

(1991) 04 BOM CK 0020

In the Bombay High Court

Case No : Civil Revision Application No. 179/85

Pundik Nazire

APPELLANT

Vs

Maharashtra State Farming Corporation

RESPONDENT

Date of Decision : 04-04-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 51, 58(1)
Constitution of India, 1950 — Article 21

Citation : AIR 1992 Bom 48 : (1991) 3 BomCR 478 : (1992) 1 MhLj 455

Hon'ble Judges : A.D. Mane, J

Bench : Single Bench

Advocate : Shri K.G. Nawandar, for the Appellant; Shri A.M. Dabir, for the Respondent

Judgement

1. The revision application is directed against the order issuing warrant for arrest and detention of the petitioner under Order XXI Rule 38 read with S. 51 of Code of Civil Procedure.

2. The petitioner was working with the respondent as a Clerk and it was the case of the respondent that during his tenure of service he has misappropriated certain amount being the sale proceeds to a sum of Rs. 6,530.62 Ps. The plaintiff-respondent therefore, filed a suit to recover the said amount from the petitioner. The said suit was decreed on February 26, 1980. The respondent, thereafter, tried to execute the decree by attaching the petitioner's provident fund. The amount could not be legally attached and, therefore, there was no realisation of the decree. Thereafter, it appears that the petitioner gave his consent and authorised the respondent to withdraw the amount from his provident fund with the leave of the Court. The decree was, however, not satisfied. The respondent then applied to the executing Court inter alia alleging that the petitioner is a well to do person and has got means to pay but has been adopting delaying tactics and wants to prolong the matter and, therefore, he should be arrested and detained in the civil prison.

3. That application of the respondent (Ex. 35) has been granted with a cryptic impugned order which reads as follows :

"Heard advocate Shri Muley on behalf of D.H. Perused the testimony of the parties. Advocate for J.D. not present. Perused the VII and XII extract filed herewith along with list (Ex. 37). So also the certificate of concerned Sarpanch not challenged. It appears that J.D. tenant in possession of S.No. 113/1 Anchalgaon. It appears that I.D. has means to pay the decretal dues. Hence, issue warrant against J.D. U/O 21 Rule 38, C.P.C. S. 51 C.P.C. D. H. shall deposit the subsistence allowance, as per the prevailing rule, within 8 days."

4. Shri Navandar, the learned Counsel for the petitioner, in the first place, urged that there is absolutely no evidence to show that the petitioner has any means to pay and that he has mala fide or dishonestly declined to pay. Therefore, the essential conditions to invoke provision of O.21, R. 38 read with S. 51, C.P.C. were wanting and in consequence the impugned order is bad in law. Secondly it has been urged that there is non-application of mind by the Court below in ordering arrest and detention of the petitioner, inasmuch as there has been no period of detention in the order as required by law and, therefore, the impugned order is also liable to be quashed and set aside for want of proper exercise of jurisdiction by the Court below.

5. Shri Dabir, the learned Counsel for the respondent has no doubt submitted that there is neither error relating to jurisdiction nor procedure followed by the Court below so as to interfere with the impugned order in revision.

6. In my opinion, the impugned order cannot stand in law as it suffers from serious infirmities. The first infirmity is the non-application of mind by the Court to the facts and circumstances of the case. The proviso to S. 51 so far it is relevant here lays down that where the decree is for payment of money, execution by detention in prison shall not be ordered unless the Court is satisfied that the judgment-debtor, has or has had since the date of the decree the means to pay the amount of decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same. The respondent has alleged in the application (Ex. 35) that the petitioner is a tenant in respect of the land at Achalgaon because his name appears in the record of rights of the year 1982. There is, however, absolutely no material to show that except the provident fund which he had, the petitioner has or has had any means to pay. There is also no evidence to show that he derives any income from the said land. In the circumstances, it is not possible to infer that the petitioner either refuses or has refused or neglected to pay the decretal amount. In case of Jolly George Varghese and Another Vs. The Bank of Cochin, , it has been laid down that when the judgment debtor if once had the means to pay the debt but subsequently after the date of decree, has no such means or he has money on which there are other pressing claims, and no dishonesty or bad faith intervenes, the judgment-debtor cannot be confined in jail for non-fulfilment of his decretal obligation by coercive method which is violative of Art. 21 of the Constitution of India. The

proviso to S. 51 emphasized the need to establish not mere omission to pay but an attitude of refusal on demand intervening dishonest disowning of the obligation under the decree. The learned Judge of the executing Court, therefore, has failed to satisfy aforesaid requirement before passing the impugned order.

7. There is another infirmity in the order. Proviso to sub-sec. (1) of S. 58 of CPC lays down that every person detained in the civil prison shall be so detained when the decree is for the payment of sum of money exceeding Rs. 1,000/- for the period of not exceeding three months. In the instant case no period is mentioned in the impugned order, even though the decretal amount exceeds Rs. 1,000/-. That means the order of detention is for indefinite period. This is obviously material illegality in exercising the jurisdiction by the court below.

8. The impugned order which suffers from basic infirmities as aforesaid will have to be quashed and set aside.

9. Shri Dabir, the learned counsel for the respondent no doubt invited my attention to the previous order passed by this Court, directing the petitioner to deposit the decretal amount and the petitioner in compliance with that direction has deposited a sum of Rs. 5,500/- and has sought for further time to deposit the balance. It has, therefore, been submitted that the petitioner is prevented from challenging the impugned order. This submission of the learned Counsel for the respondent is devoid of any merit. Keeping in view the essential safeguard provided u/S. 51 of CPC merely because the petitioner has deposited aforesaid amount that by itself is no ground to deny him the legal remedy.

10. The result is that the revision application is allowed. The impugned order is set aside. Rule is made absolute with costs.

11. Revision allowed.