

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
APPELLATE SIDE  
WRIT PETITION NO.6937 OF 2003

Sanjay Mahendra Pawar,  
Aged: Major, Occ: Business,  
r/o Soygaon, behind Aroma  
Theatre, Tal: Malegaon,  
Dist: Nashik,  
currently r/o Kakadgaon,  
Tal. Satana/Baglan,  
Dist: Nashik.

.... Petitioner  
(Ori.J.D.No.1)

- Versus -

1. Malegaon Municipal Corporation,  
through the Municipal  
Commissioner, Malegaon  
Municipal Corporation,  
Malegaon.

.... Respondent  
(Ori.Decree Holder)

2. Ramdas Chinda Pakar,  
Aged: Adult, Occ: Journalist,  
r/o Sangameshwar, Ekta  
Printing Press,  
Tal. Malegaon,  
Dist: Nashik.

.... Respondent  
(Ori.J.D.No.2)

Sarvasri V.V. Tulzapurkar, Senior Advocate, with  
M.M. Sathaye, Advocate, for the Petitioner.

Sarvasri N.V. Walawalkar, Advocate, with S.M.  
Sabdrad, Advocate, for the Respondent No.1.

**CORAM:** R.M.S. KHANDEPARKAR, J.

**DATED:** OCTOBER 29, 2004

**ORAL JUDGMENT:**

1. Heard the learned Advocates for the parties.

2. The petitioner challenges the order dated 11-9-2003

passed in Special Darkhast No.35 of 2002 by the Civil Judge, Senior Division, Malegaon, directing arrest of the petitioner in case of failure to pay the decretal amount as specified in the said order.

3. The facts of the case relevant for the decision are that the petitioner is the judgment-debtor No.1 in the Special Darkhast No.35 of 2002, filed by the respondent No.1 for the execution of the judgment and decree dated 27-2-2002 passed in Special Civil Suit No.129 of 1995 for recovery of the sum of Rs.1,98,71,737/- with interest at the rate of 20% per annum thereon. The petitioner has challenged the said decree by filing First Appeal No.1768 of 2002 which has been admitted by this Court and is pending for final disposal. The petitioner, however, has not filed any application for stay of execution of the decree. The executing Court issued show cause notice seeking explanation from the petitioner as to why he should not be committed to civil prison consequent to the filing of the darkhast application by the respondent. The same was replied by the petitioner on 31-10-2002. The parties led evidence in support of their rival contentions in relation to the request of the respondent for detention of the petitioner in civil prison on account of failure on the part of the petitioner to pay the decretal amount. After hearing the parties, the executing Court by the

impugned order directed the petitioner to deposit at least Rs.1,25,00,000/- within one month from the date of the impugned order, failing which the petitioner was directed to be detained in civil prison for a period of three months on payment of subsistence allowance by the decree holder. Hence the present petition.

3. While challenging the impugned order, the learned Advocate for the petitioner submitted that the direction for detention of the petitioner in civil prison has been issued merely on the finding that inspite of availability of amount of money with the petitioner, the petitioner has not paid the same towards the decretal amount and therefore he has been held to be liable to be detained in civil prison, ignoring the provisions of law which are required to be complied with before issuing direction for the detention of the judgment-debtor in civil prison for default in payment of the money under the decree of the civil Court. It was further contended that the decree holder inspite of having other modes available for recovery of the decretal amount has chosen to seek the detention of the petitioner in the civil prison in total violation of the provision of Section 51 of the Code of Civil Procedure as well as the law laid down in that regard by various judicial pronouncements and reliance is sought to be placed in the decisions in the matters of **K.M. Kannu Gounder v. Mahboob Ali Sahib**

and another, reported in AIR 2003 Madras 362 and **V. Ganesa Nadar v. K. Chellathai Ammal**, reported in AIR 1989 Madras 8 while submitting that without exploring the other modes for recovery of the decretal amount, the decree holder is not entitled to seek detention of the judgment-debtor in civil prison. As regards the merits of the case, it was submitted on behalf of the petitioner that the findings arrived at to justify the detention of the petitioner in civil prison are totally contrary to the materials on record and are perverse. Referring to the finding regarding the source of money being available on account of compensation having been paid in the land acquisition cases, it was contended that in relation to Case No.213 of 1991 the records disclose that the same relates to the property belonging to a person totally different from the petitioner and even his family members, and in relation to the other land acquisition proceedings the same pertain to the properties belonging to the family members of the petitioner wherein the petitioner had appeared in the capacity as the attorney for his relatives. Similar is the case in relation to the car which is stated to be belonging to the petitioner. It is further contended that there is no finding that such assets were available with the petitioner subsequent to the passing of the decree which was sought to be executed. Reliance is sought to be placed in that regard in the decisions in

I.K. Merchants Ltd. v. Indra Prakash Karnani, reported in AIR 1973 Calcutta 306 and Kesava Pillai Karunakaran Pillai v. Ouseph Joseph, reported in AIR 1977 Kerala 27. It is the further case of the petitioner that even in relation to the properties which belong to the petitioner, there was deliberate attempt on the part of the respondent to prevent the petitioner from generating funds by disposing such properties and to pay the decretal amount, and the same was done by addressing a letter to the revenue authorities not to carry out the mutation entries in relation to the properties of the petitioner and this fact, according to the petitioner clearly discloses that there was no negligence as such on the part of the petitioner in the matter of compliance of the decree of the civil Court and in that regard attention is drawn to the decisions in the matters of M.V.P. Paramanandaswami alias Pichamuthu Pillai v. A.K. Shanmugham Pillai, reported in AIR (36) 1949 Madras 822 and Jolly George Varghese and another v. The Bank of Cochin, reported in (1980) 2 SCC 360.

4. On the other hand, the learned Advocate for the respondent submitted that the conduct of the petitioner clearly disentitles the petitioner from seeking interference by this Court in the impugned order which has been passed by the executing Court after taking into

consideration all the materials placed on record. According to the learned Advocate for the respondent, the findings arrived at by the Court below obviously disclose that the petitioner intentionally avoided to pay the decretal amount and, therefore, no fault can be found with the impugned order directing the detention of the petitioner in civil prison on account of failure to pay the decretal amount. It was further submitted that various materials placed on record by the respondent in reply to the petition would reveal that though the petitioner owns sufficient number of properties yet the petitioner has failed to pay the decretal amount to the respondent. Attention was sought to be drawn to the evidence recorded before the trial Court which discloses that the petitioner is an income-tax payer and he has enough income from agricultural property jointly with other members of the family and yet he has refused to pay the decretal amount to the respondent. According to the learned Advocate for the respondent, the conduct of the petitioner itself disentitles him to seek any equitable relief in the matter. He has also further submitted that considering the fact that the petitioner owns various properties and attempts are being made to dispose of the same and even the agreements for sale are being executed by the petitioner in favour of the third parties, the petitioner should be restrained from alienating his properties.

5. Perusal of the impugned order discloses that the observation to the effect that the petitioner has means to pay and that he has intentionally avoided to pay the decretal amount, and the same has been made by the executing Court, based on the inference sought to be drawn on the basis of the finding which is arrived at by the executing Court that "the D.H. has placed voluminous documents on record from which it can be ascertained that J.D. and his family which prima facie looks to be joint possesses sufficient means to pay the decretal amount .....". Apparently, the finding in relation to sufficient means being available at the disposal of the petitioner to pay the decretal amount is based on the conclusion which is sought to be arrived at by the executing Court on the basis that the voluminous documents on record prima facie show sufficient assets with the petitioner, jointly with his family members. This conclusion, as is evident from the impugned order has been arrived at on the basis of certain amount which is stated to have been received on account of payment of compensation in the land acquisition proceedings, the value of the car disclosed to the income-tax department and bank balance in various accounts with the banks. It is, however, to be noted that the analysis of the materials on record in relation to either the compensation stated to have been received in the land

acquisition proceedings or in relation to the value of the motor-car or pertaining to the bank balances, there is no finding in the impugned order that such amount out of the compensation or pertaining to the value of the motor-car or the bank balance were available with the petitioner on or subsequent to the date of passing of the decree in the civil suit, or that since that day the petitioner had attempted to dispose of such amount in any manner or with the object to obstruct or delay either the execution of the decree or the payment of the decretal amount by the petitioner.

6. In terms of the provisions of law comprised under Section 51 of the C.P.C., while dealing with the application for arrest of the judgment-debtor on account of the alleged acts of obstruction for execution of the decree by the judgment-debtor, it is necessary for the executing Court before ordering the arrest and detention of the judgment-debtor in civil prison to ascertain from the materials placed on record by the parties as to whether the judgment-debtor has acted in a manner with the object or to effect obstruction or to delay the execution of the decree or has intentionally neglected to pay the decretal amount. Such finding will have to be arrived at with reference to the acts on the part of the judgment-debtor, from and subsequent to the date of the decree passed by the trial Court. Undoubtedly, the



acts of the judgment-debtor prior to that date and from the date of filing of the suit may be relevant to substantiate the finding in relation to the actual acts of the judgment-debtor subsequent to the decree of the civil Court. Bare perusal of the impugned order, however, nowhere discloses any such exercise having been done by the executing Court before issuing direction for detention of the petitioner in civil prison on account of failure to pay the decretal amount. On this count alone, the impugned order directing the detention of the petitioner in civil prison cannot be sustained and is liable to be set aside.

7. The Section 51 of the C.P.C. and particularly the proviso thereto clearly provides 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 to be recorded in writing, is satisfied that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree, is likely to abscond or leave the local limits of the jurisdiction of the Court, or has, after the institution of the suit in which the decree was passed, dishonestly transfers, conceals, or removes any part of his property, or commits any other act of bad faith in

relation to his property, or 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 that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account. Obviously therefore, in relation to means to pay the decretal amount or even a substantial part thereof, refusal or neglect in that regard has necessarily to relate to the period from and the date of the decree and it cannot relate to the day prior to the date of the decree. Undoubtedly, the alienation of his property with dishonest intention to defeat the execution of the decree which may be passed in the matter could certainly be one of the factors to be considered while dealing with the application for detention of the judgment-debtor in civil prison for failure to pay the decretal amount. However, in the case in hand, the order has not been passed on account of any such dishonest alienation during the pendency of the suit. Besides, it is nobody's case that during the pendency of the civil suit there was any attempt on the part of the decree holder to secure any order in terms of the provisions comprised under Order 38 of the C.P.C. Apparently, the impugned order has been passed in relation to Clause (b) of the proviso to Section 51 which deals with the subject of availability of means to

pay the decretal amount and yet there is refusal or neglect to pay the same. The provisions of law in that regard being specifically relating to the date of the issuance of the decree, it is necessary for the executing Court to ascertain whether the materials on record reveal the act on the part of the judgment-debtor since the date of the decree, refusal or neglect to pay the decretal amount by the judgment-debtor inspite of there being means to pay the same. As already observed above, though the impugned order refers to various compensations having been received on account of land acquisition proceedings or the value of the car as well as the bank balance, it nowhere refers to the period from the date of issuance of the decree and subsequent thereto. Merely because in past such amount was available with the petitioner, that cannot by itself be a justification to exercise the powers under Section 51 to order the detention of the judgment-debtor in civil prison on account of his failure to pay the decretal amount. It is not mere failure to pay the decretal amount but such failure has to be in the circumstances specified in the statutory provisions. Apparently therefore, the executing Court has exercised its discretion arbitrarily and an improper exercise of jurisdiction which clearly warrants interference in the impugned order in writ jurisdiction.

8. The Madras High Court in **K.M. Kannu Gounder's** case (supra) has held that though the decree holder is at liberty to seek any mode of relief to recover the amount due under a decree, so far as the choice whether a decree holder could adopt execution petition for attachment or for arrest is concerned, prior to embarking upon the arrest, the other procedures like the attachment, etc., should be exhausted first and that has been the trend and approved by various judicial pronouncements and the view taken even by the Apex Court. Further, in **V. Ganesa Nadar's** case (supra), the Madras High Court has held that choosing the mode of arrest and detention in civil prison for non-payment of the decretal amount without utilising the provisions relating to attachment and sale of the property of the judgment-debtor would disclose mala fide on the part of the decree holder. It was clearly held that "merely because a judgment-debtor possesses immovable property, an order of detention in civil prison cannot be made for his failure to pay.".

9. The Calcutta High Court in **I.K. Merchant's** case (supra) has clearly highlighted the obligation of the executing Court to decide the issue regarding the means to pay the decretal amount by the judgment-debtor on the basis of the materials to be placed by the parties before the Court and not to be swayed by any submissions

made or statements made by the parties in the course of recording of the evidence in support of the rival contentions and that the finding in that regard should be clearly borne out from the records.

10. In **Kesava Pillai's** case (supra) of the Kerala High Court, it was clearly ruled that the burden of proving that the conditions mentioned in Section 51 of the C.P.C. exist is on the decree holder.

11. The Madras High Court in **S.K. Kuttalalingam Pillai v. S.V.N. Chinnakannu Pillai**, reported in AIR (39) 1952 Madras 18 has held that a Court must record its reasons in writing regarding its being satisfied, under Section 51 of the C.P.C., that the judgment-debtor had rendered himself liable to be arrested and sent to civil jail on any one of the grounds mentioned therein, before directing his arrest and detention in civil jail, and that the reasons must be given every time a man is ordered to be arrested and in every proceeding where he is ordered to be arrested and that any order for arrest without giving any reason would be unsustainable. Obviously, the reasons are required to be in consonance with the provisions of law comprised under Section 51 of the C.P.C.

12. The Madras High Court in **A.K. Shanmugham Pillai's**

case (supra) disbelieved the allegation regarding neglect on the part of the judgment-debtor to pay the decretal amount on account of certain acts on the part of the decree holder which were in the nature of creating obstruction to the judgment-debtor to dispose of his property for the purpose of generating funds to pay the decretal amount, and held that "It is conceded that apart from the properties which are the subject-matter of O.S. No.22/47 the appellant does neither own nor is in possession of other immovable properties. So far as the subject-matter of the suit is concerned, as we have already stated, there was a consent order in and by which the properties could not be sold pending the disposal of that suit. The learned counsel for the respondent argues that in spite of the consent order the appellant could alienate the properties by private treaty. Though theoretically it might do so, it is impossible to expect that any person would buy those properties. In the circumstances we hold that the judgment-debtor is not shown to have the means to pay the amount of the decree and refused or neglected to pay the same."

13. In fact the Apex Court in the case of **Jolly George Varghese** (supra) had clearly ruled that:-

"10. Equally meaningful is the import

of Article 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 Article 21, read with Articles 14 and 19, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence. **Maneka Gandhi** case as developed further in **Sunil Batra v. Delhi Administration**, **Sita Ram v. State of U.P.** and **Sunil Batra v. Delhi Administration** 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 narayana**, is no crime and to recover debts by the procedure of putting one in prison is too flagrant violative of Article 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 inferrable from Article 11 of the Covenant. But this is precisely the interpretation we have put on the proviso to Section 51, C.P.C. and the lethal blow of Article 21 cannot strike down the provision, as now interpreted.

11. The words which hurt are "or has had since the date of the decree, the means to pay the amount of the decree". This implies, superficially read, that if at any time after the passing of an old decree the judgment-debtor had come by some resources and had not discharged the decree, he could be detained in prison even though at that later point of time he was found to be penniless. This is not a sound position apart from being inhuman going by the standards of Article 11 (of the Covenant) and Article 21 (of the Constitution). The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some



deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. 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. Here considerations of the debtor's other pressing needs and straitened circumstances will play prominently. We would have, by this construction, sauced law with justice, harmonised Section 51 with the Covenant and the Constitution."

The Apex Court, therefore, has clearly ruled that in order to invoke the powers under Section 51 of the C.P.C., to direct the arrest and detention of the judgment-debtor in civil prison on account of default in payment of the decretal amount, an element of bad faith has to be disclosed from the materials on record in relation to such failure on the part of the judgment-debtor to comply with the decree for payment of money. Obviously therefore, the Court before issuing direction for arrest and detention of the judgment-debtor in civil prison has to arrive at the conclusion about the deliberate or intentional acts on

the part of the judgment-debtor in denying the benefits of the money decree in favour of the decree holder inspite of having means to comply with such order, and in the absence of such clear finding, the question of upholding the order for detention of the judgment-debtor does not arise.

14. The law therefore clearly warrants that though the decree holder has option to adopt various modes to seek recovery of the decretal amount, the choice to seek detention of the judgment-debtor is not available as a matter of course and certainly it is not to be allowed to be preferred unless the decree holder exhausts the other modes available to him. Even in case of request for detention of the judgment-debtor for the purpose of recovery of the decretal amount, before issuing any order to that effect, the executing Court has to satisfy itself that the provisions of law comprised under Section 51 of the C.P.C. and more particularly comprised under the proviso to the said Section are meticulously observed and there is clear case of wilful neglect or refusal to pay the decretal amount inspite of the fact that the judgment-debtor has means to pay the decretal amount or at least a substantial part thereof. An order for arrest and detention of the judgment-debtor should not be passed merely to assist the decree holder to recover the decretal amount but it has to be passed

as a last resort when all other options for recovery of the decretal amount are exhausted, albeit depending upon the facts of each case.

15. Perusal of the impugned order discloses that the executing Court has not been able to arrive at the finding about the availability of means with the petitioner to comply with the money decree or any substantial part thereof by the petitioner so as to justify his detention in civil prison. There is no finding that during the period from the date of the decree till the passing of the impugned order, the petitioner had means to pay the decretal amount or any substantial part thereof and yet the petitioner had either refused or neglected to pay the same. The finding about "the wilful conduct of non-obeying the decree" by the petitioner, as rightly submitted by the learned senior Advocate for the petitioner, is merely inferential finding based on another finding to the effect that "the petitioner and his family prima facie looks to be in joint possession of sufficient means to pay the decretal amount" which finding is not borne out from the records. Being so, on this count also the impugned order cannot be sustained and is liable to be set aside.

16. It has been strenuously argued on behalf of the

respondent that the petitioner does possess properties and yet is refusing to pay the decretal amount. In fact the very such statement justifies the setting aside of the impugned order leaving it to the decree holder to pursue the other modes for execution of the decree, including the one of attachment of the properties of the petitioner and sale thereof in accordance with the provisions of law. The decree holder who is able to establish that the judgment-debtor is in possession of the property, and on alienation thereof, can generate resources for payment of the decretal amount, disentitles himself to claim relief in the nature of detention of the judgment-debtor in civil prison without exhausting the remedy of attachment and sale of such property of the judgment-debtor.

17. It was also submitted on behalf of the respondent that in order to secure the interest of the decree holder, the petitioner may be restrained from disposing of the properties of the petitioner. Undoubtedly, neither any such application was filed by the respondent in the executing Court nor even in the present petition. In fact the question of granting any such relief by this Court in the present petition does not arise at all as the scope of the present petition is related to the propriety and the legality of the impugned order which pertains to direction for arrest and detention of the

petitioner for non-compliance of the money decree. The respondent is certainly entitled to approach the executing Court, in case he so desires, to seek seek the relief in the nature of injunction against the disposal of his properties or the attachment of the properties of the petitioner. Of course, if such an application is filed, the same will have to be decided in accordance with the provisions of law. It is too premature for this Court to express any opinion as regards the right of the parties for any such relief.

18. For the reasons stated above, therefore, the impugned order directing the detention of the petitioner in civil prison cannot be sustained and hence the petition succeeds and the impugned order, as far as it relates to the direction for detention of the petitioner is concerned, is hereby quashed and set aside. The rule is made absolute accordingly with no order as to costs.

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