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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CM(M) 1548/2019, CM APPL. 46789/2019 (Stay) and CM APPL. 55276/2019 (Extension of time)

M/S CELL PAGE COMMUNICAITON Petitioner

Through: Mr. Vinay Gupta, Adv.

versus

VIJAY SHANKAR PANDEY Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

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J U D G M E N T

11.10.2022

1. Ex 990/2018 was preferred by the respondent Vijay Shankar Pandey, seeking execution of judgment and decree dated 29th September 2018 passed by the learned Additional District Judge (“the learned ADJ”) in CS 7999/2016 (*Vijay Shankar Pandey v. M/s. Cell Page Communication*), whereby the said suit was decreed in favour of the respondent and against the petitioner for a sum of ₹ 25 lakhs with simple interest @ 9% per annum from May 2014 till filing of the suit and *pendente lite* and future interest @ 9% per annum, along with costs.

2. The decree under execution was, therefore, a money decree simplicitor.



3. The Memo of parties in the Execution Petition disclosed the following two addresses of the petitioner:

- (i) 252A, Nanak Bhawan,
Panchsheel Commercial Complex,
Shahpurjat, New Delhi – 110049
- (ii) 299, Espace Villa, Nirvana Country,
South City – II, Gurgaon,
Haryana

4. On 20th December 2018, the learned ADJ issued warrants of attachment of the movable properties of the petitioner/judgment debtor. The warrants were received back with the endorsement “JD has left the given address”. On 23rd February 2019, this fact was noted, as also the submission of learned Counsel for the respondent/decree holder that the petitioner was appearing in the Court of learned Additional Sessions Judge (“the learned ASJ”) in another criminal case. Time was, therefore, granted to the respondent to move an appropriate application for arrest of the petitioner.

5. An application under Order XXI Rule 37¹ of the Code of Civil Procedure, 1908 (CPC) was, accordingly, moved by the respondent,

¹ 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.



seeking issuance of warrants of arrest against the petitioner. Notice was issued, on the said application, by the learned ADJ on 23rd April 2019, returnable on 17th July 2019.

6. Once again, the notice issued by the learned ADJ was received back with a report of the Process Server, to the effect that the petitioner had left the address a year ago. On the next date of hearing, i.e. 17th July 2019 learned Counsel appearing for the respondent again reiterated his submission that the petitioner was appearing in another criminal appeal pending before the learned ASJ. He also sought issuance of warrants of arrest, submitting that there was every likelihood that, even after receiving notice of the application, the petitioner would frustrate the decree. In these circumstances, the learned ADJ observed thus:

“The execution has been filed way back in November 2018. The address of the JD are not known to the DH. The circumstance warrants that instead of issue of notice of the application for arrest, warrants of arrest be issued against the JD on filing of PF and subsistence allowance to be executed when the JD appears before the court of aforementioned criminal court.”

7. On 16th August 2019 when the matter was listed next, it was reported, to the learned ADJ, that the warrants of arrest of the petitioner could not be executed. The learned ADJ directed the order to be complied with afresh and directed the Bailiff to execute the warrants of arrest of the petitioner on or prior to 1st October 2019. The matter was made returnable on 3rd October 2019.

8. At this juncture, the petitioner moved an application under



Section 151 of the CPC, seeking recall of the order dated 16th August 2019 (*supra*) and cancellation of the earlier warrants of arrest issued against it. It was submitted, in the said application, that the petitioner was, to the knowledge of the respondent, situate in Gurgaon, at the alternate address provided in the memo of parties in the Execution Petition. The petitioner also pointed out that it had regularly been appearing before the learned ASJ in Crl. Appeal No. 364/2018. It was claimed, in the application, that no notice or warrants of arrest have been served on the petitioner, as notice and warrants of arrest, were on each occasion, attempted to be served at the New Delhi address of the petitioner of which the petitioner was no longer in occupation.

9. It was also sought to be submitted, in the application, that issuance of warrants of arrest against the petitioner, in a case of execution of a money decree, without a prior notice to the petitioner to show cause against such proposed arrest, was not permissible in view of Section 51 read with Order XXI Rule 37 and Order XXI Rule 40 of the CPC.

10. Asserting that the petitioner had never deliberately avoided appearance before the Court, the application sought, as already noted, sought recall of the warrants of arrest issued against it as well as the order dated 16th August 2019.

11. The said application stands rejected by the learned ADJ *vide* order dated 3rd October 2019, forming subject matter of challenge in the present petition, preferred under Article 227 of the Constitution of



India.

12. The learned ADJ has, in the impugned order, noted the contention of the petitioner that no show cause notice had ever been issued or served on it prior to issuance of warrants of arrest and that service of all summons and warrants of arrest had been attempted to be effected at the erstwhile New Delhi office of the petitioner, of which the petitioner was no longer in occupation. The learned ADJ observes, nonetheless, that, as the petitioner had contested the suit instituted by the respondent, the petitioner could not plead ignorance of the judgment and decree dated 29th September 2018. Thereafter, the learned further observes as under:

“Learned Counsel for JD has failed to show as to why JD should not be sentenced to civil imprisonment for non-payment of the decretal amount. Therefore, no case is made out for recalling of order dated 16.08.2019.”

13. The impugned order proceeds, therefore, to direct issuance fresh warrants of arrest against the petitioner in terms of the earlier order dated 16th August 2019.

14. It is this order dated 3rd October 2019, which forms subject matter of challenge in the present petition.

15. Notice was issued, in the present petition, on 23rd October 2019. Stay of execution of impugned warrants of arrest was also granted subject to the petitioner depositing, with the learned Registrar General of this Court, a sum of ₹ 10 lakhs, in addition to an amount of ₹ 5 lakhs, which already stands deposited by the petitioner.



16. Mr. Vinay Gupta, learned Counsel for the petitioner, submits that, owing to financial stringency, his client has been unable to deposit ₹ 10 lakhs with the learned Registrar General of this Court, as directed on 23rd October 2019. That aspect may not, however be of particular significance, as the said deposit was directed only for grant of stay of operation of the warrants of arrest issued against the petitioner, and this Court has taken up the present petition for final hearing.

17. Preliminary submissions were advanced by Mr. Vinay Gupta on the present petition yesterday, i.e. on 10th October 2022. The matter has been listed today in order to provide an opportunity to the respondent to be present. There is no appearance on behalf of the respondent either yesterday or today.

18. As such, I have heard Mr. Vinay Gupta, perused the record and proceed to decide the petition.

19. Mr. Vinay Gupta essentially urges the two contentions which form subject matter of the application preferred by the petitioner under Section 151 of the CPC. His first contention is that despite the petitioner's Gurgaon address, being specifically reflected in the memo of parties accompanying the Execution Petition, no attempt to serve the petitioner at the said address was ever made. His second contention, which is a fallout of the first, is predicated on Section 51 of the CPC read with Order XXI Rules 37 and 40 of the CPC. Mr.



Vinay Gupta has also placed reliance, in this context, on the judgments of the High Court of Punjab and Haryana in *Maruti Ltd. v. Pan India Plastic Pvt. Ltd.*², the High Court of Madhya Pradesh in *Subhash Chand Jain v. Central Bank of India*³, the High Court of Andhra Pradesh in *Rashavarapu Nagesevara Rao v. Tenneti Venkata Lakshmi Narayana*⁴, and the High Court of Madras in *T.S. Ranganathan v. P.R. Mohan Ram*⁵.

20. There is substance in both the contentions of Mr. Gupta. However, I propose to take up the second contention first. The decision on the first would follow as a logical corollary.

21. Section 51 of the CPC and Rules 37 and 40 of Order XXI of the CPC read thus:

“Section 51:

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;

² AIR 1993 P&H 215

³ AIR 1999 MP 195

⁴ 1998 AIHC 2145

⁵ AIR 1992 Mad 322



- (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.

Rules 37 and 40 of Order XXI of the CPC

**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 1 [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.

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 cause 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:

Provided that in order to give the judgment-debtor an opportunity of satisfying 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 fifteen 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 be not sooner satisfied.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) 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, direct his release.”

22. Arrest and detention in prison is one of the modes by which Section 51 permits the executing court to enforce execution of a decree. This power is, however, expressly subject to the proviso to Section 51. It is well settled that a proviso is in the nature of an exception to the main provision.⁶ The proviso to Section 51 applies exclusively to a situation in which the decree under execution is a money decree, as in the present case. In such a case, there is an absolute proscription – as is reflected by the use of the words “shall not be ordered” – against execution of a money decree by detention in prison unless the protocol envisaged by the proviso is scrupulously followed. This protocol may be set out thus:

⁶ Refer *Madras & Southern Maharatta Rly. Co. Ltd. v. Bezwada Municipality* AIR 1994 PC 71, *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha* AIR 1961 SCC 1596



(i) The executing court is required, in the first instance, to grant, to the judgment debtor, an opportunity to show cause as to why he be not committed to prison.

(ii) Consequent on receipt of response from the judgment debtor to the said show cause notice, the Court has to be satisfied that one or more of the exigencies envisaged by Clauses (a) to (c) of the proviso exist. Clause (a) envisages the judgment debtor being likely to abscond or to leave the local limits of the jurisdiction of the Court or dishonestly transferring, concealing or removing any part of his property or committing any other bad faith in relation to his property, with the object or effect of obstructing or delaying the execution of the decree. Clause (b) envisages a situation in which the judgment debtor, despite being possessed of the means to pay the amount of the decree or a substantial part thereof, refuses or neglects to do so. Clause (c) contemplates a situation in which the decree is for a sum for which the judgment debtor was bound to account in a fiduciary capacity.

(iv) It is only after issuing a notice to the judgment debtor to show cause against committal in prison, and the court is satisfied that one or more of these exigencies applies, that execution of the decree by detention in prison can be ordered.

23. Clearly, therefore, Section 51 prescribes a very rigid protocol



before enforcing execution of a simplicitor money decree by detention of the judgment debtor in prison. This protocol is mandatory and non-negotiable.

24. Order XXI Rule 37 is, in a manner of speaking, a provision supplemental to Section 51 of the CPC and geared at facilitating the implementation thereof. Order XXI Rule 37 also applies where the execution application seeks execution of a money decree. The provision starts with the non-obstante clause, indicating that it prevails over other Rules in the CPC.

25. Order XXI Rule 37(1) provides that, in the case of an application for execution of a money decree, instead of issuing warrants of arrest of the judgment debtor, the Court *shall* – thereby indicating the provision to be mandatory – issue of notice to the judgment debtor calling upon him to appear before the Court on a specified date and show cause as to why he be not committed to the civil prison. The proviso to Order XXI Rule 37 relaxes this requirement “if the Court is satisfied, by affidavit or otherwise, and that the object and 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”.

26. It is obvious that insofar as the proviso to Order XXI Rule 37(1) compromises the liberty of the judgment debtor, it has to be subjected to a strict construction. It can apply, therefore, only where the Court, for clear and cogent reasons, satisfies itself that the judgment debtor is likely to abscond or leave the jurisdiction of the Court with the object



or effect of delaying the execution of the decree.

27. It is only where appearance is not made in response to the notice issued Order XXI Rule 37(1) that Order XXI Rule 37(2) empowers the Court to issue a warrant for arrest of the judgment debtor.

28. Order XXI Rule 40 envisages yet a further protocol, where a judgment debtor appears before the executing court in obedience to the notice issued under Order XXI Rule 37. Where notice is issued under Order XXI Rule 37(1) and in response thereto, the judgment debtor appears before the executing court, the court cannot straightaway direct him to be detained in civil prison, even where he is in default of execution of the decree. The Court is required to (i) hear the decree holder, (ii) take all such evidence as may be produced by the decree holder in support of his execution application and thereafter (iii) provide, to the judgment debtor, an opportunity to show cause as to why he be not committed to the civil prison. The exercise that Order XXI Rule 40(1) envisages is an inquisitorial exercise, as is apparent from the opening words of Order XXI Rule 40(2), which provides for detention, of the judgment debtor, in the custody of an officer of the Court, pending conclusion of the inquiry under Order XXI Rule 40(1). It is only after this inquisitorial exercise is carried out under Order XXI Rule 40(3), that the Court may direct detention of the judgment debtor in civil prison.

29. It is not necessary to refer to the relevant passages cited by Mr. Gupta from the four decisions noted hereinabove, as they essentially



reiterate the principles contained in Section 51 and Rules 37 and 40 of Order XXI of the CPC.

30. Suffice it to state that, in the present case, the issuance of warrants of arrest of the petitioner, by the learned ADJ, does not conform to the rigour of the protocol envisaged by Section 51 and Rules 37 and 40 of Order XXI of the CPC. Warrants of attachments were initially issued for attaching the properties of the petitioner. The said warrants were received back with the endorsement that the petitioner had left the address at which the warrants were attempted to be served. Thereafter, warrants of arrest of the petitioner were issued at the very same address. They were also received back. Despite the fact that an alternate address of the petitioner was available in the Execution Petition filed by the respondent, no attempt to serve the petitioner at the said alternate address was made. Rather, in the order dated 17th July 2019, the learned ADJ observes that, in the circumstances, “instead of issuance of notice of the application for arrest, warrants of arrest be issued against the JD”.

31. This, quite clearly, is in the teeth of the procedure, envisaged by Section 51 and Rules 37 and 40 of Order XXI of the CPC.

32. The arrest of any citizen compromises his right to life and personal liberty, which are the most sanctified of the fundamental rights under Part III of the Constitution of India. Liberty is a sanctified preambular constitutional goal. Adherence, to any procedure which affects the liberty of the citizen, has to be strict and



scrupulous.

33. In the impugned order dated 3rd October 2019, the learned ADJ has noted that the learned Counsel for the petitioner had failed “to show” – which, apparently, should read “to show cause” – as to why the petitioner be not sentenced to civil imprisonment for non-payment of the decretal amount. This indicates that the learned ADJ was conscious of the fact that, prior to issuing of warrants of arrest against the petitioner, an opportunity to show cause against such proposed action was required to be given. The observation that the learned Counsel for the petitioner/judgment debtor had failed to show cause, is contrary to the record, as no opportunity was granted to the petitioner, at the first instance, to show cause against issuance of warrants of arrest. The impugned order, therefore, also appears to have been passed under the mistaken premise that such an opportunity had been granted and the petitioner had not been able to satisfactorily show cause.

34. In view of the aforesaid, the issuance of warrants of arrest against the petitioner by the learned ADJ is obviously unsustainable in law. The warrants of arrest of the petitioner, issued by the learned ADJ, are, therefore, quashed. Resultantly, the impugned order dated 3rd October 2019 is also set aside.

35. The petition stands allowed in the aforesaid terms with no orders as to costs. Miscellaneous applications are also disposed of.



36. Needless to say, the learned ADJ would be at liberty to proceed with the matter in accordance with law, the provisions of the CPC and the observations made hereinabove.

C.HARI SHANKAR, J

OCTOBER 11, 2022

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