

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.02.2018

CORAM

THE HONOURABLE MR. JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P.NO.38714 OF 2016
AND WMP NO.33169 OF 2016

Suresh Pillai .. Petitioner
VS.

1.The Recovery Officer
Debts Recovery Tribunal - II
Chennai.

2.Debts Recovery Tribunal - II
Rep. by its Registrar
4th Floor, Dewa Towers,
770A, Anna Salai, Chennai - 2.

3.Indian Bank
M.G.T. Branch
No.321, Old No.155, Thambu Chetty Street,
Chennai - 600 001.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified Mandamus, to call for the papers with respect to the orders dated 03.10.2016 passed in M.A.No.42 of 2014 in DRC 209 of 2012 by the first respondent herein and quash the same and further direct the second respondent herein to take the Appeal S.R.No.9816/2016 on record and dispose the same on merits.

For Petitioner : Mr.Srinath Sridevan
For Respondent-3 : Mr.P.K.Paneer Selvam

O R D E R

(ORDER OF THE COURT WAS MADE BY M.GOVINDARAJ, J.)

Whether personal liberty enshrined under Article 21 of the Constitution of India is violated, in view of Article 11 of the International Covenant on Civil and Political Rights, by

issuing a show cause notice for arrest and detention of a judgment debtor, while executing a decree under Section 25(b) of Recovery of Debts Due to Banks and Financial Institutions Act, 1993, read with Regulation 35(1) of Debts Recovery Tribunal- II Chennai Regulations 2015 or not? Whether the High Court, while exercising jurisdiction under Article 226 of the Constitution of India can interfere in recovery proceedings, de hors the availability of appeal remedy under the relevant statute or not? are the issues to be decided.

2. Admittedly, the writ petitioner and his wife, Directors of the Company have suffered a decree in O.A.No.61 of 2011 dated 17.10.2012 on the file of the Debts Recovery Tribunal, Chennai. The decree passed on merits, after contest has become final, and no appeal has been preferred. The respondent Bank sought to execute the decree in DRC No.209/2012. During the pendency of the recovery proceedings, the writ petitioner offered for a One Time Settlement (OTS) by a letter dated 22.11.2013 and 17.12.2013, for 1.50 Crores. By letter dated 20.02.2014, the Bank offered to settle the loan for Rs.237.00 Lakhs under OTS. On behalf of his company, the writ petitioner, sought for confirmation for settlement for Rs.210 Lakhs, as per the negotiations with the Bank. On 08.09.2014, the Bank accepted the proposal for OTS, for a sum of Rs.2,15,00,000/- to be paid on or before 07.03.2015. Responding to the same, the writ petitioner acknowledged the confirmation and promised to settle the amount, as per the terms of acceptance and pay the full amount on or before 07.03.2015, as stipulated by the Bank, by his letter dated 15.09.2014. As per the terms agreed, in the event of default, the respondent Bank is entitled to recover the entire dues i.e., a sum of Rs.4,15,26,878.33 together with future interest.

3. When the original application was pending before the Debts Recovery Tribunal, the respondent Bank has lodged a complaint with Central Bureau of Investigation (CBI) for criminal conspiracy, cheating, forgery against the writ petitioner and for using forged document as genuine and criminal misconduct by public servant, abusing official position by a public servant against unknown public servants, under Section 120-B read with Sections 420, 468 and 471 IPC and 13(2) read with 13(1)(d) of PC Act 1988 and the same was registered in FIR No.RC.4(S)/2012/CBI/SCB/Chn dated 30.04.2012. The main allegation is that the writ petitioner conspired with his Auditors, fudged the balance sheet and cheated the Bank in securing the loan amount.

4. The respondent Bank, for the default in payment, proceeded with the recovery proceedings and filed a petition for arrest and detention of the writ petitioner. After contest, the Recovery Officer ordered Show Cause Notice in MA No.42/2014 in DRC No.209/2012 dated 03.10.2016. Against which, the writ

petitioner preferred an appeal in, Appeal SR No.9816/16 dated 19.10.2016 under Section 30(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The appeal was not numbered for want of pre-deposit and consequent on which the petitioner preferred the instant writ petition complaining violation of Article 21 of the Constitution of India and useless formality theory, to set aside the order and sought for a direction directing the Tribunal to number the appeal without payment of pre-deposit.

5. Relying on the judgment of Justice V.R.Krishna Iyer in JOLLY GEORGE VARGHESE AND ANOTHER VS. THE BANK OF COCHIN [1980 (2) SCC 360] the learned counsel for the petitioner would contend that when the writ petitioner has clearly pleaded and proved that he has no means, borne out by documents like, income tax returns and the bank on the other hand, has failed to prove means of the petitioner. Therefore, show cause notice issued for personal appearance is only an empty formality and if he appears, he will be arrested and detained in civil prison. Hence, the order to show cause is liable to be set aside. He further submitted that a person of no means shall be permitted to contest the matter in appeal, without insisting on pre-deposit.

6. Per contra, the learned counsel for the respondent Bank would contend that the writ petition is not maintainable against a show cause notice. Even if the notice ordered to show cause in not conformity with the regulations, there is an alternative remedy of appeal, available under the statute. The petitioner is not entitled to any relief, as he has indulged in fudging the accounts and cheated the Bank. A criminal complaint is also pending against him, on the file of CBI. He further submitted that Three Judges Bench of the Hon'ble Supreme Court has categorically held that arrest and detention in execution proceedings is not violative of Article 21 of the Constitution and for the abovesaid reasons, prayed for the dismissal of the writ petition.

7. Heard the rival contentions.

8. The points to be decided in the above writ petition are that;

a) Whether the personal liberty enshrined under Article 21 of the Constitution of India is violated by the impugned order, in view of Article 11 of the International Covenants on Civil and Political Rights.

b) Whether the International Covenants prevail over Municipal Law.

c) Whether the petitioner is a honest judgment debtor and the Bank has proved his means.

d) Whether the High Court can interfere in recovery proceedings at the show cause notice stage, more so, when an appeal remedy is available under the statute.

9. Hon'ble Justice V.R.Krishna Iyer in JOLLY GEORGE VARGHESE's case reported in 1980 (2) SCC 360 observed that "No one shall be imprisoned, merely on the ground of inability to fulfil a contractual obligation". Revered Lordship further held that,

"The position has been spelt out correctly in a Kerala ruling on the same point. In that case, a judgment-debtor was sought to be detained under O. 21, r. 37 C.P.C. although he was seventy and had spent away on his illness the means he once had to pay off the decree. The observations there made are apposite and may bear exception:

The last argument which consumed most of the time of the long arguments of learned counsel for the appellant is that the International Covenants on Civil and Political Rights are part of the law of the land and have to be respected by the Municipal Courts. Article 11, which I have extracted earlier, grants immunity from imprisonment to indigent but honest judgment-debtors.

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 s. 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 fulfil 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.....

10. Further, observed 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 as developed further in Sunil Batra v. Delhi Administration, Sita Ram & Ors. v. State of U.P. and Sunil Batra v. Delhi Administration 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 s. 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 recalcitrant 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 s. 51 with the Covenant and the Constitution."

11. From the above decision, it can be inferred that there shall be minimal proof of wilful failure on the part of the judgment debtor and a fair procedure be adopted in finding as to whether he has the ability to pay, but have improperly evaded or postponed in doing so, or otherwise, dishonestly committed acts of bad faith. The underlining element is that a judgment debtor must be a honest person and unable to honour his

obligations. In such cases, according to Justice V.R.Krishna Iyer, fundamental rights of living with dignity shall not be taken away. In cases, where there is some other vice or mens rea, apart from failure to foot the decree, International Covenant on Civil and Political Rights will not apply.

12. Hon'ble Justice V.R.Krishna Iyer in JOLLY GEORGE VARGHESE's case (cited supra) also concurred with the construction of Section 51 of Code of Civil Procedure, which deals with the modes of execution of a decree, that quondam difference and current indigence without intervening dishonesty or bad faith, in liquidating his liability, can be consistent with Article 11 of the covenant, because no detention is permissible under Section 51 of Code of Civil Procedure.

13. The view of Law Commission, in its 54th report on Section 51(b) has been extracted, in the judgment by a three Judges Bench in RAM NARAYAN AGARWAL AND OTHERS VS. STATE OF UTTAR PRADESH AND OTHERS [1983 (4) SCC 276] as under:

"Situation in Section 51 (b)-
1-E. 12. Perhaps, it could be argued that imprisonment of the judgment-debtor in the situation in section 51, proviso, clause (b) causes hardship. That clause applies where the judgment-debtor (i) has the means and refuses or neglects to pay or (ii) has had the means and has refused or neglected to pay. The essential condition in either case is the possession of means, coupled with contemporaneous failure or neglect to pay. Imprisonment, if it follows in such cases, is not based on mere non-payment nor on mere inability to pay, but is confined to cases where a person is able to pay and dishonestly makes default in payment.

1-E.13. It will, thus, be seen that the provisions as to arrest do not violate the provision in the International Covenant, as they are not based on mere non-fulfilment of a contract. Further, even apart from their consistency with the Covenant, they are justifiable on principle because the conduct which attracts their operation is dishonest. Technically, no crime is committed, as there is no bodily harm to the decree-holder or direct harm to society. But, to deprive another person of this lawful dues when one has the means to pay is, in the special situations to

which section 51, proviso, is confined ultimately causing harm to society, which suffers if an individual member suffers by reason of the dishonest conduct of another member.

Present law sufficiently restrictive.

1-E.14, We are, therefore, of the view that so far as the cases in which arrest may be ordered are concerned the law in India is sufficiently restrictive, except in two respects, which we shall presently discuss. This mode of execution should not, therefore, be totally abolished.

The situations mentioned in the proviso to section 51-which is the section dealing with arrest in execution of decrees for payment of money-are those which indicate fraud or clandestine designs on the part of judgment-debtor. Mere inability to perform the obligation to repay a loan (or other monetary obligation) does not result in imprisonment."

14. On the basis of the report, the Hon'ble Supreme Court has declared that the mode of recovery in execution proceedings, by arrest and detention, are not unconstitutional, in the following lines:

"The foregoing shows that in the contemporary Indian conditions the process of arrest and detention of a judgment-debtor or a defaulter to enforce payment of the amount due from him is not altogether unreasonable. It cannot be held to be unconstitutional if there are sufficient safeguards which make the process conform to reasonable standards. "

15. Therefore, it can be inferred that when there is an element of bad faith, dishonesty, wilful evasion or neglect or indifference to pay or some deliberate or reasonable disposition, arrest and detention cannot be said to violate personal liberty enshrined in Article 21 of the Constitution of India. Larger Bench has declared that, arrest is not by way of punishment, but to recover the arrears of public money.

16. Justice V.R.Krishna Iyer in JOLLY GEORGE VARGHESE's case (cited supra) had also discussed the effect of International Law and enforceability, as held by the Kerala High

Court in XAVIER VS. CANARA BANK LTD., [1969 KLT 927] has held under:

"The judgment dealt with the effect of international law and the enforceability of such law at the instance of individuals within the State, and observed:

The remedy for breaches of International Law in general is not to be found in the law courts of the State because International Law per se or proprio vigore has not the force or authority of civil law, till under its inspirational impact actual legislation is undertaken. I agree that the Declaration of Human Rights merely sets a common standard of achievement for all peoples and all nations but cannot create a binding set of rules. Member States may seek, through appropriate agencies, to initiate action when these basic rights are violated; but individual citizens cannot complain about their breach in the municipal courts even if the country concerned has adopted the covenants and ratified the operational protocol. The individual cannot come to Court but may complain to the Human Rights Committee, which, in turn, will set in motion other procedures. In short, the basic human rights enshrined in the International Covenants above referred to, may at best inform judicial institutions and inspire legislative action within member-States; but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of judicial authority.

While considering the international impact of international covenants on municipal law, the decision concluded:

Indeed the construction I have adopted of s. 51, CPC has the flavour of Article 11 of the Human Rights Covenants. Counsel for the appellant insisted that law and justice must be

on speaking terms-by justice he meant, in the present case that a debtor unable to pay must not be detained in civil prison. But my interpretation does put law and justice on speaking terms. Counsel for the respondent did argue that International Law is the vanishing point of jurisprudence is itself vanishing in a world where humanity is moving steadily, though slowly, towards a world order, led by that intensely active, although yet ineffectual body, the United Nations Organisation. Its resolutions and covenants mirror the conscience of mankind and insominate, within the member States, progressive legislation; but till this last step of actual enactment of law takes place, the citizen in a world of sovereign States, has only inchoate rights in the domestic Courts under these international covenants."

17. Ultimately held that the positive commitment of the States parties ignites legislative action at home, but does not automatically make the covenant an enforceable part of the Corpus juris of India. On the facts and circumstances of this case, we are of the view that International Covenant will not prevail over Municipal Law.

18. In the instant case, it is admitted that the decree passed on merits, after contest, has become final and the writ petitioner is liable to pay the decree amount with interest. Whether the writ petitioner, as claimed by him, is an innocent, honest person having no means to pay is an important issue to be discussed. The past conduct of the writ petitioner, as claimed by him in voluntarily settling his immovable property in favour of another creditor, namely Canara Bank, who had the charge over the property, had left him without means. Even assuming that the petitioner has no other immovable property, will it make him a person of no means, much less a honest person ?. At the first instance, income tax returns and balance sheets produced by him to woo the bank and the income tax returns filed present to show that he has no means except his salary to the tune of One Lakh speaks volumes on his conduct.

19. Be that as it may, the contention of the petitioner that he had offered to pay Rs.30,000/- per month from his salary to discharge the debt does not augur well, for the said amount

will not even satisfy a portion of interest chargeable by the banks for an outstanding of around 4 crores in 2015.

20. Further, the writ petitioner had offered for One Time Settlement (OTS), ever since the filing of the recovery proceedings in DRC No.209/2012, much less from 22.11.2013. Finally, Bank has agreed to settle the matter at Rs.237 Lakhs, which was accepted by the writ petitioner and after negotiation, it was reduced to Rs.215 Lakhs. Even after confirmation, the writ petitioner failed to comply with his promise. The Company owned by him is the asset to enter into settlement / negotiations. But, a person, who had offered to settle the dues on or before 07.03.2015, shall not go back on his promise or offer, and suddenly plead, no means. Either way, statement that there existed a possibility of One Time Settlement for Rs.215 Lakhs or the statement that he is a man of no means, within a short period, runs contrary to each other. The writ petitioner has not approached the Court with clean hands.

21. From the conduct of the writ petitioner, we have no hesitation to find that he is not a honest person but has deliberately acted with supine indifference and evaded payment. Therefore, he is not entitled to any equitable relief.

22. The Hon'ble Supreme Court in COMMISSIONER OF INCOME TAX AND OTHERS VS. CHHABIL DASS AGARWAL [2014 (1) SCC 603] has held that:

" 15.....while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titagarh Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory

dispensation. "

23. The next issue to be considered is as to whether the High Court can intervene the recovery proceedings at the show cause notice stage, more so, when an appeal remedy is available under the relevant statute. As discussed above, the writ petitioner has not acted in good faith. Even then, he is entitled to a fair procedure and reasonable opportunity. He was served with notice and filed his counter. He was given ample opportunity to effectively contest his case. As per Section 25 and Regulation 35(1) a certified debtor shall be given opportunity to show cause as to why he shall not be arrested and detained in civil prison.

24. Relevant regulation of Debts Recovery Tribunal - II, Chennai Regulations, 2015 is as under:

"35. Arrest and detention in Civil Prison

(1) Whether the amount of R.C. is sought to be recovered by arrest and detention of a C.D. in the civil prison, the Recovery Officer shall issue show cause notice in Form - 17 calling upon him to appear before him on the date 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 Recovery Officer is satisfied, by affidavit or otherwise, that, with the object or effect of delaying the recovery, the C.D. is likely to abscond or leave the local limits of the Tribunal."

25. As per the regulation, the Recovery Officer, by his adjudication dated 30.01.2016 has ordered notice, to show cause in person as to why he shall not be arrested and detained in civil prison.

26. As held by the Hon'ble Supreme Court, the Tribunal has not passed any order to impose punishment but adhered to the procedure laid down by the statute, in conformity with the principles of natural justice. At this juncture, it is open to the writ petitioner to appear before the Tribunal and prove his bonafides. It is premature for the High Court to interfere in the recovery proceedings, when there is no illegality or irregularity, causing miscarriage of justice. In a similar situation, High Court of Calcutta, in a judgment dated 16.07.2013 in W.P.No.4014 (W) of 2004 between SUBHASH CHANDRA SAHA VS. RPFC AND OTHERS has held that " it is not also in

dispute that the petitioner has not filed reply to the said show cause notice. If law requires certain parameters and / or formalities to be followed and / or adhered to before issuing warrant of arrest, the Court would not presume that the authority would not follow the said provision". Therefore, the contention that it is an empty formality and that the Recovery Officer will arrest the petitioner is untenable, and premature.

27. Further, the Hon'ble Supreme Court in UNITED BANK OF INDIA VS. SATYAWATI TANDON AND OTHERS [2010 (8) SCC 110] has categorically observed as under:

"30. The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors.

The Court in appropriate cases in its discretion may direct the State or its instrumentalities as the case may be to file proper affidavits placing all the relevant facts truly and accurately for the consideration of the Court and particularly in cases where public revenue and public interest are involved. Such directions are always required to be complied with by the State. No relief could be granted in a public law remedy as a matter of course only on the ground that the State did not file its counter-affidavit opposing the writ petition. Further, empty and self-defeating affidavits or statements of Government spokesmen by themselves do not form basis to grant any relief to a person in a public law remedy to which he is not otherwise entitled to in law."

When appeal remedy is available, the High Court cannot interfere with the proceedings.

28. It only remains to be decided as to whether the petitioner is entitled to the second part of the prayer, to direct the Tribunal to number the appeal filed by him. As discussed above, we find that the writ petitioner has not proved that he has acted in good faith. The past conduct and serious allegations in fudging the accounts with an ulterior motive, precludes us from granting the equitable relief, in favour of the petitioner. If at all the petitioner is aggrieved over the return of the appeal for non-compliance of statutory requirement, he would have bonafidely approached this Court with appropriate, independent petition. Seeking a prayer under the pretext of challenging the order, does not reveal any bonafide on the other hand it lacks bonafide.

29. In the light of the above discussion, we are of the view that the writ petitioner is not deprived of his personal liberty enshrined under Article 21 of the Constitution of India, as the action taken, is in accordance with due procedure of law. The petitioner lacks bonafides and therefore, not entitled to the benefit of Article 11 of the International Covenant on Civil and Political Rights. The claim that he is entitled to Article 17 of the above mentioned covenant, is also not available to him, as there is no intrusion of privacy or attack on his honour and reputation. The judgment of the Hon'ble Supreme Court in PEOPLE'S UNION FOR CIVIL LIBERTIES (PUCL) VS. UNION OF INDIA AND ANOTHER [1997 (1) SCC 301], is not applicable to the writ petitioner.

30. In fine, the petitioner is not entitled to any relief and the writ petition is accordingly dismissed. No costs. Consequently, connected miscellaneous petition is closed.

सत्यमेव जयते

Sd/-

Assistant Registrar(CO)

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//True copy//

Sub Assistant Registrar

TK

To

1.The Recovery Officer
Debts Recovery Tribunal - II
Chennai.

2.The Registrar ,
Debts Recovery Tribunal - II
4th Floor, Dewa Towers,
770A, Anna Salai, Chennai - 2.

3.Indian Bank
M.G.T. Branch
No.321, Old No.155, Thambu Chetty Street,
Chennai - 600 001.

+2cc to Mr.P.K.Pannerselvam, Advocate SR.No.7827
+1cc to Mr.Srinath Sridevan, Advocate SR.No.7845

W.P.NO.38714 OF 2016

SSD(CO)
GN(23/02/2018)



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