

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.03.2017

CORAM

THE HON'BLE DR.JUSTICE P.DEVADASS

C.R.P.(PD) No.3747 of 2011 &
MP.No.1 of 2011

Ramasamy .. Petitioner/Judgment
Debtor/Defendant

Vs.

Pushpa .. Respondent/Decree
Holder/Plaintiff

This Civil revision is filed under Section 115 of the Civil Procedure Code against the order, dated 07.09.2011 passed in E.P.No.99 of 2007 in O.S.No.3 of 2005 on the file of the Principal Subordinate Judge, Tiruvannamalai.

For Petitioner : Mr.K.Kovaiganesan
For Respondent : Mr.W.M.Abdul Majeed for
Mrs.G.Sumitra

ORDER

This is a judgment debtor's revision as against the order of the learned Principal Sub Judge, Tiruvannamalai in E.P.No.99 of 2007 in O.S.No.3 of 2005 directing his arrest and detention in Civil prison for not discharging a decree debt.

2. In O.S.No.3 of 2005 on the file of the learned Principal Sub Judge, Tiruvannamalai, the plaintiff/respondent sued the defendant/revision petitioner for Rs.1,65,000/- with 9% interest p.a. and with future interest @ 6% p.a. due on a debt found on a promissory note. Ultimately, on 14.11.2006, the suit was decreed. The defendant became a judgment debtor. The plaintiff became a decree holder.

3 To collect the decree debt now amounting to Rs.2,38,091/- the decree holder levied execution in E.P.No.99 of 2007 by arresting the judgment debtor and putting him in civil prison. The Execution Court issued him show cause notice. He appeared. He filed his counter. He pleaded no means. Enquiry was conducted. The decree holder let in 'means evidence'. The judgment debtor let in 'no means evidence'.

4 Upon appreciating their evidence oral and documentary, the Execution Court concluded that since the judgment debtor is receiving pension and he is also having a share in a joint family property, he has means (financial capacity) to satisfy the

decree debt, but he has no intention to discharge the same. Thus, ordered his arrest and detention in civil prison.

5 Aggrieved, the judgment debtor/revision petitioner has directed this revision.

6 The learned counsel for the revision petitioner would contend that before ordering his detention, the Execution Court must come to a conclusion that inspite of having sufficient means, the judgment debtor had refused, neglected to pay the decree debt. The decree holder must prove the financial soundness of the judgment debtor. This has to be proved through means evidence. However, in this case, it was not so established.

7 The learned counsel for the revision petitioner further contended that right to live has been constitutionally guaranteed in this country in Article 21, Constitution of India. On account of inability to pay debt, sending a person to jail is depriving him of his liberty in an inhuman way.

8 In this connection, the learned counsel for the revision petitioner would cite **Jolly George Varghese and another vs. The Bank of Cochin [(1980)2 SCC 360]** and **Senthil Kumar vs. K.M.N. Surendran [2012(3) CTC 294]**.

9 On the other hand, the learned counsel for the respondent would contend that by means evidence, it has been established that the judgment debtor is in receipt of pension and he is also having properties which he could have disposed of and raised money but he did not do so because he has no intention to do so. In such circumstances, the Execution Court has rightly ordered his detention in civil prison. There is no flaw in its order. The decisions cited are not applicable to the facts of this case.

10 I have anxiously considered the rival submissions and perused the impugned order, materials on record and the decisions cited.

11 While the Code of Civil Procedure, 1908 providing for passing of decrees, it had also prescribed several modes by which

such decrees could be executed through Execution Court. Let us notice them hereunder with special emphasis on the mode of execution by arrest and detention of a judgment debtor in civil prison.

12 Section 51 C.P.C. dealing with powers of Court to enforce execution runs as under:

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

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison;
- (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, is satisfied-

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

Explanation.-In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree. (Emphasis supplied) .

13 We shall immediately refer to order 21, Rule 37 C.P.C. which runs as under:

"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 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:

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."

14 A combined reading of Section 51(c) and Order 21, Rule 37, 40 C.P.C. shows importation of principles of natural justice to Civil Procedure Code, 1908. They provide for conducting a fair enquiry and giving of opportunity to both sides.

15 Certain conditions have been imposed upon the decree holder for ordering the detention of a (judgment) debtor in civil prison. The decree holder must clearly establish the means, that means the financial ability of the judgment debtor to pay the decree debt. The Execution Court must record a clearcut finding on this aspect **(See P.G.Ranganathan Padayatchi vs. Mayavaram Financial Corporation [A.I.R. 1974 Mad 1] also see M.M.Saleem**

vs. R.Praveen Kumar Reddy [(2010(5) CTC 469)].

16 The said provisions of procedural law are in plain words. They are in printed form. They will not speak. Judges have to make these inanimate words to speak by their interpretation. They are in bone form. Flesh, blood and vein to it have to be supplied by the Judges.

17 'Law' and 'Justice' are not synonymous. But they are not antonymous. They shall not be pitted as against each. Law can be found in big books and in bare Acts. Where is justice ? What it is ? In what form it is ? What is the colour of it; Justice is in us. It is with the Judges. It is with everybody. It is in every one's action. Law and justice must be on speaking terms. Law should not be static. It must be dynamic. It must be a living and growing organ. That will be growth of law. Then, there will be 'march of law'.

18 The year 1948 seen the birth of Universal Declaration of Human Rights. The year 1950 witnessed the birth of a Republican Constitution in India. While intending to have a democratic form of Government to have a Socialistic pattern of society, in Part III of the

Constitution of India, our Founding Fathers have laboured much to provide us certain Basic Rights. They are Fundamental Rights. Part III of the Constitution is the bedrock of the Rights of the Individuals.

19 Article 21 of the Constitution proclaims that "no person shall be deprived of his life or personal liberty except according to procedure established by law". This articles, Article 21 is the Cindrella of lovers of Civil liberties. It is more than British Magna Carta and the American Bill of Rights. Of course, Article 21 is couched in few lines. The very basis of human right to live with dignity has been guaranteed in these few lines. Less of it; life and liberty will be miserable. It is a basic features of our Constitution. It cannot be tinkered with by the Executive. (See **Kesavananda Barathi vs. State of Kerala [(1973)4 SCC 225]**).

20 In **MANEKA GANDHI vs. UNION OF INDIA (AIR 1978 SC 597)** the Hon'ble Supreme Court put in many live words into the phrases 'life and liberty' in Article 21, Constitution of India by holding that the procedure by which liberty of person is taken away must be 'fair', 'reasonable' and 'not unjust'.

21 In **JOLLY GEORGE VARGHESE AND ANOTHER VS. THE BANK OF COCHIN [(1980)2 SCC 360]** the Hon'ble Supreme Court widened the umbrella of protection of Article 21, Constitution of India, not only to persons arrested in criminal cases but also to persons arrested in execution of a money decree under Order XXI, Rule 37 of C.P.C. The Hon'ble Apex Court laid down that poverty/inability to pay a debt cannot be a reason to send a person to jail, let it be a civil prison.

22 Actually, close on the heels is Article 11, International covenant on Civil and Political Rights which declared that "no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation." Liability to pay a debt arose under a promissory note is an instance of a contractual obligation. India being a signatory to the said International Covenant, as per Article 51(c) of the Constitution of India, it will have its repercussion in our Municipal law.

23 It is apposite here to notice the following glittering

words in a judgment of Kerala High Court made in **XAVIER VS. CANARA BANK LTD. (1969 KLT 927)**:

"The march of civilization has been a story of progressive subordination of property rights to personal freedom; and a by-product of this subordination finds noble expression in the declaration that "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation." This revolutionary change in the regard for the human person is spanned by the possible shock that a resuscitated Shylock would suffer if a modern Daniel were to come to judgment when the former asks the pound of flesh from Antonio's bosom according to the tenor of the bond, by flatly refusing the mayhem on the debtor, because the inability of an impecunious oblige shall not imperil his liberty or person under the new dispensation proclaimed by the Universal Declaration of Human Rights. Viewed in this progressive perspective we may examine whether there is any conflict between section 51 CPC and Article 11 of the International Covenants quoted above. As already indicated by me, this latter provision only interdicts imprisonment if that is sought solely on the ground of inability to fulfill the obligation. Section 51 also declares that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of

bad faith, he incurs the liability to imprisonment under s. 51 of the Code, but this does not violate the mandate of Article 11. However, if he once had the means but now has not or if he has money now on which there are other pressing claims, it is violative of the spirit of Article 11 to arrest and confine him in jail so as to coerce him into payment....."

24 In **Jolly George** (supra), the Hon'ble Supreme Court referring to Section 51, Order XXI Rule 37 to 40 C.P.C. has to hold as under:

"10. Equally meaningful is the import of Art. 21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and the worth of the human person enshrined in Art. 21, read with Arts. 14 and 19, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence. **Maneka Gandhi's** case (1978)¹ SCC 248) as developed further in **Sunil Batra v. Delhi Administration** [(1978)⁴ SCC 494] **Sita Ram & Ors. v. State of U.P.**[(1979)² SCC 656] and **Sunil Batra v. Delhi Administration (W.P.No.1009 of 1979 dated 20.12.1979)** lays down the proposition. It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in

this land of daridra Narayana, is no crime and to 'recover' debts by the procedure of putting one in prison is too flagrantly violative of Art. 21 unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Art. 11 of the Covenant. But this is precisely the interpretation we have put on the proviso to Section 51 C.P.C. and the lethal blow of Art. 21 cannot strike down the provision, as now interpreted.

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 Art. 11 (of the Covenant) and Art. 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, sauced law with justice, harmonised Section 51 with the Covenant and the Constitution."

25 In **SENTHIL KUMAR VS. K.M.N. SURENDRAN [2012(3) CTC 294]**, a learned Judge of this Court applied the ratio in **JOLLY GEORGE** to a judgment debtor.

26 Now, it is firmly settled that even in an execution petition under Order XXI Rule 37 C.P.C., simply because the decree holder wishes that the judgment debtor should be made to count the bars of a Civil prison on account of his inability to pay the decree debt, the Court could not send the debtor to jail unless he has current ability to clear off the debt or he has malafide refusal or he has some other vice or mens rea apart from his failure to foot the decree.

27 In the light of the above principles, elucidations, now

we will revert back to the case at our hand.

28 In the impugned order passed by the Execution Court, directing the arrest and detention of the judgment debtor in Civil Prison, the Execution Court quotes two instances to show that he has means to discharge the decree debt, namely, he is in receipt of pension and he has property. Now, we will proceed to assess this assertion of the trial Court in the light of the evidence adduced.

29 The judgment debtor retired as a Clerk from Food Corporation of India. He got voluntary retirement. It is also a retirement. Pension is a financial support to a person in the evening of his service. Pension will not be equal to full pay. It will be less of house rent allowance and other allowances. It will be half. It would not be bountiful. Especially to a person like the petitioner it will be hand to mouth. A whole family is living on the pension amount. There may be hungry mouths. That apart there is dearth of materials as to what is the exact amount of pension being received by him, whether is there any surplus after defraying his survival expenses. In such circumstances, Execution Court ought not to have

taken into account the pension amount.

30 The second ground taken by the Execution Court is that the judgment debtor has lot of properties. In this respect, the Execution Court had referred to Ex.R1 to R3. These are copies of the execution proceedings before the Principal Sub Judge, Kallakurichi, Villupuram District. It emerges that the judgment debtor is heavily indebted. There seems to be scramble among his creditors to bounce upon him. One of the decree holder was much ahead of the present decree holder/respondent. He seems to have realised his decree debt to the extent of Rs.70,000/- by purchasing 1/5th of undivided share of the judgment debtor in a Court auction held in 2005 as a permitted decree holder. That apart it had taken place in 2005. It was much prior to the present Execution petition. Now referring to it is irrelevant and inappropriate.

31 In **Jolly George** (supra), the Hon'ble Supreme Court clearly ruled that based on his earlier financial position, a person cannot be send to civil prison. His current financial position alone have to be taken into account to. Thus, the second ground taken by

the Execution Court to send the petitioner to jail is also not correct.

32 In this case, the means evidence let in by the decree holder does not establish that the judgment debtor has means, but failed, refused and neglect to satisfy the decree debt. In such circumstances, the Execution Court fell into error, misdirected itself in ordering the arrest and detention of the petitioner in civil prison. The said order is flawed. It calls for our interference in exercise of our revisional jurisdiction to correct this legal error committed by the Execution Court.

33 In view of the foregoing reasonings, it is ordered as under:

(1) This revision succeeds.

(2) The impugned order passed by the learned Principal Sub Judge, Tiruvannamalai in E.P.No.99 of 2007 in O.S.No.3 of 2005 is set aside.

(3) Consequently, connected miscellaneous petition is closed. However, in the circumstances, no costs.

13.03.2017

Speaking/Non Speaking order

Index : Yes

Internet : Yes

vaan

Note: Issue order copy on 23.3.2017

DR.P.DEVADASS, J.

vaan

Note:

The Registry is directed to place this order before My Lord, the Hon'ble Acting Chief Justice, for orders to circulate copies of the same among the Judicial officers in Tamilnadu and in the Union Territory of Puducherry as it contains certain guidance on an important aspect of civil procedure and constitutional perspective.

To

- 1 The Principal District Judge,
Tiruvannamalai
- 2 The Principal Subordinate Judge,
Tiruvannamalai.

Copy to

- 1 The Registrar (Judicial)
- 2 The Assistant Registrar,
(Appellate side)
High Court, Madras.
- 3 The Director,
Tamilnadu State Judicial Academy,
Greenways Road,

R.A.Puram,
Chennai - 28.

C.R.P.No.3747 of 2011 &
MP.No.1 of 2011

Dated: 13.3.2017