

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No. 94 of 2016**

Prem Sagar Gabhel S/o Dhaniram Gabhel, Aged About 50 Years R/o Village Minagi Thana Jobi, District Raigarh Chhattisgarh

---- **Petitioner****Versus**

1. Amrita Bai W/o Late Natthulal, Aged About 50 Years R/o Korkoma, Tehsil & District Korba Chhattisgarh
2. Ishwar Dutt Gautam, S/o Prem Dutt Gautam, R/o Madian Makuwa, District Datiya Madhya Pradesh, Presently R/o At Sakti, Tahsil And P.S. Sakti, District Janjgir Champa Chhattisgarh

---- **Respondents****And****WP227 No. 95 of 2016**

Prem Sagar Gabhel S/o Dhaniram Gabhel, Aged About 32 Years R/o Village Minagi Thana Jobi, District Raigarh Chhattisgarh

---- **Petitioner****Versus**

1. Raj Prasad Gupta, S/o Late Mangleswar Prasad Gupta, age 32 years.
2. Ku. Padma Gupta, D/o Mangleswar Prasad Gupta, age 29 years.
3. Natthulal Gupta, S/o Phoduram Gupta, age 68 years **(died)**
4. Amrika Bai, W/o Late Natthulal Gupta, age 50 years

All of us resident of Korkoma, District – Korba (C.G.)

5. Ishwar Dutt Gautam, S/o Prem Dutt Gautam, aged about unknown, R/o Madian Makuwa, District Datiya (M.P.), presently resided at Sakti, Tahsil and P.S. Sakti, District

Janjgir Champa (C.G.)

---- Respondents

For Petitioner	:	Shri Amit Sharma, Advocate.
For Respondents	:	Shri H.S. Patel, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

30/11/2016

(1) The petitioner herein is a judgment-debtor before the trial Court as he has suffered an award passed by Motor Accident Claims Tribunal. By the impugned order dated 20.11.2015, the said Court (M.A.C.T.), the trial Court has allowed the application for sending the petitioner/judgment debtor to civil jail as provided under Order 21 Rule 37 read with Rule 40 of the Code of Civil Procedure.

(2) Feeling aggrieved & dissatisfied with the order sending the petitioner/judgment-debtor to Civil Jail, instant writ petition under Article 227 of the Constitution of India has been filed. Since both the writ petitions involved common questions of law & facts, they are being disposed of by this common order.

(3) Mr. Amit Sharma, learned counsel appearing for the petitioner/judgment debtor would submit that remedy of execution by arrest and detention being extraordinary remedy, it could not have been granted by the trial Court/M.A.C.T. without holding the

enquiry as contemplated under Order 21 Rule 10 CPC and, therefore, impugned order is liable to be set aside.

(4) On the other hand, Mr. H.S. Patel, learned counsel appearing for the respondents/decreed holder would submit that the petitioner has attitude of not paying the award amount and has also filed a suit for declaring him insolvent, therefore, the decree holders have no option except to proceed under Order 21 Rule 37 of the CPC.

(5) I have heard learned counsel appearing for the parties at length and considered their rival submissions made therein with utmost circumspection.

(6) Section 51 of the Code of Civil Procedure deals with the powers of Court to enforce execution. One of the mode for enforcement of the execution under clause (c) of Section 51 is by arrest and detention in prison for such period not exceeding the period specified in Section 58, where arrest and detention is permissible under this section. Before the Court passes an order for detention the Court passes an order for detention the Court has to satisfy the conditions of the proviso to Section 51 which reads thus:

“51. Power of Court to enforce execution.- Subject of such conditions and limitations as may be prescribed, the Court may, on the application of the decree- holder, order execution of the decree-holder-

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by the sale without attachment of any property;
- (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];
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require;

Provided 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, as satisfied -

- (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,-
 - (1) 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 fiduciary capacity to account.”

(7) Order 21 of the Code of Civil Procedure deals with execution of decrees and orders. Arrest and detention in the Civil Prison is deal with from Rule 37 to 40 of Order 21. Order 21, Rule 37 speaks of discretionary power to permit judgment-debtor to show cause against detention in prison, relevant for the present case is extracted thus:-

“37.(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 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.

(8) On appearance of the judgment-debtor in compliance of notice, the proceedings are to take place in accordance with Rule

40 of Order 37, which reads thus:-

“Rule 40. Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.- (1)

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 given the judgment-debtor an opportunity of showing cause whey he should not be committed to the civil prison.

(2) 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.

(3) Upon the conclusion of the inquiry under sub-rule (1) the Court may, subject to the provisions of Section 51 and to the other provisions of this 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.”

(9) A careful perusal of the aforesaid legal provisions quoted above, it is quite vivid that when executing Court exercises discretion of issuing show cause to the judgment debtor against the detention in prison then executing Court has to follow the procedure laid down in clause (1) of Rule 40 of Order 21 which

provides that after notice issued under Rule 37; the Court shall proceed to hear the decree holder and to 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. As such, for holding of enquiry upon show cause, firstly evidence of decree holder and then the opportunity of hearing to the judgment debtor is necessary. Thus, the holding of enquiry is *sine qua none* for sending the judgment debtor in prison. In the case in hand, executing Court after issuing show cause did not hold any enquiry as contemplated of Clause (1) of Rule 40 of Order 21 nor has complied the conditions laid down in proviso to Section 51 so as to record its reasons after its satisfaction for detaining or sending the judgment -debtor in civil prison, as such holding of an enquiry under Order 21 Rule 40 CPC is mandatory.

(10) The petitioner has filed certified copy of the relevant order sheets. A careful perusal of the order sheet, it appears that application for sending the petitioner/judgment-debtor on civil prison was filed on 19.11.2009, on which time was granted to the decree holder to file reply but no enquiry was made on the said application to satisfy means of the judgment debtor and straightway, order for seeking the petitioner to civil jail has been passed.

(11) In the matter of Jolly George Varghese Vs. Bank of

Cochin¹, their Lordships of the Supreme Court has the Executing Court has to record finding on the present status of the debtors vis-a-vis the present pressure of indebtedness or whether they have had the ability to pay the debt and observed in paragraph 11 as under:-

“11. The words which hurt are “or has had since the date of the decree, the means to pay the amount of the decree.” This implies superficially read, that if at any time after the passing of an old decree the judgment-debtor had come by some resources and had not discharged the decree, he could be detained in prison even though at that later point of time he was found to be penniless. This is not a sound position apart from being inhuman going by the standards of Article 11 (of the Covenant) and Article 21 (of the Constitution). 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 of 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 play prominently. We would have, by this construction, saved law with justice, harmonised Section 51 with the Covenant and the Constitution.”

1 AIR 1980 SC 470

(12) Likewise, the High Court of Allahabad in the matter of **Mathura Prasad Sharma Vs. Parmeshthi Das**² has held that a Court cannot directly arrest the judgment-debtor where the decree-holder has not satisfactorily proved concealment of means to pay decretal amount.

(13) The High Court of Madhya Pradesh in the matter of **Subhash Chand Jain Vs. Central Bank of India**³, has held that holding of an enquiry under Order 21 Rule 40 CPC is mandatory before sending the judgment-debtor into the civil jail.

(14) Therefore, the order passed without following the mandatory provisions cannot be sustained and is quashed. The matter now shall go back to the executing Court for holding an enquiry as contemplated by clause (1) of Rule 40 of Order 21 and to record its reasons after its satisfaction as required by provision to Section 51 of the Code of Civil Procedure. The parties shall appear before the executing Court on **22nd December, 2016** of which notice shall not be given to the parties as they have notice here. If any of the parties fail to appear, the executing Court shall proceed to decide the application for sending the petitioner/judgment debtor in prison in accordance with law.

(15) It is made clear that the executing Court shall pass the orders within a period of two months from the date of appearance of the parties.

² AIR 1971 Allahabad 433 (V 58 C 115)

³ AIR 1999 MP 195

(16) Accordingly, the writ petitions stand allowed to the extent indicated above. No order as to costs.

Sd/-

(Sanjay K. Agrawal)

Judge

D/-