

HIGH COURT OF CHHATTISGARH AT BILASPUR**WP227 No. 185 of 2019**

1. Motilal Sahu, S/o Puran Sahu, Aged about 70 years.
2. Rishi Kumar S/o Motilal, Aged about 41 years.

Both are R/o Village Sakra, P.S. Arjuni, Tahsil Dhamtari, District Dhamtari, Chhattisgarh.

---Petitioners

Versus

Dhaniram S/o Nathel Yadav, Jila Sahakari Krishi Yavam Gramin Vikas Bank Maryadit, Janjgir, District Janjgir-Champa, Chhattisgarh (Died) Through Lrs. Gajendra S/o Dhaniram R/o Jila Sahakari Krishi Yavam Gramin Vikas Bank Maryadit, Janjgir, District Janjgir-Champa, Chhattisgarh

---- Respondent

For Petitioners	:	Mrs. Renu Kochar, Advocate
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Hon'ble Shri Justice Sanjay K. Agrawal
Order on Board

02/08/2019

1. This writ petition is directed against the order dated 20/02/2019 by which learned Motor Accidents Claims Tribunal has allowed the application filed by the respondent / decree holder under Order 21 Rule 37 of CPC and the petitioners / judgment debtors are directed to be sent to civil jail. Feeling aggrieved and dissatisfied with the impugned order directing the petitioners / judgment debtors to be sent to civil jail, this writ petition under Article 227 of the Constitution of India has been preferred.
2. Mrs. Renu Kochar, learned counsel for the petitioners / judgment debtors would submit that learned Motor Accidents Claims Tribunal is

absolutely unjustified in granting the application in favour of the respondent / decree holder without holding enquiry which is mandatory under Order 21 Rule 40 of CPC and straightway after filing the reply, that application has been granted which is in teeth of the decision rendered by the Supreme Court, in the matter of ***Jolly George Varghese & Anr. Vs. The Bank of Cochin***¹, which has been followed by The High Court of Madhya Pradesh in the matter of ***Subhash Chand Jain Vs. Central Bank of India***².

3. None appears for the respondents.
4. I have heard learned counsel for the petitioners, considered her submissions and went through the records with utmost circumspection.
5. Section 51 of the CPC deals with the powers of the Court to enforce execution. One of the modes 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 has to satisfy the conditions of the proviso to Section 51 which reads as under :-
6. **“51. Powers of Court to enforce execution** – 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 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

1 AIR 1980 SC 470

2 AIR 1999 MP 195

(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.”

7. Order 21 of the CPC deals with execution of decrees and orders.

Arrest and detention in the Civil Prison is dealt with Rule 37 to Rule 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 below :-

“37. Discretionary power to permit judgment-debtor to show cause against detention in prison – (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. ”

8. On appearance of the judgment-debtor in compliance of notice, the proceedings are to take place in accordance with Order 21 Rule 40, which states as under :-

“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 give the judgment-debtor an opportunity of showing case why 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 would show 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 Order 21 Rule 40 (1) of the CPC which provides that after notice is 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 non* 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 in Order 21 Rule 40 (1) of the CPC nor has it 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 of the CPC is mandatory.

10. In the matter of **Jolly George Varghese** (supra), their Lordships of the Supreme Court have held as under :-

11. "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 s. 51 with the Covenant and the Constitution. ”

12. The High Court of Madhya Pradesh, in the matter of **Subhash Chand Jain** (supra) has considered the provisions contained in Order 21 Rule 37 and Rule 40 of the CPC and held that after issuance of the show cause notice, holding an enquiry as contemplated in Order 21 Rule 40 (1) of the CPC is mandatory, which is cited below :-

“7. From a bare reading of the relevant provisions quoted above, it is evident that when executing Court exercises discretion of issuing show cause 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. In the case in hand the 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.

8. 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 proviso to Section 51 of the Code of Civil Procedure. The parties shall appear before the executing Court on 21-9-1998 of which notice shall not be given to the parties as they have been noticed here. If any of the parties fail to appear, the executing court shall proceed to decide the application for sending the applicant in prison in accordance with law. 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. ”

13. Reverting to the facts of the present case, it appears that the execution petition has been restored without issuing notice to the petitioners / judgment debtors and no enquiry was undertaken by the executing Court and straightway warrant of arrest was issued against the petitioners / judgment debtors, which is clearly contrary to the provisions contained in Order 21 Rule 40 (1) of the CPC.
14. Accordingly, the impugned order dated 20/02/2019 in this writ petition is hereby set aside and the matter is remitted back to the executing Court to hold an enquiry as contemplated under Order 21 Rule 40 (1) of the CPC and proceed in accordance with law. Enquiry will be conducted after giving opportunity to the parties.
15. With the aforesaid observations, this writ petition stands disposed of. However, petitioners / judgment debtors are at liberty to file additional reply in support of their case, if any. Respondent / decree holder is at liberty to file application for modification, if aggrieved.
16. A copy of this order be sent to the concerned executing Court by e-mail/fax.

Sd/-

(Sanjay K. Agrawal)
Judge