

(2011) 04 CHH CK 0043
In the Chhattisgarh High Court
Case No : Writ Petition (227) No. 962 of 2010

Shri Ram Murty Goel

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-04-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 10, Order 21 Rule 11, Order 21 Rule 11A, Order 21 Rule 37, Order 21 Rule 38
Constitution of India, 1950 — Article 21, 227

Citation : (2011) 3 CGLJ 481

Hon'ble Judges : N.K. Agarwal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

N.K. Agarwal, J.—The instant petition filed under Article 227 of the Constitution of India calls in question the legality and propriety of the order dated 01.02.2010 (Annexure P/I) passed by District Judge Durg, in Execution Case No. 5-A/ 1999, whereby and whereunder the executing court directed for issuance of warrant of arrest against the judgment debtor/Petitioner and fixed the matter for his presence for the purpose of sending him to the civil prison.

2. Brief facts of the case are: an application under Order 21 Rules 37, 38 and 39 of the Code of Civil Procedure, 1908 (for short "the Code") was filed by the Respondent No. 1 for recovery of decretal amount by sending judgment debtor to civil prison. Petitioner did not deposit Rs. 50,000/- i.e. part of decretal amount despite time granted by the court on his own request. Petitioner did not appear before the court in obedience of court's order dated 23.03.06 and 25.01.07. On 08.10.2009, Petitioner's counsel intimated that Petitioner is now residing in the State of Haryana, not taking interest in the matter and also not in touch with him. In these circumstances, matter was heard by the executing court and the order impugned was passed.

3. Shri Sanjay K Agrawal, learned Counsel appearing for the Petitioner assailed

the order on the ground.: the same is not passed in strict adherence of provisions contained in proviso to Section 51, Order 21 Rules 37, 38 and 39 and Order 21 Rule 11-A of the Code. It was further contended order impugned was passed without holding any enquiry in terms of Order 21 Rule 40 of the Code, and therefore, the impugned order is liable to set aside. In support of his contention, reliance has been placed in cases of Jolly George Varghese and Another Vs. The Bank of Cochin, , Pundik Nazire Vs. Maharashtra State Farming Corporation, , Subhash Chand Jain Vs. Central Bank of India, , K. Vijayakumar Vs. N. Gururaja Rao, and Joseph K. Mathai Vs. Luckose Kurian, .

4. On the other hand, Smt. Fouzia Mirza, learned Asst. Solicitor General, appealing for Union of India/Respondent No. 1 vehemently argued, the order impugned has been passed by the executing court after affording due opportunity of hearing to the Petitioner, in due compliance of the relevant provisions of Code and the same deserves to be upheld. She would further submit, vide order impugned, the executing court has only ordered for production of judgment debtor by way of arrest, thereafter imperative procedure has to be followed under Order 21 Rule 40 of Code for the purpose of conducting enquiry before sending him to civil prison. This stage has not yet reached. It was further contended, from vary perusal of order sheets (Annexure P/8) it is evident that the Petitioner is not only avoiding payment of decretal amount but also avoiding his presence before the lower court.

5. I have heard the counsel appearing for the parties and perused the order impugned.

6. Under proviso to Section 51 of Code, no order for detention in prison of the judgment debtor can be passed by the court unless he has been given an opportunity of showing cause why he should not be committed to prison and for the reasons recorded in writing, is satisfied (a) by delivery of any property specifically decreed (b) by attachment and sale or by the sale without attachment of any property and (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.

7. Under Order 21 Rule 37 of the Code, 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. As per proviso to above provision, 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.

8. Under Order 21 Rule 38 of Code, every warrant for the arrest of a judgment-

debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

9. Under Order 21 Rule 40 of Code, 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.

10. Under Order 21 Rule 40 (2) of Code, 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.

11. The Supreme Court in case of Jolly George Varghese and Another Vs. The Bank of Cochin, has held: 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 fulfillment of his decretal obligation by coercive method which is violative of Article 21 of the Constitution of India. The proviso to Section 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.

12. Single Bench of Bombay High Court in case of Pundik Nazire Vs. Maharashtra State Farming Corporation, , relying upon the judgment of Supreme Court as referred hereinabove, has held: proviso to Section 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.

13. Single Bench of MP High Court in case of Subhash Chand Jain Vs. Central Bank of India, has held: order of detention in prison without holding enquiry as contemplated under Order 21 Rule 40 (1) or without complying conditions laid down in proviso to Section 51 are not sustainable in law.

14. The High Court of Kerela in case of Joseph K. Mathai Vs. Luckose Kurian, has held: since Order 21 Rule 40 of CODE directs an enquiry, it was irregular on the part of the court to have acted on the affidavit of the decree holder filed before the issue of warrant under Order 21 Rule 37. Even assuming that court can act upon an affidavit of the decree holder in appropriate cases where the judgment

debtor does not contest and when all the relevant facts necessary for the court to decide the case are contained in the affidavit, in cases where the judgment debtor contests, it is incumbent that the court should give him an opportunity to adduce evidence as directed in Order 21 Rule 40 of CODE.

15. The High Court of Punjab & Haryana in case of M/s. Maruti Ltd. (In Liqn.), Chandigarh and another Vs. M/s. Pan India Plastic Pvt. Ltd., has held: If an application for arrest and detention in prison of the judgment debtor is filed it has to accompany affidavit stating the grounds on which arrest is applied for. Simply on doing so, the order of arrest is not required to be passed. As provided u/s 51 of CODE in the case of a decree for the payment of money execution of detention in prison is not to be ordered unless the judgment debtor is afforded an opportunity of showing cause why he should not be committed to prison and the court is required to record reason in writing for its satisfaction of the grounds mentioned therein. On failure to establish one of such grounds in which reliance is placed, order detaining the judgment debtor in prison cannot be passed.

16. The High Court of Madras in case of K. Manokaran Vs. A.U. Subbannan, has held in para 15 of its judgment as under:

15. In a similar situation, this Court made the following observations in a case reported in 200 (4) C.T.C. 481 (Chinaraj v. Kanthasamy):

Order 21, Rule 40 Code of Civil Procedure. prescribes the procedure on the judgment-debtor either appearing in court in obedience to the notice or is brought before Court after being arrested in execution of the decree for payment of money. This provision would say that when the judgment debtor so appears or is brought before Court, 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 with the proviso to Section 51 which prescribes that the judgment-debtor; shall be given an opportunity to show cause before he is committed to civil prison. In other words, it can be safely held that there is nothing in the Code which would indicate or compels the executing Court either to give an opportunity to the judgment-debtor or the decree-holder to adduce evidence to have a full-fledged enquiry and record its reasons in writing before even it passes an order of arrest against the judgment-debtor.

As indicated above, the application has been filed under Order 21, Rule 10 and 11 CPC requesting to issue notice under Rule 37 and then to issue warrant under Rule 38. In respect of that prayer, the executing Court after hearing the counsel for the parties has passed the order impugned issuing warrant under Rule 38. In other words, it is clear that the impugned order cannot be construed to be the order passed under Order 21, Rule 40 CPC. If this order is established to be an order under Order 21, Rule 40 of the Code, then it would certainly be wrong, for the reason, ordering detention of the judgment debtor should be only after making an enquiry after giving opportunity to both parties to adduce evidence in

order to decide as to whether the judgment-debtor was liable to be detained in civil prison in execution of the decree. But, as indicated above, there is nothing to show that in the present case, the order of arrest passed by the executing Court was one made under Order 21, Rule 40, since the order was passed only under Rule 38.

....

In the light of the above discussion, it shall be held that the order of arrest passed by the executing Court without conducting enquiry as provided in Rule 40 and without giving a finding with regard to the means of the judgment-debtors, is not one without jurisdiction, as the order of arrest is only under Order 21, Rule 38 CPC therefore, I do not find any illegality in the impugned order.

....

Whatever it is. Since I take the view that the impugned order has been passed under Rule 38, the question regarding the means to pay and other opportunity to adduce evidence by both the parties before the Court, would arise only when the final order is passed under Order 21, Rule 40 C.R.C. after the Petitioners were arrested and brought before the Court, therefore, the Petitioners are liable to be arrested and brought before the Court to enable the Court to take further course of action for recovering the decree amount.

17. The High Court of Punjab & Haryana in case of Bhagat Singh Vs. Gurmukh Singh, has held in para 5 of its judgment as under:

5. In the abovesaid view, I am fortified by the observations of Mudholkar, J. (as he then was) in Madhusudan Prabhakar Chitale Vs. Trimbak Vyankatesh Joshi, . It was observed therein that under Order 21, Rule 37(1) the Court has a power to issue a warrant for the arrest of the person against whom the execution is sought. In lieu of issue of such a warrant the court has power to direct the issue of such a notice. But even in answer to such a notice the judgment-debtor must appear in Court in person and his appearance through counsel is not enough. Where the judgment-debtor is present on the date originally mentioned in the notice and actually files his written statement on that day but the matter is not taken up by the Court on that day but on a subsequent day, it is obligatory upon him to remain present on that date also. Where a court issues a warrant either under Sub-rule (1) or under Sub-rule (2) of Rule 37, it does not do so with the intention of committing the petition against whom the warrant is issued to prison. It only issues such a warrant to secure the presence of such a person in court. Therefore, in such a case the provisions of Section 51 or Order 21, Rule 40 are not applicable. It is further observed that the provisions of the later rule would apply only at a later stage that is, after the judgment debtor appears in Court, in pursuance either of a notice or warrant. I am in respectful agreement with the above observations.

18. Learned Single Judge of Andhra Pradesh High Court in case of K.

Vijayakumar Vs. N. Gururaja Rao, has placed reliance upon the judgment of Division Bench in case of Sastry v. Bank of India 1978 (2) APLJ 217, in which order 21 Rule 37 has been elaborately dealt with as under:

16. What is therefor manifest from the foregoing provisions of law is-

1. The court has power conferred upon it u/s 51 of the Code to order the execution of a decree for the payment of money by arrest and detention of the judgment debtor in prison on the application of a decree holder.

2. The condition precedent for the exercise of that power is that it should be prescribed by the court's affording an opportunity to the judgment debtor of showing cause as to why he should not be committed to civil prison.

3. The court should be satisfied, for reasons to be recorded in writing, 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 that the judgment debtor has refused or neglected to pay the same.

4. The court shall, instead of issuing a warrant for the arrest of the judgment debtor, shall have to issue notice calling upon the judgment debtor to appear before the court and show cause why he should not be committed to the civil prison.

5. Where no such appearance is made in-obedience to the notice and if the decree holder so requires, it is rendered obligatory on the part of the court to issue a warrant for the arrest of the judgment debtor.

19. Now, reverting to the facts of the present case, Petitioner is not a person of no means. As per his own affidavit, he is having property in the State of Haryana. In order to afford full opportunity of hearing to the Petitioner, the trial court had granted several adjournments to answer Respondent's application filed under Order 21 Rule 37, 38 & 39 of Code. Petitioner himself sought time for payment of decretal amount. Executing court directed him to deposit Rs. 50,000/- for that also several opportunities were granted. On 08.10.2009, his counsel expressed his inability to defend Petitioner and sought time to give its intimation to the Petitioner. Despite specific direction of the executing court, the Petitioner did not appear in person and therefore, it is rendered obligatory on the part of the executing court to issue a warrant for the arrest of the judgment debtor. Smt. Fouzia Mirza, learned Asst. Solicitor General, appearing for Union of India/Respondent No. 1 is right in her submission that the executing court has only ordered for production of judgment debtor by way of arrest, thereafter imperative procedure has to be followed under Order 21 Rule 40 of Code for the purpose of conducting enquiry before sending him to civil prison and above stage has not yet reached.

20. The judgment and decree has been passed in the year 1995. Execution of same is still pending, judgment debtor started residing in the State of Haryana, did not appear in person in complete disregard of court's order, therefore, in the

considered opinion of this Court, the order impugned has been passed in substantial compliance of the provisions and law laid down by the Supreme Court and various High Courts in cases referred hereinabove. So far as enquiry under Order 21 Rule 40 of the Code for the purpose of committing the Petitioner to civil prison is concerned, it would be conducted only after production of judgment debtor before the court by way of warrant of arrest.

21. For the reasons mentioned hereinabove, the Petitioner has utterly failed to demonstrate any illegality or irregularity committed by the executing court so as to invoke the extraordinary jurisdiction of this Court under Article 227 of the Constitution of India.

22. It is well settled principle of law that this Court, in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India, should refrain itself from interfering with the order passed by the Court below, except in such cases where perversity, illegality, irregularity or jurisdictional error is writ large on the face of the record, which is not in the present case.

23. In the result, the petition fails and is accordingly dismissed. No order as to costs.