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

% ***Date of decision: 24th September, 2024***

+ CM(M) 3460/2024 & CM APPL. 56045-56046/2024

VINOD KUMAR SHARMA

.....Petitioner

Through: Mr. Ankur Aggarwal and Mr. Dhruv
Nagpal, Advocates.

versus

GEETA KHURANA

.....Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE MANOJ JAIN

J U D G M E N T (oral)

1. Petitioner had suffered a money decree. As per the decree drawn on 03.12.2016, the principle amount was Rs. 25,00,000/- with interest.
2. It is apprised that during the pendency of the Execution Petition, the entire principle amount was cleared, and in addition to above a further sum of Rs. 3,50,000/- has also been paid.
3. When the Execution Petition was taken up by the learned Executing Court on 13.09.2024, the following order was passed:-

“13.09.2024

*Present: Ld. counsel for the DH.
JD with Ld. counsel.*

*Ld. counsel for JD submits that his application filed under section 151
CPC in the year 2021 is still pending which is in respect of rescheduling of*



payment.

I have heard the Ld. counsel. It appears that the conduct of JD has not been proper in this case. Even it appears that in the year 2024, there have been repeated submission on the part of counsel for JD that the JD will pay the amount within a month etc. JD never has followed his own words. The aforesaid application is dismissed.

Ld. counsel for DH has filed an application for attachment. Copy supplied. Reply, if any, may be filed.

Before conclusion of proceeding today, the JD and his counsel has left the court. The court has waited. It is now 2.44 pm and despite repeated calls, no one is appearing on behalf of JD. Ld. counsel for DH has pointed out that his application for arrest of JD filed in the year 2020 is still pending. Since the JD has left the court and the conduct of JD in this case is not upto the mark, warrant of arrest is directed to be issued on filing of necessary PF against the JD.

List for further proceedings on 18.10.2024.”

4. The grievance of the petitioner/JDs is very precise. He states that his application for rescheduling of balance payment has been dismissed without giving any reason and moreover, when the Decree Holder had merely moved an application seeking attachment of assets and a copy thereof was given to him for filing reply, the learned Trial Court, instead, issued *warrant of arrest* ostensibly on the ground that the JD had left the Court and, therefore, his conduct was not upto the mark.
5. There is no appearance from the side of respondent despite advance service.
6. Be that as it may, on the face of it, it is quite evident that there was no



reason or occasion for the learned Trial Court to have issued any *warrant of arrest* in the manner in which it has been done.

7. The JD was represented with his counsel and as noticed above, the application had merely been moved seeking attachment and since the JD had, as reflected in the impugned order, left the Court, *albeit*, abruptly, it seems that the Court got carried away unnecessarily and issued *warrant of arrest* which was neither desirable nor permissible.

8. This Court has already laid emphasis with respect to the protocol which needs to be followed, while issuing any such coercive process. Reference be made to *CELL Page Communication vs. Vijay Shankar Pandey: 2022 SCC OnLine Del 3421* wherein it has been categorically observed as under:-

“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. 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:

(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.

(iii) 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 simpliciter or 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.”

9. In view of the above, the present order is not sustainable in the eyes of



law and, therefore, there is apparent jurisdictional error.

10. The petition is, therefore, allowed and the above said orders directing issuance of warrant of arrest is set aside.

11. Needless to say, the learned Trial Court would be at liberty to issue any such process but not without adhering to the relevant provisions as delineated in the above order.

12. Petition stands disposed of.

13. Order *dasti* under the signatures of the Court Master.

(MANOJ JAIN)
JUDGE

SEPTEMBER 24, 2024/sw