

**IN THE COURT OF SH. SHIV KUMAR
DISTRICT JUDGE-02, WEST
TIS HAZARI COURTS; DELHI**

Ex. No. 172/2019

M/s Saini Construction

....Decree Holder

Versus

M/s Rock Star Gym Pvt. Ltd. & Anr.

.... Judgment Debtors

ORDER

1. Vide this order, I shall decide application filed by the JD no. 2/Sh. Mohammad Kashmeri, under Section 114 CPC for review of order dated 20.04.2023 and 28.05.2024.

2. It is averred in the application by the JD No. 2 that he is Managing Director of JD No. 1 and on the basis of application of DH, this court has issued warrants of arrest against him for his detention in civil imprisonment.

3. It is further averred by JD No. 2 that without affording opportunity of showing cause, the JD No. 2 cannot be sent to civil imprison u/s 51 CPC and the court is also required to record reasons in writing for its satisfaction for the existence of grounds for sending the JD to Civil imprisonment.

4. It is further averred by JD No. 2 that the decree of the present execution, has been passed against the JD No. 1 and JD

No. 2 but the said decree has not been passed against JD No. 2 in his individual capacity.

5. Reply of the above said application has been filed by the DH. The DH has averred that the application of the JD No. 2 is hopelessly time barred and has not been filed within 30 days from order dated 20.04.2023 and 28.05.2024.

6. It is further contended by the DH that under section 114 read with order 47 rule 1 CPC, this court has limited jurisdiction to interfere in the said orders, whereas there is no apparent error in order dated 20.04.2023 and 28.05.2024. It is further contended that the present application has been filed just to prolong the execution petition.

7. It is further contended by the DH that JD No. 2, in utter violation of the order of the court, which was passed on the application of the DH under order 38 rule 5 CPC, not only disposed off the material/goods of the JD No. 1 but has also avoided the notices sent by this court.

8. It is further contended by the DH that this court has passed order dated 20.04.2023, after fully considering the previous conduct of JD No. 2, from which it is apparent that no fruitful purpose will be served by issuing notice of the application u/o 21 rule 37 CPC and that too by exercising its discretion confer upon the court under the said rule.

9. Arguments heard. Case file perused.

10. I have perused judgment of Hon'ble Madhya Pradesh High Court, passed in a case titled Jeevan Singh Vs Jagdish, Misc Petition no. 7406 of 2023, decided on 18.03.2024, in which the Hon'ble High Court has observed as follows:

09. Section 51 of the CPC confers power upon the Court to enforce execution of a decree. As per Clause (c) thereof one of such mode is by arrest and detention of the judgment debtor in prison for a period not exceeding the period specified in Section 58 where arrest and detention is permissible under this section. However, prior to passing of an order for detention, the Court has to satisfy itself about existence of the conditions of the proviso. For ready reference Section 51 is reproduced below:-

"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 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];

(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."

10. Under Order 21 Rule 37 of the CPC arrest and detention in civil prison is provided for. Rule 37 gives discretionary power to the executing Court to permit judgment debtor to show cause against detention in prison. The same is as under:-

"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."

11. When a notice is issued to the judgment debtor under Order 21 Rule 37, on his appearance, proceedings are to be conducted in accordance with Rule 40 of Order 37 which reads thus:-

"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."

12. Under Order 21 Rule 37 of the CPC where application is made for arrest and detention of the judgment debtor in civil prison, the executing Court has to issue

firstly, instead of a warrant for his arrest, a notice calling upon him to appear before the Court to show cause why he should not be committed to civil prison. After he so appears, the executing Court has to proceed to hear the decree holder and take all such evidence as may be produced by him in support of his application and then has to give an opportunity to the judgment debtor of showing cause as to why he should not be committed to civil prison. Thus, an enquiry is contemplated thereunder prior to committing the judgment debtor to civil prison.

13. Before ordering detention of judgment debtor in civil prison, the Court has to record reasons in writing of its satisfaction of existence of any of the conditions enumerated in Clause (a), Clause (b) or Clause

(c) of the proviso to Section 51. It is specifically mandated that prior to detention of judgment debtor in civil prison reasons have to be recorded in writing, satisfaction has to be arrived at and at least one of the contingencies contemplated under Clause (a), Clause (b) or Clause (c) of the proviso have to be held to be existing. The procedure which has been laid down in sub-rule (1) of Rule 40 of Order 21 has to be followed and the conditions laid down in the proviso to Section 51 have to be held existing.

14. In this regard, I may profitably refer to the decision of this Court in Subhash Chand Jain Vs. Central Bank of India, AIR 1999 MP 195 in which it has been held as under:-

"7. From a bare reading of the relevant provisions quoted above, it is evident 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 notice issued 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 case in hand the executing Court after issuing show cause did not hold any enquiry as contemplated of Clause (1) of Rule 40 of Order 21 nor has complied the conditions laid down in proviso to Section 51 so as to record its reasons after its satisfaction for detaining or sending the judgment-debtor in civil prison"

11. I have perused the order dated 20.04.2023. On the said date, an application under order 21 rule 37 CPC was filed on behalf of the DH. On the same day, the court allowed the above said application of the DH and issued warrant of arrest for detention of JD No. 2 in civil prison.

12. From the above said order, it is clear that no notice of the said application has been given to the JD No. 2 and no inquiry as per order 21 rule 40 CPC has been held by the court, before passing order for sending the JD No. 2 to civil imprisonment.

13. It is mandatory for the court to conduct inquiry under order 21 rule 40 CPC, before sending the JD to civil imprisonment, but the above said provision of order 21 rule 40 CPC has not been

considered by the court, while passing order dated 20.04.2023, against JD No. 2.

14. The above said mistake regarding not considering mandatory provision of order 21 rule 40 CPC before sending the JD to civil imprisonment, is an error apparent on the record of the court. The JD has never been given notice of application under order 21 rule 37 CPC and he was brought before the court after issuance of warrant of arrest on 4.09.2024 and thereafter the present application has been filed on 19.09.2024, therefore the present application has been filed within time after knowing the order dated 20.04.2023, by the JD No. 2.

15. In view of the above said facts and observations, the present application stands allowed. The order dated 20.04.2023 to the extent of allowing application of DH filed u/o 21 rule 37 CPC and issuing warrant of arrest for detention of JD No. 2 in civil imprisonment stands recalled and set aside. Consequently, order dated 28.05.2024 issuing fresh warrant of arrest against JD No. 2 also stands recalled. Application stands allowed accordingly.

**Announced in the open court
on 10th December, 2024**

**(SHIV KUMAR)
District Judge-02
(West), Delhi**