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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% ***Date of Decision: 18th March, 2025***+ **CM(M) 504/2025 & CM APPL. 15542-15543/2025****ASHOK KUMAR**PetitionerThrough: Mr. Amit Srivastava, Ms. Uzma, Mr.
Manish Panchal and Mr. Kapil Tomar,
Advocates.

versus

MANMOHAN HARJAIRespondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE MANOJ JAIN****J U D G M E N T (oral)**

1. Petitioner herein was defending a *summary suit* filed under Order XXXVII CPC for recovery of Rs. 2,50,000/- with interest.
2. He, eventually, suffered a decree as the abovesaid suit was decided against him *vide* judgment dated 15.03.2019.
3. Based on the abovesaid decree, decree-holder filed an Execution Petition which was registered as 2 EX 2024/2019.
4. When such Execution Petition was taken up by the learned Executing Court on 29.11.2024, it passed following order:-

“On last date of hearing, warrants of attachment were issued, which were received back 'not enough articles'. Today, Ld. counsel for DH has moved an application u/o XXI Rule 30 CPC. Soft copy supplied. Ld. counsel for JD submits that he wants to file the reply to the application u/o XXI rule 30 CPC. Since the warrants of attachment were not executed, the Court is not inclined to hear the arguments on above mentioned application. Application stands allowed. Let warrants of arrest be issued against JD to be executed through SHO concerned on filing of PF and subsistence allowance for one week within 7 days from today, returnable on NDOH i.e. 23.01.2025.”

5. The learned Executing Court, on the next date i.e. 23.01.2025, noticed that the *warrant of arrest* had been received back with report “out of station”



and, accordingly, it issued fresh *warrant of arrest*, albeit, conditional one with the direction that if judgment-debtor failed to pay the decretal amount, he be arrested.

6. On the next date i.e. 27.02.2025, the conditional warrants also returned back unexecuted and, therefore, the learned Executing Court observed that perhaps, the judgment-debtor was, intentionally, evading the process to avoid the payment of decretal amount. It is in the abovesaid backdrop that *warrants of arrest* have been issued against the judgment-debtor with returnable date as 27.03.2025.

7. Such orders are under challenge.

8. It also needs to be highlighted, right here, that, when arrest warrants were issued against the petitioner herein on 27.02.2025, the judgment-debtor was duly represented through counsel.

9. According to petitioner, he, though, wished to pay the decretal amount but it was only due to lack of resources that he was unable to make the payment in one go. It is contended that request was made to the decree-holder to permit him to pay the decretal amount in instalments but such request was never acceded to.

10. However, the prime concern expressed herein is altogether different.

11. It is submitted that before issuing any arrest warrants, the Court should have recorded its due satisfaction as contemplated under Order XXI Rule 37 CPC. It is submitted that without conducting any inquiry with respect to the fact whether the judgment-debtor had any capacity to pay or not, the order of arrest could not have been passed in a casual and routine manner.

12. Petitioner also relies upon *Jolly George Varghese and Another vs. The Bank of Cochin: AIR 1980 SC 470*, wherein the Hon'ble Supreme Court has



observed that *committing a person to jail is an extreme step, especially for the purposes of enforcing a money decree. The Court also observed that simple default to discharge is not enough and there must exist 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. It is further observed that 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.*

13. It is submitted that it is not a case where the judgment-debtor is avoiding participation in the execution proceedings. On the contrary, learned Executing Court even refused to give him any hearing before issuing any *warrants of arrest*, as would be obvious from the order dated 29.11.2024.

14. There is no appearance from the side of respondent/decreed-holder despite there being advance notice.

15. On careful perusal of the abovesaid three orders dated 29.11.2024, 23.01.2025 and 27.02.2025, this Court is of the considered opinion that the learned Executing Court should not have acted in haste.

16. This Court has already, while dealing with another matter of similar nature, referred to the protocol which needs to be followed by any such Executing Court before issuing any such extreme coercive process. Reference be made to *Vinod Kumar Sharma vs. Geeta Khurana: 2024 SCC OnLine Del 6724*.

17. Relevant paras of said order read as under:-

“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.*”

18. The situation herein is also similar and there does not seem to be any adherence to the specific statutory provisions contained under Section 51 of CPC and Order XXI Rule 37 CPC.

19. Moreover, learned counsel for judgment-debtor had rather made a specific submission before the learned Executing Court that he may be permitted to file a reply to the application moved under Order XXI Rule 30 CPC but such opportunity was declined, without giving any justifiable and valid reason.

20. Learned counsel for petitioner submits that there was never any intention to delay the execution proceedings and in future also, it will be ensured that judgment-debtor is duly represented before the learned Executing Court on each and every date.

21. Keeping in mind the overall facts and circumstances of the case and also considering the fact that the *arrest warrants* have been issued without following the relevant provisions and without adhering to the protocol laid down in *CELL Page Communication (supra)*, the present petition is allowed and order of *warrant of arrest* is hereby set aside.

22. The next date before the learned Executing Court is 27.03.2025 and the judgment-debtor is directed to appear before the learned Executing Court on said date.

23. Learned Executing Court would be at liberty to proceed further in accordance with law but it is expected that before taking any further extreme step like issuance of *warrant of arrest*, it would adhere to the relevant



2025:DHC:1776



provisions of law and said protocol.

24. The present petition, along with all the pending applications, if any, stands disposed of in aforesaid terms.

(MANOJ JAIN)
JUDGE

MARCH 18, 2025/ss/SS