

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL

ON THE 30th OF JANUARY, 2024

MISC. PETITION NO.7452 OF 2023

BETWEEN:-

SADKIK AKARAM

.....PETITIONER

(BY SHRI SHRIKANT SHRIVASTAVA - ADVOCATE)

AND

KULDEEP,

....RESPONDENT

(BY SHRI D.C. MALLIK - ADVOCATE)

This petition coming on for admission this day, the Court passed the following:

ORDER

This misc. petition has been preferred by the petitioner/defendant/judgment debtor (J.D.) challenging the order dated 21.11.2023 passed by 3rd Civil Judge Class-I, Tikamgarh in execution case no.5A/22 whereby upon respondent/plaintiff/decreed holder (D.H.)'s application under Order 21 rule 37 CPC, executing Court has on the one hand directed the petitioner/J.D. to show cause why he should not be sent

to civil prison and on the other hand, directed the respondent/D.H. to furnish details of the period for which he wants to send the petitioner/J.D. in civil prison.

2. Learned counsel for the petitioner/J.D. submits that although by the impugned order itself the petitioner has been asked to show cause why he should not be sent to civil prison but at the same time, executing Court has recorded finding in earlier part of same paragraph to the effect that petitioner/J.D. deserves to be sent to civil prison that too in the circumstances where respondent/D.H. himself has filed application with the contention that there is no property of the ownership of petitioner/J.D. and he has already transferred entire property in the name of his wife and sons. He further submits that by filing reply to the application, it was specifically contended by the petitioner that he has no property in his name and he has also not transferred any property to his wife and sons and since his business has already been closed, therefore, he is ready to deposit decretal amount in installments, from the salary being paid to him by his employer (a private businessman), where he is doing job. He also submits that in these circumstances, no order of sending the petitioner in civil prison could have been passed that too without considering the explanation yet to be given by the petitioner in compliance of the impugned order.

3. Learned counsel for the respondent/D.H. supports the impugned order and prays for dismissal of the misc. petition.

4. Heard learned counsel for the parties and perused the impugned order as well as the record available.

5. From perusal of the impugned order, it appears that in pending execution proceedings, the respondent/D.H. has moved an application

under Order 21 rule 37 CPC with the prayer for sending the petitioner in civil prison. If narration of facts of the application under Order 21 rule 37 CPC, is taken to be true, then it appears that petitioner/J.D. has no property and he has already transferred the entire property in the name of his wife and sons. However, no inquiry appears to have been done by executing Court as to whether on the date of filing of suit or after passing of judgment and decree dated 13.02.2020, the petitioner possessed any property or he has sold/transferred the property in the name of his wife and sons. In absence of which it cannot be said that despite having sufficient property, the petitioner does not want to pay decretal amount.

6. As is mentioned in third paragraph of impugned order, executing Court on the one hand directed the petitioner/J.D. to show cause why he should not be sent to civil prison and on the other hand, in earlier part of same paragraph, has recorded finding to the effect that as petitioner/J.D. has no property for recovery of decretal amount, he deserves to be sent to civil prison. From the impugned order it is also not clear that before passing order of sending the petitioner into civil prison, petitioner had ever tried to escape from his liability under the decree passed against him for recovery of money.

7. In respect to the aforesaid facts, relevant provisions of CPC i.e. section 51 and order 21 rule 37, 40 are quoted as under:

Section 51 runs thus:

“51. 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 sale without attachment of any property;

(c) by arrest and detention in prison,

(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.

Order 21, Rule 37 runs thus:

37. (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 judgement-debtor.”

Order 21, Rule 40 runs thus:

"40(1) When a judgment-debtor appears before the Court in obedience to a notice is-

sued 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 S. 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."

8. Bare reading of the said provisions shows 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 issuance of notice 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 instant case the executing Court after issuing show cause did not hold any enquiry as contemplated in Clause (1) of Rule 40 of Order 21 nor has complied the conditions laid down in proviso to S. 51

so as to record its reasons after its satisfaction for detaining or sending the judgment-debtor in civil prison.

9. Hon'ble Supreme Court, in the case of Jolly George Varghese and another vs. Bank of Cochin Supreme Court, has held as under:-

“10. Equally meaningful is the import of Art. 21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and the worth of the human person enshrined in Art. 21 read with Arts. 14 and 19, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence. Maneka Gandhi's case (1978) 1 SCC 248 as developed further in Sunil Batra v. Delhi Administration (1978) 4 SCC 494, Sita Ram v. State of U.P., (1979) 2 SCR 1085 and Sunil Batra v. Delhi Administration, W. P. No. 1009 of 1979, D/- 20-12-79 (SC) lays down the proposition. It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of Daridra Narayan (land of poverty) is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Art. 21 unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Art. 11 of the Covenant. But this is precisely the interpretation we have put on the proviso to S. 51, C.P.C. and the lethal blow of Art. 21 cannot strike down the provision, as now interpreted.”

10. In view of the aforesaid decision of Hon'ble Supreme Court it is clear that merely because there is a money decree in favour of respondent/D.H., the petitioner/J.D. who has no property or source to pay the decretal amount, cannot be sent to civil prison because poverty is not an offence. The impugned order also does not show that executing Court has followed the provisions contained in Section 51, Order 21 rule 37 and 40 CPC in their true letter and spirit.

11. Resultantly, impugned order is not sustainable and is hereby set aside with further direction to executing Court to decide the application under Order 21 rule 37 CPC afresh in accordance with the law.

12. With the aforesaid observation, this misc. petition is **allowed and disposed off.**

13. However no order as to costs.
14. Pending application(s), if any, shall stand disposed off.

(DWARKA DHISH BANSAL)
JUDGE

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