

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 639 OF 2015

Vinod Hinigorani S/o Mr. Ramchand
Rochiram Hingorani,
Aged 58 years, of Mumbai Indian
Inhabitant, R/at D-63, Punarvasu
Srushti, Sector -3, Mira Road,
Thane – 401 104

..Petitioner

v/s.

1. The Securities & Exchange Board
of India, having its Head Office at
SEBI Bhavan, Plot No.C4-A, G Block,
Bandra Kurla Complex, Bandra (E),
Mumbai – 400 051

2. State of Maharashtra

..Respondents

Ms. Ankita Singhanian i/b. Halal & Co. for the petitioner.
Mr. Darius Khambatta a/w. Mr. Mihir Mody, Ms. Shruti Chiniwar, Mr.
Bhoomin Badani i/b. K. Ashar & Co. for the Respondent No.1.
Mrs. U.V.Kejriwal, APP for the Respondent/State.

**CORAM : RANJIT MORE &
SMT. ANUJA PRABHUDESSAI, JJ.
DATED : MARCH 10th, 2015.**

JUDGMENT (PER ANUJA PRABHUDESSAI, J.):

1. By this petition filed under Article 226 of Constitution of India,

the petitioner herein is challenging the validity of the orders dated 18.12.2014 and 29.12.2014 passed by the Recovery Officer of the respondent no.1 above and further to order his release from Byculla District Prison.

2. The petitioner claims that he was a non existing Chairman of the company known as Adan Camsof Ltd. and Kolar Biotech Ltd and that he had no role in the day to day affairs and the management of the said companies.

3. The petitioner claims that the respondent had initiated recovery proceeding against him and drawn up certificate nos. 211 and 231 both dated 11.7.2014 and certificate dated 288 of 2014 dated 16.7.2014. The respondent had also issued notice of demand dated 11.7.2014 and 16.7.2014 under Rule III and Part I of second Schedule to the Income Tax Act 1961 r/w. Section 28A of the Securities and Exchange Board of India, 1992, whereby the petitioner was directed to pay dues of Rs.37,62,644/- , Rs.81,98,863/- and Rs.45,19,904/- i.e. total aggregate of Rs.1,64,81,411/- along with

further interest and expenses within fifteen days from the respective notices.

4. The petitioner had claimed that in the year 2004 he was a Director of KSPL and was paid monthly salary of Rs.15,000/-. The petitioner has claimed that he had not received any benefits from ACL/KBL. He had submitted that he used to sign the documents as per the instructions of Shri. Rajkumar Basantani who was the main promoter of both the companies. The petitioner had claimed that he was only a front for the promoters of the said companies and that he had not benefited from any of the alleged transactions.

5. The petitioner claims that pursuant to the said notices, the respondent has attached his bank accounts as well as DEMAT accounts. Under the circumstances, he has no access to any funds in order to satisfy any alleged amounts claimed by the respondent in the said certificates.

6. The petitioner has stated that vide notices dated 21.11.2014

and 10.12.2014 he was called upon to show cause before the Recovery Officer of the respondent as to why he should not be committed to civil prison for the default in payment of the alleged dues. The hearing was held on 18.12.2014 on which date the petitioner had sought leave to be represented by a lawyer. The petitioner has claimed that the said request was arbitrarily rejected. It is alleged that the respondent did not grant him an hearing and had demanded that he should submit a proposal for payment of the alleged dues at the hearing itself. His request for grant of time on the ground that he wanted to challenge the order of penalty was also not considered and he was illegally detained at the SEBI Bhavan and directed to submit the proposal for repayment, failing which he was threatened that he would be committed to civil prison. The petitioner has stated that he was not allowed to consult anyone and was illegally detained in a manner which was arbitrary and illegal and subsequently illegally arrested and committed to prison for a period of six months.

7. Vide application dated 23.12.2014 the petitioner once again

informed the respondent that he intends to challenge the order of penalty before the Security Appellate Tribunal and requested to release him on such terms and conditions as deemed fit. The said request was also not considered and instead he was once again instructed to give a proposal for repayment of the alleged dues. The petitioner claims that the impugned order dated 18.12.2014 and 29.12.2014 are arbitrary, illegal and bad in law and deserves to be quashed.

8. The Assistant General Manager of the respondent has filed an affidavit in reply. The respondents have raised the preliminary objection about the maintainability of the petition in view of efficacious remedy of appeal. On merits the respondents have stated that the Adjudicating Officer had passed the order dated 28.4.2010 against the petitioner for committing fraudulent activities in the shares of Kolar BioTech Ltd., for violations of regulations 3, (1), 4(2) (k), 4 (2)(r) of SEBI Regulations 2003 and had imposed penalty of Rs.30 lakhs. The Adjudicating Officer had passed another order dated 28.4.2010 for violation of Regulations 3(b), 3(c), 4(1), 4(2)(r)

of SEBI Regulations and imposed penalty of Rs. 25 lakhs, and by order dated 10.6.2010 the Adjudicating Officer had imposed penalty of Rs.55 lakhs for violationg Regulations 3(a), 3(c), 4(1), 4(2)(a) and 4(2)(e) of SEBI Regulations 2003.

9. The respondent has stated that the petitioner neither challenged the said order nor paid the penalty aggregating to Rs.1,10,00,000/- despite various reminders, hence the respondent Board initiated prosecution proceeding under Section 20 of SEBI Act before the Magistrate Court at Bandra and Sessions Court at Mumbai.

10. It is the case of the respondent that in exercise of powers conferred under Section 28A of SEBI, 1992, the respondent initiated proceedings against the petitioner by two certificates, one dated 11.7.2014 and another certificate dated 16.7.2014 whereby the petitioner was directed to pay dues aggregating to Rs.1,61,84,411/- along with further interest and expenses. The petitioner neither responded to the said notices nor made the payment. The Recovery Officer therefore attached all the Bank and DEMAT Accounts.

However, except the amount of Rs.5,160.82 no further bank account details of the petitioner were traceable. The petitioner was therefore directed to appear before the Recovery Officer. However, the petitioner forwarded a reply dated 11.11.2014 stating that he was not liable. The respondent therefore issued notice under Rule 73(1) of second Schedule r/w. Section 222(1)(c) of the Income Tax Act and Section 28S of the Act and called upon the petitioner to appear before the Recovery Officer on 10.12.2014 and show cause why he should not be committed to civil prison.

11. The respondent has stated that at the request of the petitioner, the hearing scheduled on 10.12.2014 was adjourned to 18.12.2014, on which date the petitioner appeared before the Recovery Officer , but failed to submit any substantial proposal for payment of the amount. Since the petitioner had not shown substantial cause and had failed to furnish the proposal for payment of dues as advised by the Recovery Officer, the petitioner was ordered to be detained in Civil Prison for a period of six months.

12. The respondent has stated that the application dated 23.12.2014 filed by the petitioner was rejected vide order dated 29.12.2014 since the petitioner had failed to satisfy the condition as stated under Rule 78 & 79 of Schedule II of Income Tax Act and also failed to pay the dues or furnish security towards the dues and further failed to furnish any proposal as to how he was going to repay the dues. The respondents have denied that the order is arbitrary or illegal.

13. Advocate Singhania, learned counsel for the petitioner has urged that the Recovery Officer has not recorded his satisfaction in writing that the petitioner has either transferred, concealed or removed any part of the property with an intention of obstructing the execution of the certificate or that he has refused or neglected to pay the arrears despite having means to pay the same. Learned Counsel for the petitioner therefore claims that notices issued under Rule 73 and consequent detention is illegal for want of compliance of pre-requisite stipulated under Rule 73. She has relied upon the decision of the Apex Court in the case of *Jolly George Verghese Vs. The Bank*

of Cochin, AIR 1980, SC 470 and the decision of the Gujarat High Court in *Mohmad Akhtar Hussain Vs. State of Gujarat & Ors. (1991) 1 GLR 305*.

14. Learned Counsel for the petitioner has further urged that the petitioner was not given a fair hearing and that he has been detained only because he failed to accede to the demand of the Recovery Officer to give a proposal of settlement. Learned Counsel therefore claims that the order of detention is arbitrary and illegal and is in violation of the principles of natural justice.

15. Learned Senior Counsel Shri Khambatta has raised the issue of maintainability of the petition in view of the efficacious and alternative remedy of appeal before the Securities Appellate Tribunal. Learned Senior Counsel Shri Khambatta has contended that the petitioner had not challenged the order of penalty, hence the same had attained finality. The petitioner had not paid the dues despite giving sufficient opportunity. Referring to the averments in the

affidavit-in-reply, learned Counsel for the respondent has urged that though the Bank and DEMAT Account of the petitioner were attached, only an amount of Rs.5160.82 was traceable in the account held by the petitioner in Punjab National Bank at Mira Road. Learned Senior Counsel Shri Khambatta therefore claims that this situation necessitated the Recovery Officer to exercise the powers conferred under the SEBI Act and issue notices as stipulated under Rule 73. Learned Senior Counsel Shri Khambatta has submitted that the petitioner was given fair hearing as well as sufficient time and opportunity to make the payment, despite which the petitioner has failed to pay the dues and has also failed to show the sufficient cause. Learned Senior Counsel Shri Khambatta therefore claims that the order of detention is neither arbitrary, nor illegal.

16. We have perused the records and considered the submissions advanced by the respective counsel. We shall first consider the preliminary objection raised by learned Counsel Shri Khambatta regarding the maintainability of the petition under Article 226 of the Constitution of India in view of the availability of alternative and

efficacious remedy of appeal before the Appellate Tribunal.

17. It is well settled that the alternative remedy does not serve as an absolute bar for exercising writ jurisdiction. The writ Court can, depending on the facts and circumstances of the particular case, entertain the writ petition notwithstanding availability of alternative remedy. In the case of [State of H.P. and Ors. v. Gujarat Ambuja Cement Ltd. and Anr.](#) AIR 2005, SC 3936, the Apex court has reiterated the parameters for exercise of such discretion as follows :-

“19. Except for a period when Article 226 was amended by the Constitution (42nd Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High

Court without availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

20. *Constitution Benches of this Court in [K.S. Rashid and Sons v. Income Tax Investigation Commission and Ors.](#), AIR (1954) SC 207; [Sangram Singh v. Election Tribunal, Kotah and Ors.](#), AIR (1955) SC 425; [Union of India v. T.R. Varma](#), AIR (1957) SC 882; [State of U.P. and Ors. v. Mohammad Nooh](#), AIR (1958) SC 86 and [M/s K.S. Venkataraman and Co. \(P\) Ltd. v. State of Madras](#), AIR (1966) SC 1089, held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.*

21. *Another Constitution Bench of this Court in [State of Madhya Pradesh and Anr. v. Bhailal Bhai etc.](#), AIR (1964) SC 1006,*

held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been re- iterated in [N.T. Veluswami Thevar v. G. Raja Nainar and Ors.](#), AIR (1959) SC 422; [Municipal Council, Khurai and Anr. v. Kamal Kumar and Anr.](#), AIR (1965) SC 1321; [Siliguri Municipality and Ors. v. Amalendu Das and Ors.](#), AIR (1984) SC 653; [S.T. Muthusami v. K. Natarajan and Ors.](#), AIR (1988) SC 616; [R.S.R.T.C. and Anr. v. Krishna Kant and Ors.](#), AIR (1995) SC 1715; [Kerala State Electricity Board and Anr. v. Kurien E. Kalathil and Ors.](#), AIR (2000) SC 2573; [A. Venkatasubbiah Naidu v. S. Chellappan and Ors.](#), [2000] 7 SCC 695; and [L.L. Sudhakar Reddy and Ors. v. State of Andhra Pradesh and Ors.](#), [2001] 6 SCC 634; [Shri Sant Sadguru Janardan Swami \(Moingiri Maharaj\) Sahakari Dugdha Utpadak Sanstha and Anr. v. State of Maharashtra and Ors.](#), [2001] 8 SCC 509; [Pratap Singh and Anr. v. State of Haryana](#), [2002] 7 SCC 484 and [G.K.N. Driveshafts \(India\) Ltd. v. Income Tax Officer and Ors.](#), [2003] 1 SCC 72.

22. *In [Harbans Lal Sahnia v. Indian Oil Corporation Ltd.](#), [2003] 2 SCC 107, this Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must*

consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights; where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

23. In [G. Veerappa Pillai v. Raman and Raman Ltd., AIR \(1952\) SC 192](#); [Assistant Collector of Central Excise v. Dunlop India Ltd., AIR \(1985\) SC 330](#); [Ramendra Kishore Biswas v. State of Tripura, AIR \(1999\) SC 294](#); [Shivgonda Anna Patil and Ors. v. State of Maharashtra and Ors., AIR \(1999\) SC 2281](#); [C.A. Abraham v. I.T.O. Kottayam and Ors., AIR \(1961\) SC 609](#); [Titaghur Paper Mills Co. Ltd. v. State of Orissa and Anr., AIR \(1983\) SC 603](#); *H.B. Gandhi v. M/s Gopinath and Sons, [1992] Suppl. 2 SCC 312*; [Whirlpool Corporation v. Registrar of Trade Marks and Ors., AIR \(1999\) SC 22](#); [Tin Plate Co. of India Ltd. v. State of Bihar and Ors., AIR \(1999\) SC 74](#); [Sheela Devi v. Jaspal Singh, \[1999\] 1 SCC 209](#) and [Punjab National Bank v. O.C. Krishnan and Ors. \[2001\] 6 SCC 569](#), this Court held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction.”

18. Thus, it can be said that despite an alternative remedy, the writ

petition can be entertained in appropriate cases where there is violation of principles of natural justice, or procedure required for decision has not been adopted or there is an allegation of infringement of fundamental rights, or where the orders or proceedings are wholly without jurisdiction or the virus of an Act is challenged or when it is shown that it would be a case of palpable injustice to the petitioner to force him to adopt remedies provided by the statute.

19. In the present case, the petitioner has claimed that he has been detained in a summary and arbitrary manner. The petitioner has claimed that his arrest is illegal and is in contravention of principles of natural justice. The petitioner, in short, has made an allegation of infringement of fundamental rights. In the light of such challenge, this Court is not precluded from examining the legality and propriety of the impugned order notwithstanding availability of alternative remedy.

20. The next question which, therefore, follows is whether the

arrest of the petitioner is in accordance with law. It is not in dispute that the Adjudicating Officer of the respondent vide orders dated 28.4.2010 and 10.6.2010 had called upon the petitioner to pay penalty aggregating to Rs.1,10,00,000/- for committing fraudulent activities. The petitioner had not challenged the said order and had not paid the dues. The respondent had therefore resorted to the recovery proceedings in accordance with the provisions of 28A of SEBI Act, 1992 which reads as follows:-

28-A. Recovery of amounts – (1) *If a person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any direction of the Board for refund of monies or fails to comply with a direction of disgorgement order issued under Section 11-B or fails to pay any fees due to the Board, the Recovery Officer may draw up under his signature a statement in the specified form specifying the amount due from the person (such statement being hereafter in this Chapter referred to as certificate) and shall proceed to recover from such person the amount specified in the certificate by one or more of the following modes, namely:-*

- (a) attachment and sale of the person's movable property;*
- (b) attachment of the person's bank account;*

*(c) attachment and sale of the person's immovable property;
(d) arrest of the person and his detention in prison;
(e) appointing a receiver for the management of the person's
movable and immovable properties.”*

21. Rule 28-A further provides that in the exercise of power of effecting recovery of amount, the provisions of Section 222, 227, 228A, 229, 232 and Second and Third Schedule of the Income Tax Act, 1961 are applicable.

22. Since the Tax Recovery Officer has resorted to the mode of arrest and detention, it is necessary to refer to Part V of Schedule II to the Income Tax Act, which deals with the mode of “arrest and detention of the defaulters” and which reads as follows:-

“73.(1) No order for the arrest and detention in civil prison of a defaulter shall be made unless the Tax Recovery Officer has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice and to show cause why he should not be committed to the civil prison, and unless the Tax Recovery Officer, for reasons recorded in writing, is satisfied.

(a) that the defaulter, with the object or effect of obstructing the execution of the certificate, has, after [drawing up of the certificate by the Tax Recovery Officer] dishonestly transferred, concealed, or removed any part of his property.

(b) that the defaulter has, or has had since [the drawing up of the certificate by the Tax Recovery Officer], the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same.

Sub-Rule (2) of Rule 73 provides that notwithstanding anything contained in sub-rule (1), a warrant for the arrest of the defaulter may be issued by the Tax Recovery Officer if the Tax Recovery Officer is satisfied, by affidavit or otherwise, that with the object or effect of delaying the execution of the certificate, the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Tax Recovery Officer.

Whereas Sub-Rule(3) of Rule 73 deals with other contingencies and provides where appearance is not made in obedience to a notice issued and served under sub rule (1), the Tax Recovery Officer may issue a warrant for the arrest of the defaulter.

Sub-Rule (4) mandates that every person arrested in pursuance of a warrant of arrest under [this rule] shall be brought before the Tax Recovery Officer [issuing the warrant] as soon as practicable and in any event within twenty-four hours of

his arrest (exclusive of the time required for the journey):

Rule 74 which provides for hearing of the defaulter states that when a defaulter appears before the Tax Recovery Officer in obedience to a notice to show cause or is brought before the Tax Recovery Officer under Rule 73, [the Tax Recovery Officer shall give the defaulter] an opportunity of showing cause why he should not be committed to the civil prison.”

Rule 75 which provides for interim custody stipulates that Pending the conclusion of the inquiry, the Tax Recovery Officer may, in this discretion, order the defaulter to be detained in the custody of such officer as the Tax Recovery Officer may think fit or release him on his furnishing security to the satisfaction of the Tax Recovery Officer for his appearance when required.

Rule 76 which authorizes the Tax Recovery Officer to pass an order of detention lay down that upon the conclusion of the inquiry, the Tax Recovery Officer may make an order for the detention of the defaulter in the civil prison and shall in that event cause him to be arrested if he is not already under arrest;

Proviso to Rule 76 provides that in order to give the defaulter an opportunity of satisfying the arrears, the Tax Recovery Officer may, before making the order of detention, leave the defaulter in the custody of the officer arresting him

or of any other officer for a specified period not exceeding 15 days, or release him on his furnishing security to the satisfaction of the Tax Recovery Officer for his appearance at the expiration of the specified period if the arrears are not so satisfied.

Rule 77 stipulates the period of detention in the civil prison. Clause (a) of Rule 77 stipulates a period of 6 months detention where the certificate is for a demand of an amount exceeding Rs.250/-.”

23. A perusal of aforesaid relevant provision indicates that Part V of Second Schedule provides a detail procedure which is required to be complied with when the Tax Recovery Officer resorts to the mode of arrest and detention. Needless to state that the mode of arrest and detention though not a punitive action, is a drastic step which infringes upon the liberty of a person. Hence, recourse to such mode has to be necessarily in strict compliance with the provisions stipulated in Part V of second Schedule.

24. In the instant case, the petitioner was served with three notices of demand, two dated 11.07.2014 and the third dated 16.07.2014,

directing to pay dues with interest aggregating to Rs.1,64,81,411/-. The petitioner having failed to pay the dues was served with a notice dated 21.11.2014 and subsequent notice dated 10.12.2014, whereby the petitioner was informed that recovery proceedings were initiated against him. The petitioner was directed to appear in person before the Recovery Officer on 18.12.2014 and show cause why he should not be committed to the civil prison.

25. The notice dated 10.12.2014 was followed by a hearing on 18.12.2014 and consequent order dated 18.12.2014 under Rule 75 and 76 of Part V of Schedule II. The impugned order dated 18.12.2014 states that the petitioner had failed to pay the amounts specified in the notice of demand. Hence, he was served with a notice under Rule 73 (1). The impugned order states that the petitioner had appeared before the Tax Recovery Officer on 18.12.2014 and that in the course of the proceedings the petitioner was advised to make payment towards the dues and or submit a proposal for payment of dues. The impugned order further states that the defaulter i.e. the petitioner herein had failed to furnish any

substantial proposal for payment of the dues, except stating that he was not responsible for any activities for which penalty has been levied.

26. The Recovery Officer has recorded that since the petitioner has not shown and substantial cause for not committing him to the civil prison, he was detained at SEBI Bhavan and directed to give a proposal towards payment of dues. The impugned order further states that despite detention the petitioner did not give any proposal for any repayment of dues. The Recovery Officer therefore held that he is satisfied that the petitioner should be arrested and committed to civil prison. Accordingly, under powers conferred under Rule 76, the petitioner was arrested and sent to civil prison for a period of six months or until the payment of dues with interest.

27. The petitioner had filed an application dated 23.12.2014 through his advocate to stay the order of arrest and to release the defaulter on the ground that he intended challenging the order imposing the penalty before the Security Appellate Tribunal. The said application was rejected vide order dated 29.12.2014 on the

ground that the petitioner had failed to take steps to pay the amount despite issuance of notices of demand and that he had not submitted any concrete proposal for repayment of dues even after his detention at SEBI Bhavan.

28. A bare reading of the notice and the impugned orders makes it abundantly clear that the power of arrest has not been exercised in the manner and for the circumstances provided for in Rule 73(1). It is to be noted that Rule 73(1) confers power of arrest and detention only in two situations i.e. when the Tax Recovery Officer is satisfied that (i) the defaulter, with the object or effect of any obstructing the execution of the certificate, has dishonestly transferred, property or (ii) despite having means the defaulter, refuses or neglects to pay the dues. Rule 73(1) further mandates the Tax Recovery Officer to record in writing the reasons of his satisfaction.

29. In the instant case, the Tax Recovery Officer had not recorded his satisfaction with reasons in writing, as regards the existence of

two situations, which are specified in Clause (a) of Rule 73(1). The Tax Recovery Officer has not detained and arrested the petitioner on the ground that he had transferred, concealed or removed any part of his property. The respondent had stated in the affidavit that upon issuance of the attachment orders, none of the banks have reported any accounts in the name of the petitioner, except Punjab National Bank at Mira Road (E) branch and only an amount of Rs.5160.82 was recovered by the respondent Board. By these averments, the respondent has sought to justify the arrest. Needless to state that having failed to record the reasons as regards existence of the situation in clause (a), the respondent cannot rectify the lacuna by stating the reasons in the reply.

30. It is also not the case of the Respondent Authority that the petitioner had failed to pay dues despite having means to pay the arrears or some substantial part thereof. On the contrary, a bare perusal of the impugned order reveals that the petitioner was detained and arrested for non-payment of dues and further for not giving a proposal of payment.

31. Needless to state that Rule 73 does not confer power on the Tax Recovery Officer to arrest and detain the defaulter for not giving a proposal for payment of dues. Ordering arrest and detention for not giving a proposal of repayment is a sheer abuse of power. Similarly, in the absence of the finding that the petitioner had means to pay, the mere non-payment of dues does not constitute neglect or refusal to pay. In the case of **Jolly George Vargese v. Bank of Cochin, AIR 1980 SC 470**, the Apex Court while considering the provisions of Section 61 and Order 21 Rule 37 of CPC has held that :-

“the simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or reculant 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 to refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and straitened circumstances will paly prominently.”

32. In the light of the aforesaid principles, the Tax Recovery could

not have ordered detention of the petitioner solely on the ground that he had failed to pay an amount or give the proposal.

33. The authority of the respondent had therefore not arrived at a satisfaction that the conditions specified in clause (a) and (b) of Rule 73(1) were satisfied and had further not complied with the mandate of Rule 73(1) of recording the reasons of satisfaction in writing. The absence of satisfaction as well as recording of reasons vitiates the exercise of power of arrest. We are, therefore, of the considered view that the detention and arrest is patently illegal and arbitrary.

34. The records further reveals that the petitioner was not given reasonable opportunity as stipulated in Rule 74. The Tax Recovery Officer had not conducted any inquiry but on the very day of the hearing he had detained the petitioner and had advised him to give a proposal for payment. On the same day, on failure to give a proposal, the Tax Recovery Officer had arrested the petitioner and sent him to civil prison. The order is in total violation of principle of natural justice and is illegal and void. The Tax Recovery Officer has

exercised the power of arrest in total contravention of provisions. The impugned order is therefore arbitrary, illegal and void.

35. Since the Tax Recovery Officer had not undertaken to exercise of arriving at satisfaction of existence of condition precedent for passing an order under Rule 73(1), in our considered view, the interest of justice demands that the Tax Recovery Officer should be given a fair opportunity of arriving at appropriate finding as required by Rule 73(1) r/w 76(1).

36. As stated earlier, the arrest and detention of the petitioner is illegal, hence, he is entitled to be released forthwith. The apprehension of the respondent that the petitioner may go abroad if released, can be alleviated by imposing appropriate conditions and or securing an undertaking that he will not leave the country during the pendency of the proceedings. Learned Counsel representing the petitioner has also stated that the passport of the petitioner is already attached by the E.O.W. Crime Branch, Mumbai and there is no possibility of the petitioner leaving the country.

37. Under the circumstances, we pass following order :-

ORDER

(i) The Writ Petition is allowed.

(ii) The impugned orders dated 18.12.2014 and 29.12.2014 are quashed and set aside.

(ii) The petitioner is ordered to be released from the civil prison forthwith.

(iii) The matter is remitted to the Tax Recovery Officer with directions to decide the same afresh in accordance with law within a period of three weeks from the date of receipt of this order.

(iv) The petitioner shall not leave the country during the pendency of the proceedings before the Tax Recovery Officer.

(v) The EOW, Crime Branch, Mumbai shall not return the passport to the petitioner during the pendency of the proceedings before the Tax Recovery Officer.

(ANUJA PRABHUDESSAI, J.)

(RANJIT MORE, J.)