



CNR: KAHC010263602019

NC: 2026:KHC:47920
W.P. No.40536/2019

IN THE HIGH COURT OF KARNATAKA AT BENGALURU
DATED THIS THE 3RD DAY OF SEPTEMBER, 2026
BEFORE
THE HON'BLE MR. JUSTICE VIJAYKUMAR A. PATIL
WRIT PETITION NO.40536/2019 (GM-CPC)

BETWEEN:

1. MR. AJEEJ AHMED
S/O LATE GULAM MOHIDDIN
AGED ABOUT 67 YEARS.
2. MR. FAYAZ AHAMAD
S/O LATE GULAM MOHIDDIN
AGED ABOUT 53 YEARS.
3. MR. RAFEEZ AHMED
S/O LATE GULAM MOHIDDIN
AGED ABOUT 48 YEARS.

ALL ARE R/OF PETE BANAVARA
ARASIKERE TALUK
HASSAN DISTRICT.

...PETITIONERS

Digitally signed
by RUPA V
Location: HIGH
COURT OF
KARNATAKA

(BY SRI. KASHINATH J.D. ADV.,)

AND:

1. MRS. MAHABOOBI
W/O RASHID AHAMAD @
ABDUL RASHID, (DEAD)
SINCE R1 DIED REP. BY HER LEGAL HEIRS.
- 1(a) MR. MUSTAQ AHAMAD
S/O RASHID AHAMAD @ ABDUL RASHID
AGED ABOUT 54 YEARS
RESIDING AT BIRUR
KADUR TALUK
CHIKKAMAGALURU DISTRICT.



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- 1(b) MR. ARASHAD AHAMAD
S/O RASHID AHAMAD @ ABDUL RASHID
AGED ABOUT 48 YEARS
RESIDING AT AJJAMPUR ROAD
BIRUR, KADUR TALUK
CHIKKAMAGALURU DISTRICT.
- 1(c) MR. IRSHAD AHAMAD RASHID
S/O RASHID AHAMAD @ ABDUL RASHID
AGED ABOUT 54 YEARS
RESIDING AT TIPPU NAGAR
ARASIKERE TALUK
HASSAN DISTRICT-573201.
- 1(d) MRS. YASMIN BANU
D/O RASHID AHAMAD
W/O FAYAZ AHAMAD
AGED MAJOR
R/AT KODI CAMP, TARIKERE
CHIKKAMAGALURU DISTRICT.

...RESPONDENTS

(BY SRI. S.R. KULKARNI, ADV., FOR R3 TO R5
SRI. K.R. NITHYANANDA, ADV., FOR R2
V/O/DTD:12.06.2025, R2 TO R4 ARE THE LR'S OF
DECEASED R1)

THIS W.P. IS FILED UNDER ARTICLE 227 OF THE
CONSTITUTION OF INDIA, PRAYING TO CALL FOR THE
RECORDS PERTAINS TO EX NO.27/2011 PENDING ON THE FILE
OF ADDITIONAL CIVIL JUDGE AND JMFC AT ARASIKERE.
QUASH THE IMPUGNED ORDER PASSED IN EX NO.27/2011
DTD:23.4.2019 PENDING ON THE FILE OF ADDITIONAL CIVIL
JUDGE AND JMFC AT ARASIKERE AS PER ANNEXURE-A & ETC.

THIS PETITION, COMING ON FOR ORDERS, THIS DAY,
ORDER WAS MADE THEREIN AS UNDER:

CORAM: HON'BLE MR. JUSTICE VIJAYKUMAR A. PATIL



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ORAL ORDER

This petition is filed challenging the order dated 23.04.2019 passed in Ex.No.27/2011 by the Additional Civil Judge and JMFC, Arsikere, (for short 'the Executing Court').

2. Heard Sri.Kashinath J.D., learned counsel appearing for the petitioners, Sri.S.R.Kulkarni, learned counsel for respondent Nos.3 to 5, Sri.K.R.Nithyananda, learned counsel for respondent No.2 and perused the material available on record.

3. The respondents-plaintiffs filed a suit in OS.No.453/1993 seeking the relief of permanent injunction. The said suit came to be decreed, restraining the petitioners herein from interfering with the possession of the respondents over the suit schedule property. The said decree has attained finality. Thereafter, the respondents-decree holders filed execution petition in Ex.No.27/2011 on the ground that, in violation of the



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decree, the petitioners-judgment debtors were interfering with their possession over the suit schedule property. The Executing Court, under the impugned order recorded a finding that judgment debtor Nos.1 to 3 had willfully violated the judgment and decree passed in OS.No.453/1993 and ordered to detain judgment debtor Nos.1 to 3 in civil imprisonment for a period of three months.

4. It is trite law that, when the Executing Court comes to the conclusion that there has been a violation of the decree, then it would have proceeded to attach the movable, then immovable properties of the judgment debtors and thereafter, sold such property in the process of execution, and as a last resort, proceeded to order for civil imprisonment. In the present case, without following any of the procedure, the Executing Court has straightaway ordered to detain judgment debtor Nos.1 to 3 in civil imprisonment, which is impermissible.



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5. My view gains support from the decision of this Court in the case of **B.S.Ashok vs. The Investment Trust of India Ltd¹**, wherein paragraph Nos.17 to 22 reads as under:

"17. The Hon'ble Supreme Court in the case of Jolly George referred to supra has held as follows:

"The simple default to discharge the decree, is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal as demand verging on dishonest disowning of the obligation under the decree."

Keeping the principles enunciated by their Lordships in Jolly George case, the facts of the present case are required to be examined. On perusal of the records it is seen that the decree holder has filed an affidavit in support of his prayer for issuance of arrest warrant to J.Dr 2(a). A bare perusal of the said affidavit discloses that the ingredients contemplated under Order 21 Rule 37 for issue of arrest warrant are conspicuously absent. The mandate of Sub-Rule (1) of order 40 is when the J.Dr appears before the Court in obedience to the notice issued under Rule 37 or when J.Dr is brought

¹ W.P.No.5958/2007 DD:18.12.2009



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before the Court after being arrested, the executing Court should proceed to hear the decree holder and take all such evidence as may be produced by him in support of his application and thereafterwards a duty is cast on the executing Court to give the judgment debtor an opportunity of showing cause as to why he should not be committed to the Civil prison.

18. *It is seen from the impugned order that neither the decree holder has been called upon to place evidence as to the necessity for the J.Dr being detained in a civil prison nor the J.Dr has been given an opportunity for showing cause as to why he should not be detained in civil prison on the basis of material placed by Decree Holder. The enquiry prescribed under Sub-Rule (1) is not an empty formality inasmuch as the liberty of an individual will be at stakes. On surmises and conjectures or on the self serving testimony of Decree Holder a person cannot be committed to the Civil prison. There is a mandatory duty cast on the D.Hr to establish as to the incapability of the J.Dr to pay the decretal amount and to establish of intentional evasion of J.Dr to satisfy the decree. The affidavit filed by the Decree Holder, objections filed by the J.Dr and the impugned order passed by the Court below will have to be looked into in the background the judgment in the case of Seth Shamsunder & Co., by J.Shamlal and two*



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others. Vs. T.Mamu reported in ILR 1958 Mysore 164 where it is held as follows:

"On the other hand, the provisions of Rule 40 of Order XXI clearly show that before the judgment-debtor can be committed to civil prison a further procedure has got to be followed by the lower Court. It is required under sub-rule (1) that when the judgment- debtor either appears before the Court in obedience to a notice issued by the Court under Rule 37 or is brought before the Court after being arrested, the Court should proceed to hear the decree-holder and take such evidence as may be produced by him in support of his application for execution and then give an opportunity to the judgmentdebtor to show cause why he should not be committed to the civil prison. It is, therefore, seen that under sub-rule (1) of Rule 40, the Court should proceed to hear the decreeholder and take such evidence as he may adduce and is required to give the judgmentdebtor an opportunity to show cause why he should not be committed to civil prison. The obligation on the part of the Court to follow this procedure is in no way dependent on as to whether the judgment-debtor has or has not shown cause in response to a notice issued under Rule 37."

Thus, it can be seen under Rule 40 that sufficient checks and balances are contemplated which cannot be construed as a regulatory procedure. The said Rule will have to be construed strictly and any miniscule violation ought not to be eschewed since the liberty of an individual would be curtailed by virtue of committing the said individual to prison.



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19. *The object lying behind the checks and balances as stated in the above referred decisions of this Court is to ascertain from the evidence/enquiry whether the J.Dr has sufficient means to pay the debt or some substantial part thereof. Thus, I am of the opinion that in deciding whether detention of any person should or should not be ordered the Courts should apply the tests provided in provisions of clauses (a) to (d) of Section 51 r/w Order 21 Rule 40 as no J.Dr can be sent to prison unless the Court is satisfied that any of the conditions detailed in the proviso to that section / order are satisfied. The burden of proving the existence of such circumstances has been mandatorily placed on the Decree Holder. From the perusal of the order impugned in the writ petition it is seen that the Court below was swayed away by the affidavit of the Decree Holder in preference to the objections of the J.Dr. A cursory look of the impugned order also shows that the statement of objection filed by J.Dr-2(a) to the affidavit of Decree Holder is brushed aside by the executing Court on the premise that it is not rebutted by a counter affidavit and proceeded erroneously on the footing that claim of the Decree Holder is by way of an affidavit and as such it deserves due recognition. This reasoning of the executing Court is palpably erroneous and is not only contrary to the provisions of Order 21 Rule 37, Order 21 Rule 40, but also against the canons of considering*



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the pleadings. The Court below has neither conducted an enquiry nor collected any information from the Decree Holder in order to hold and satisfy itself that ingredients of both Section 51 and Order 21 Rule 37 are complied.

20. *It is observed by the Court below in paragraph 9 of its judgment that J.Dr 2(a) is doing business, having own house and capable of discharging the decretal claim in one lumpsum and in order to defeat claim of the Decree Holder he has secreted of his asset both moveable and immovable beyond the reach of the Decree Holder. It has also come to a conclusion that the J.Dr 2(a) has created documents to evade the attachment of his properties and to defeat the claim of the Decree Holder. All these reasoning is arrived at by the Court below on the basis of the affidavit filed. It is no doubt true that the J.Dr 2(a) in his objection to the affidavit of the Decree Holder has not specifically traversed the same by denying it. However, the objections filed by J.Dr did not fall for consideration by the Court below only on the ground that it is not by way of an affidavit. The obligation that is cast on the Court below is to conduct an enquiry by enquiring into the contention raised by the decree holder in his application or affidavit seeking the prayer for arrest warrant and if only the Executing Court was satisfied that J.Dr is to be arrested then it has to call upon the*



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J.Dr to show-cause by giving opportunity. Admittedly this exercise has not been carried out by the Court below. The initial burden which is cast on the decree holder is required to be satisfied and then only only the the later portion of sub-rule (1) comes to forefront namely to give the J.Dr an opportunity of showing cause. By the perusal of the order impugned in this writ petition particularly paragraph 9, it is seen that the Court below arrived at the conclusion to issue warrant of arrest only on the ground that the averments made by the decree holder in the affidavit is not traversed by the J.Dr in toto and it is not supported by an affidavit. This reasoning of the Court below not only suffers from erroneous understanding of sub-rule (1) of Order 40 but also erroneous application of the same. Hence, the order of the Court below issuing the warrant of arrest against J.Dr. suffers from legal infirmities.

21. *In the case of Mukh Ram's & another u/s Hardeep Singh reported in AIR 1987 Rajasthan 1 case the Hon'ble Rajasthan High Court has held as follows:*

"The mere non-payment of the decretal amount does not necessarily amount to a refusal or neglect to pay but it requires some intentional act on the part of the judgment-debtors, which may give rise to an inference that they are refusing or neglecting to pay the decretal amount. Refusal implies that a request was made to the judgment-debtor at the time when he had the means to pay and yet the judgment-debtor did not pay and declined to make



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any payment. Negligence to pay also connotes that when the judgment-debtor could have paid he just omitted to pay due to his negligence or carelessness because it may be that the judgment-debtors may have other claims to satisfy or other more urgent necessities to meet. Looking to all these circumstances, in the absence of a clear finding to this effect that the judgment-debtors having means to pay have neglected or refused to pay the decretal amount, the learned Munsif could not have directed them to be detained in civil prison. At the same time, it does appear that the judgment-debtors have also not come forward with sufficient explanation why having owned agricultural land to the extent of 1 Murabba, they have not been able to pay a single penny to the decree-holder and. therefore, looking to these circumstances, I am of the opinion that the matter requires a further probe.

5. It may be useful to point out that the law casts a duty on the executing Court to be very careful and circumspect in directing detention of judgment-debtors in civil prison. With this view in mind, the Legislature has provided certain guidelines and checks. S.51 lays down the conditions on the fulfilment of which a judgment-debtor can be sent to civil prison. The present case attracts the Cl.(c) with the proviso (b) and before directing the detention of the judgment-debtor to be detained in civil prison, the Court must be satisfied that the judgment-debtors have means to pay the amount of the decree or some substantial part thereof and refused or neglected to pay the same. Then O.21, R.11A provides that where an application is made for the arrest and detention in prison of the judgment-debtor, it shall state, or be accompanied by an affidavit stating, the ground on which arrest is applied for. This provision, therefore, requires that in the application itself a clear statement should be made with regard to the



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grounds on which the detention of the judgment-debtor is prayed for and a mere prayer to that effect is not sufficient. If the ground are not clearly and fully mentioned in the application itself, then an affidavit has to be filed along with it giving those grounds. Then O.21, R.37 requires that before issuing warrant of arrest, a notice shall be issued to the judgment-debtor calling upon him to appear before the Court on a date to be specified in the notice to show cause why he should not be committed to the Civil prison and before issuing such a notice, the Court must be satisfied prima facie that the judgment-debtor is liable to arrest in pursuance of an application for execution. In the present case, it does appear that the executing Court has not properly applied its mind to all these provisions and has directed the detention of the judgment-debtor in civil prison in a routine manner, which cannot be sustained."

In the case of Wehengbam Menjor Singh Vs. Adweta Debota reported in AIR 1973 Gauhati 84, the Hon'ble High Court of Gauhati has held as follows:

"In the instant case, as already pointed out the petitioner appeared before the Court in obedience to the notice issued to him under Rule 37(1). That being so, there is no scope to issue any warrant of arrest under sub-rule (2) of Rule 37. There is also no scope to cause the petitioner to be arrested under sub rule (3) of Rule 40 as the enquiry contemplated in the said rule was admittedly not made. On appearance of the petitioner judgment debtor before the Court, in obedience to the notice issued to him under sub-rule (1) of Rule 37 the proper course for the Court was to proceed with the enquiry as contemplated in sub-rule (1) of Rule 40 and to make an appropriate order under sub-rules (3) to (5) subject to the provisions of Section 51 and other provisions of the Code such as those of Sections 55 and 59. In utter disregard of this



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procedure the Court adopted a curious procedure, unknown to law in ordering the issue of warrant for the arrest of the petitioner even after he made an appearance in Court in obedience to the notice to Rule 37(1) and without any enquiry under Rule 48.

In the above circumstances of the case, the impugned order cannot be sustained and must be set aside. The revision petition is allowed and the rule is made absolute. In the circumstances of the case, I leave the parties to bear their own costs."

22. *In view of the principles enunciated by various Courts as referred to above, I am of the considered opinion that a duty is cast on the executing Court to hold an enquiry which is mandatory in nature and cannot be brushed aside particularly in the back drop of an individuals freedom being at stake as enshrined in Article 21 of the Constitution and thus the legislature in their wisdom have thought fit to have all fetters placed in order to protect gullible J.Dr. becoming a prey. But that does not give right to the J.Drs to raise frivolous pleas. In these circumstances, I am of the opinion that the Court below has proceeded on an erroneous footing by giving a complete go by to the mandatory provision of Order 21 Rule 40. Thus, the same is required to be set aside and accordingly the order of the Court below is hereby set aside."*

6. In view of the aforesaid reasons, I proceed to pass the following:



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ORDER

- i. The writ petition is ***allowed.***
- ii. The impugned order dated 23.04.2019 passed in Ex.No.27/2011 by the Additional Civil Judge and JMFC, Arsikere, is hereby set aside.
- iii. The Executing Court is directed to proceed with the execution petition in accordance with law and dispose of the execution proceedings as expeditiously as possible without any delay.
- iv. All contentions of the parties are kept open.

Sd/-
(VIJAYKUMAR A. PATIL)
JUDGE

ABK
List No.: 1 Sl No.: 3