions for execution of money decree are that the execution applications ought to be brought before the court which passed the same and thereafter, the executing court may proceed to execute either itself or the same may be transferred to the court of competent jurisdiction under the circumstances as are laid down under Sub-section (i) of Section 39 of the Act. Therefore, merely because the petitioner is residing at Merta City, since the decree under execution has been passed by a court of competent jurisdiction at Jodhpur and the same has not been either set aside or otherwise is barred from being executed and, as a result, the executing court is legally competent to executed the same.

12. In these circumstances, when the decree-holder, who is non-petitioner, did not request the executing court for transfer of the decree to the court of District Judge at Merta City and, in these circumstances, the executing court of Jodhpur also did not think it proper or advisable on its own motion to send it for execution to the court at Merta, the petitioner cannot be heard to say that the executing court was devoid of any legal authority and competency to proceed with the execution of the decree.

13. The petitioner, admittedly, did not pay the decretal amount and so he has neglected or refused to pay the same and, accordingly, it is for the non-petitioner (DH) to bring his case under any one or more of the clauses of the proviso to Section 51 of the Code. It is also found that before the court can issue a warrant arrest or a notice to the judgment-debtor under Sub-rule (1) of Rule 37 of Order 21 of the Code, it has to see that the judgment-debtor is liable to be arrested in pursuance of the application for execution. This necessarily means that the nature of the decree should be such that it can be executed by arrest of the judgment-debtor and that circumstances mentioned in Clauses (a) to (c) of proviso to Section 51 exist. Unless those circumstances exist, the judgment-debtor cannot be ordered to be arrested. The existence of such circumstances should be alleged either in the execution application itself or in separate application or an affidavit which should accompany the usual tabular execution application. The proviso to Section 51 of the Code refers only to execution by

detention in prison and, therefore, the need for the court to be satisfied with the conditions mentioned therein exist and to record the reasons applies only to an order for detention in prison and not to arrest since the court issued a warrant of arrest under Rule 37 of Order 21 of the Code only to secure the presence of the judgment-debtor in court. There is no prior need to comply with the requirements of proviso appended to Section 51 of the Code.

14. Presently, it may also be usefully mentioned that the decree-holder through Bhagwat Singh appended an affidavit with the application for execution swearing in that the petitioner was carrying on his business at Merta City and his economic position was very sound and he was in a position to pay the decretal amount at a time and so he was not incapacitated to pay the decretal amount. He was running his business in a shop located in the heart of Merta City and goods worth rupees three to four lacs were available with the petitioner. He has also recently built-up a new house in Merta City wherein he is residing along with his family members. So, inspite of his sound financial position, he is avoiding to satisfy the decree and thereby refusing and neglecting to pay the decretal amount which necessitates his arrest and, consequently, the executing court proceeded to issue a notice in terms of Sub-rule (1) of Rule 37 of Order 21 of the Code against the petitioner. The petitioner did not seize the opportunity to show cause against his detention in civil prison. Therefore, in view of the provisions of Sub-rule (2) of Rule 37 of Order 21 of the Code, the executing court was left with no alternative but to have issued a warrant of arrest. On appearance/ production of the petitioner before the executing court, it shall be required to proceed to hear the decree-holder and take all evidence as may be produced by him in support of his application for executing by arrest and detention in civil prison, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison, in terms of the provisions of Sub-rule (1) of Rule 40 of Order 21 of the Code. Besides, Sub-rule (2) of the said Rule 37, further provides that pending conclusion of the enquiry 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. It is only after the conclusion of the enquiry so envisaged, that the court may, subject to the provisions of Section 51 and to the other provisions of the 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.

15. Therefore, merely because a warrant of arrest, as is the present case, has been ordered to be issued against the petitioner, the stage for enquiry, as referred to above, is not to precede the order for arrest and production of the petitioner before the executing court but, it is only after the petitioner (i.e. judgment-debtor) is arrested and is produced or appears before the executing court, that an enquiry in terms of Sub-rule (1) of the said Rule 40 has to be made before order for his detention in civil prison is to be passed and not before. As a result, this is the executing court whereat the execution application is

pending which is to proceed according to the provisions of Sections 38, 39 and 51 read with Order 21 Rule 37 of the Code, as above.

16. As a result, there is no substance in the objection of the petitioner that the executing court of Jodhpur has no jurisdiction to execute the money decree passed against the petitioner and instead it is the competent court of Merta alone which can execute the same.

17. While interpreting the provisions of Sections 38, 39 of the Code, it was held in Tarachand and Others Vs. Misrimal and Others, as under:

13. This being the position, there is no reason to be unduly oppressed by the doctrine that lack of territorial jurisdiction makes an order or judgment a nullity (doctrine which is no doubt applicable in international law) and to hold that u/s 39 C. P. C. it is incumbent for the Court which passed a decree to send it for execution to another court in cases provided in Clauses (a), (b) and (c) of Section 39 C.P.C: and thus to infer that Section 38 is dependent of Section 39 to such an extent that the Court which passed a decree cannot proceed to execute it in the circumstances mentioned in Clauses (a) to (c) of Section 39(1) and if it does so, the order passed by the Court which passed the decree in taking any action in the matter provided in these clauses are to be struck down as nullity. Section 39(1) purposely used the word "may" and that this word "may" cannot be construed as "shall" or "must".

18. In the case in hand, though the executing court can, either on the application of the decree-holder or even on its own motion respectively under Sub-sections (1) and (2) of Section 39 of the Code, transfer the pending execution application to the court at Merta but, in its absence, the objection of the petitioner cannot be sustained that the executing court is devoid of any jurisdiction to take proceedings for execution of the money decree passed against the petitioner.

19. On the basis of above discussion, the execution court at Jodhpur is competent for execution of the decree in absence of its transfer under the provisions of Section 39 of the Code and, accordingly, during the course of its execution under the provisions of Section 51 read with Order 21, Rules 37 of the Code, it is competent to issue a warrant of arrest for detention in civil prison under the circumstances that are enumerated in Clauses (a) to (c) of the proviso to Section 51 of the Code.

20. As regards merits of ultimate order for detention in civil prison, since an enquiry, as referred to above, under the provisions of Sub-rule (1) of Rule 40 of Order 21 of the Code has to be made and then alone the petitioner can be ordered to be detained in civil prison and, therefore, apprehension of the petitioner there against is also unfounded.

21. Besides, an order of arrest of a judgment-debtor passed by the executing court, even in absence of giving a finding, before issuance of any warrant of arrest, as above, regarding the means of the judgment-debtor to pass the decree

amount is not one without jurisdiction. The executing court is required to go into the means of the judgment-debtor only after he is arrested and brought to the Court and before deciding whether he has to be committed to prison or not in execution of the decree, as has been held in the decision rendered in P.G. Ranganatha Padayachi v. The Mayavaram Financial Corporation Ltd. AIR 1974 Mad. 1.

22. In view of the aforesaid discussion, as regards the decision rendered in Jolly George Varghese's case (supra) as regards means and financial capacity of the petitioner, passed the decretal amount for satisfaction thereof, the same shall be determinable by the executing court after the petitioner is arrested and produced before the executing court subsequent to which the court shall be required to embark upon an enquiry in regard to his capacity to pay and other circumstances justifying his detention in civil prison, as concluded hereinbefore.

23. Therefore, presently, mere issuance of warrant of arrest as a result of failure of the petitioner to put in his appearance to show cause against his arrest and detention in civil prison in terms of Sub-rule (1) of Rule 37 of Order 21 of the Code, cannot be held to be either illegal or unauthorised or irregular on any ground whatsoever.

24. Resultantly, the conclusion arrived at is that the petition is wholly misconceived and is devoid of any merit and the same deserves dismissal.

25. Accordingly, this Revision Petition is hereby dismissed without any order as to costs, in the manner indicated hereinbefore.