

271

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**Civil Revision No.5756 of 2019 (O&M)
Date of Decision: 31.10.2019**

MOHINDER SINGH

.....Petitioner

Vs

**M/S AMRIK SINGH ZORA SINGH MERCHANTS &
COMMISION AGENTS**

....Respondent

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Ms. Bhavna Grewal, Advocate
for the petitioner.

Mr. Deepak Sharma, Advocate for
Mr. Pankaj Bali, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. This revision petition has been preferred against the order dated 07.05.2019 passed by the Executing Court/Additional Civil Judge (Senior Division) Khanna vide which arrest warrants have been issued against the petitioner. Petitioner has also assailed the order dated 17.08.2019 passed by the same Court vide which prayer for recalling the arrest warrants was also dismissed.

[2]. Brief facts are that the judgment debtor/petitioner has been proceeded against *ex parte* even before the executing

Court after due service in the notice under Order 21 Rule 37 CPC. The decree holder has also filed an affidavit to the effect that the petitioner is intentionally evading the process of the Court just to throttle the execution proceedings and despite having means to pay the amount in question, petitioner/ judgment debtor has not filed any reply to the notice to show cause as to why he be not sent to civil imprisonment.

[3]. The decree holder has placed on record his affidavit in support of inquiry under Order 21 Rule 40 CPC. According to the aforesaid provision, the Court in its discretion may 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. Sub-Rule 3 of Rule 40 of Order 21 CPC also prescribes that after the conclusion of enquiry under Sub-Rule 1, the executing Court may, subject to the provisions of Section 51 CPC and to the other provisions of this Code, make an order of detention of the judgment debtor in the civil imprisonment and shall in that event cause him to be arrested, if he is not already under arrest. In order to give the judgment debtor, an opportunity to satisfy the decree, the Court may before making the order of detention leave the judgment debtor in the custody of an officer of the Court for a specified period not exceeding 15 days or release

him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period, if the decree is not satisfied. The judgment debtor so released under this Rule may be re-arrested also. When the Court does not make an order of detention under Sub-Rule 3, it shall disallow the application and, if the judgment debtor is under arrest, he can be directed to be released.

[4]. Grant of adequate opportunity to the judgment debtor before detention is necessary till, he had nothing further to state. Grant of such opportunity is in consonance with law laid down by the Hon'ble Apex Court in **Subrata Roy Sahara vs. Union of India and others, 2014(8) SCC 470.** The requirement of Order 21 Rule 40 and its Sub-Rule 3 CPC is that the Court may record its satisfaction subject to the provision of Section 51 CPC for the detention of the judgment debtor in the civil imprisonment and shall in that event cause him to be arrested, if he is not already under arrest.

[5]. Section 51 CPC came to be interpreted by the Hon'ble Apex Court in **Jolly George Verghese and another vs. The Bank of Cochin, 1980 AIR (SC) 470.** Para 6 of the judgment reads as under:

“Right at the beginning, we may take up the bearing of Art. 11 on the law that is to be applied by an Indian Court when there is a specific provision in the Civil Procedure Code,

authorising detention for non-payment of a decree debt. The Covenant bans imprisonment merely for not discharging a decree debt. Unless there be some other vice or mens rea apart from failure to foot the decree, international law frowns on holding the debtor's person in civil prison, as hostage by the court. India is now a signatory to this Covenant and Article 51 (c) of the Constitution obligates the State to "foster respect for international law and treaty obligations in the dealings of organised people with one another". Even so until the municipal law is changed to accommodate the Covenant what binds the court is the former, not the latter. A. H. Robertson in "Human Rights-in National and International Law" rightly points out that international conventional law must go through the process of transformation into the municipal law before the international treaty can become an internal law.

From the national point of view the national rules alone count.. With regard to interpretation, however, it is a principle generally recognised in national legal system that, in the event of doubt, the national rule is to be interpreted in accordance with the State's international obligations."

[6]. It is true that problem of decree holder starts from the date on which he/she obtains the decree. In execution of decree, decree holder may face multi-prolonged/dimensional problems in the form of objections from different quarters. In case of decree for small amount, the decree holder even may have to spend more than the decretal amount in fighting the litigation in the corridors of different Courts. Disgruntled judgment debtor may even escape under the garb of technicalities.

[7]. In the absence of any *mala fides* and dishonesty on the

part of the judgment debtor, the ratio of **Jolly Goerge Varghese and another's** case (supra) can be applied. In order to ascertain *mala fides* and dishonesty on the part of the judgment debtor only assertion made in the application and denial thereof are not sufficient, unless and until a positive finding to that effect is recorded by the executing Court.

[8]. The executing Court is required to record a positive finding as there is no possible way to satisfy the decree except by way of arrest of the judgment debtor. The satisfaction has to be recorded as per requirements of Section 51 CPC. Merely because it appeared to the Court that there is no possibility to satisfy the Court is not equivalent to the satisfaction required under Section 51 CPC and in terms of Order 21 Rule 37 CPC. In order to ascertain means of satisfying the decree by the judgment debtor, the decree holder can also resort to Order 21 Rule 41 CPC, wherein the judgment debtor can be examined in respect of his property. The position has been rightly discussed in **Mal Singh and another vs. State Bank of India, 2015(5) R.C.R. (Civil) 583** on the same point.

[9]. If Section 51 CPC is read in consonance with Order 21 Rule 37 CPC, then it implies that a show cause notice is required to be issued calling upon the judgment debtor with regard to the payment of decretal amount, failing which the

judgment debtor was liable to be arrested. In the entire process the Court has to record its satisfaction. Admittedly, a show cause notice has been issued. The executing Court is required to record a positive finding as there is no possible way to satisfy the decree except by way of arrest of the judgment debtor. This satisfaction is to be recorded as per the requirement of Section 51 CPC. Merely because it appeared to the Court that there is no possibility to satisfy the decree, is not equivalent to the 'satisfaction' statutorily required under Section 51 read with Order 21 Rule 37 CPC to be recorded by the Court before proceeding to resort to arrest and detention of the judgment debtor.

[10]. Perusal of the impugned order dated 07.05.2019 would show that the executing Court has not recorded its satisfaction in terms of Section 51 CPC. To that extent only the impugned order appears to be not in consonance with the ratio of **Jolly George Varghese and another's** case (supra). The judgment debtor can only be placed under detention after recording of satisfaction by the executing Court in terms of Section 51 CPC that the judgment debtor has intentionally and by way of *mala fides* avoided and neglected to pay the decretal amount despite having means to pay. Means to pay is a factual plea for that satisfaction has to be recorded by the executing Court in

consonance with the requirement of law as explained above. To the extent of not recording satisfaction by the executing Court on the aforesaid parameter, the impugned order is illegal.

[11]. For the reasons recorded hereinabove, the impugned orders dated 07.05.2019 and 17.08.2019 are set aside to the extent of not recording satisfaction by the executing Court in terms of Section 51 CPC and Order 21 Rule 37 CPC. The case is remanded to the executing Court only for that limited purpose of recording satisfaction in terms of the aforesaid provision as regards availability of means to pay to the decretal amount.

[12]. With the aforesaid observation, this revision petition is disposed of.

October 31, 2019

Atik

Whether speaking/reasoned
Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No
Yes/No