

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.38 OF 2016.

1. Mr. Cecil Fernandes,
Major of age, House No.1241,
Anna Vaddo,
Candolim, Goa.
2. Mrs. Precila Fernandes,
Major of age, House No. 1241,
Anna Vaddo,
Candolim, Goa.
Both represented by their duly
Constituted Attorney,
Mr. Kashinath Tukaram Kadam,
Major of age, Indian National,
residing at Alto Porvorim,
Bardez, Goa.

.... Petitioners

V e r s u s

1. Mr. Derrick Barnes,
Major of age,
Residing and having his
Place of work at
Juhu Blue Sea Apts.,
Flat No. A/22,
Juhu, Mumbai 400 049.

.... Respondent.

Mr. J. Coelho Pereira, Senior Advocate with Adv. Mr. V.
Korgaonkar for the Petitioners.
Mr. V. Salatry, Advocate for the Respondent.

CORAM: S. B. SHUKRE, J.
DATE : 8TH MARCH, 2016.

ORAL JUDGMENT:

Heard. Rule. Rule made returnable forthwith. Heard
finally by consent of the parties.

2. By this Writ petition, a roznama order dated 18/11/2014 purportedly passed on the application filed under Order 21 Rule 38 of C.P.C. for issuance of warrant of arrest to the judgment debtor(Exhibit D-14) has been challenged.

3. When an application under Order 21 Rule 38, C.P.C. praying for issuance of warrant of arrest of the Judgment Debtor is passed, without issuing a show cause notice, it would be necessary for the Executing Court to record its satisfaction as to why such notice is not necessary. Order 21 Rule 37 clearly lays down that a notice need not be issued to the judgment debtor only when the Court is satisfied, by affidavit or otherwise, that, the judgment debtor, with the object or effect of delaying the execution of the decree, is likely to abscond or leave the local limits of the jurisdiction of the Court. Such satisfaction must be reflected in a specific order passed on an application seeking exercise of discretion by the Court under Order 21 Rule 38 C.P.C. This order, has not been passed in this case and what exists is only some noting in the roznama of the date 18/11/2015.

The noting in the roznama is not an order passed on any application and does not have the same status as an order which is required to be passed under a statutory provision. Thus, the entire action taken by the learned Civil Judge, Senior Division in this case by issuing a warrant of arrest is without jurisdiction.

4. It must be mentioned here that the order of arrest and detention in civil prison in execution of a decree is a drastic step which can be taken only after the Executing Court is satisfied, in view of provision of section 51 of C.P.C., that inspite of being possessed of sufficient means, the judgment debtor is refusing or neglecting to discharge the duty under the decree being executed against him. That apart, the notice as required under the law can be dispensed with only when the Court is satisfied that with a view to delay the execution of the decree the judgment debtor is likely to make himself unavailable for the Court to enforce the execution of decree against him. This satisfaction, as stated, is absent in this case and therefore the impugned orders dated 18/11/2015 cannot be sustained in the eye of law. It

is also seen from the record that similar order which was without jurisdiction was passed on 17/9/2014 by the learned civil judge. That order also needs to be interfered with.

5. Learned Senior Counsel for the petitioners has referred to me the cases of (1) **Jolly George Varghese and anr. Vs. The Bank of Cochin**, reported in AIR 1980 SC 470 and (2) **Pundlik s/o Mahadu Nazire Vs. Maharashtra State Farming Corporation**, reported in AIR 1992 Bombay 48 and the learned counsel or the respondent has referred to me, the case of **Shri Ram Murty Goel Vs. Union of India and others**, in Writ Petition No.227 No.962 of 2010 dated 28/4/2011 by the High Court of Chattisgarh. These cases, particularly, the case of **Jolly George Varghese and anr.** explain the law on the subject and which has been summarized by me in the aforesaid paragraphs. The learned Civil Judge shall go through these judgments and apply the principles stated therein to the facts of this case in accordance with law.

6. In the result the writ petition is allowed. The

impugned orders dated 18/11/2015 and 17/9/2014 are hereby quashed and set aside. The learned Civil Judge shall consider the application vide Exhibit D-14 afresh in accordance with the settled principles of law as discussed earlier.

7. Rule is made absolute in these terms.

S. B. SHUKRE, J.

Ap/-