

**Manickam, Vs. Munian, and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/904662](http://sooperkanoon.com/904662)

**Court :** Chennai

**Decided On :** Sep-30-2010

**Judge :** T.S.Sivagnanam, J.

**Acts :** Code Of Civil Procedure (CPC) - Section 115

**Appeal No. :** CRP(NPD) No.1477/2002

**Appellant :** Manickam,

**Respondent :** Munian, and ors.

**Advocate for Def. :** Mr.M.Christopher; Mr.S.Dhanaraj, Adv.

**Advocate for Pet/Ap. :** Mr. R.Subramaniam, Adv.

**Judgement :**

1. This revision petition has been filed under Section 115 of the Code of Civil Procedure against an order of arrest passed by the Executing Court against the petitioner.

2. The petitioner filed O.S.No.195 of 1981 before the District Munsif Court, Thiruchengode against the respondents for declaration, permanent injunction and partition of the suit properties. The suit was dismissed and the Sub-Court, Sankagiri in A.S.No.71 of 1985 confirmed the Judgment and decree. Aggrieved by the same, the petitioner preferred Second Appeal No.1190 of 2001 before this Court and the same is pending. While so, the respondents herein filed

R.E.P.No.37 of 2001 for recovery of costs, which was ordered by the trial as well as appellate Court being Rs.2,293.50/-. The petitioner filed a counter raising the plea of nonjoinder of proper and necessary parties and that action should be taken against the properties and only thereafter action could be taken personally against the petitioner. The Executing Court by order dated 26.07.2002, ordered arrest of the petitioner. Aggrieved by such order, this revision petition has been filed.

3. The learned counsel appearing for the petitioner would submit that the order of arrest has been mechanically passed and the Executing Court failed to see that the second appeal is pending before this Court and that no mesne enquiry has conducted before passing the order. In support of his contention, the learned counsel placed reliance on the decision of this Court in V.Ganesa Nadar v. K.Chellathai Ammal, 100 L.W. 431 and decision of the Hon'ble Supreme Court in Jolly George Varghese and another V. The Bank of Cochin, 1980 2 SCC 360.

4. The learned counsel appearing for the respondents on the other hand would contend that the order passed by the Executing Court is perfectly legal and valid and no error can be attributed to the said order.

5. I have considered the submission on either side and perused the materials available on record.

6. Order 21 Rule 37(1) provides that where an application is for execution of a money decree by the arrest and detention in civil prison, the Court instead of issuing a warrant of arrest to the Judgment debtor, 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 civil prison. In terms proviso to Rule 37 (1) 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. Rule 40 states, 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 money decree, Court shall proceed to hear the decree-holder and take all such evidence and then give an opportunity to the Judgment debtor to show cause why he should not be committed to the civil

prison. Section 51 of the Code states that before an order of arrest and detention in prison is made, the Court should give an opportunity to the Judgment-debtor for showing cause as to why he should not be committed to prison for reasons to be recorded in writing is satisfied of any of the requirements prescribed in clauses a, b or c of the proviso. This Court in *Namachivaya Mudaliar v. Manickavelu and Co*, AIR 1972 Mad 292, held that after reading section 51 and Rules 37 & 40 of Order 21 CPC, it is clear that the proviso to Section 51 is applicable and the Court is bound to record in writing its specification of one of the conditions prescribed in the Section, only when it commits a person to prison and not when issuing a warrant of arrest. This decision was referred to by the Division Bench in *P.G. Ranganatha Padayachi V. Mayavaram financial Corporation*, AIR 1974 Mad 1, and after discussing the law on the subject held thus:- "10. To sum up therefore, the order of arrest passed by the executing Court without giving a finding regarding the means of the judgment-debtor to pay the decree amount is not one without jurisdiction as the order of arrest is only under Order XXI Rule 37(2). Needless to say that the executing Court should necessarily go into the question of means of the judgment-debtor to pay the decree amount after the latter is arrested and brought to Court and before deciding whether the judgment-debtor has to be committed to prison or not in execution of the decree."

7. The order passed by the executing Court does not assign any reason that the Court is satisfied that there are prima facie material before the Court for proceeding under order 21 Rule 37. This has to be culled out only from the order as the order has to speak for itself and every decision should be supported by reasons. The power under Rule 37 is not just an innocuous matter, as the decision whether to issue of warrant of arrest or to issue a show cause to the Judgment-debtor as to why he should not be arrested are matters having an impact on human dignity. The Hon'ble Supreme Court in *Jolly George Varghese and another V. The Bank of Cochin*, 1980 2 SCC 360 had observed how gruesome and obnoxious is the remedy of incarcerating a debtor for an unpaid debt under modern conditions and in the contest of human rights. As observed earlier, perusal of the order passed by the executing Court its clear, the Court has not recorded its satisfaction and mechanically proceeded to order arrest. In terms of Rule 37 (1) of Order 21, the satisfaction of the Court is a sin-qua-non for issuing an order of

arrest. The term "satisfied" used in the proviso cannot be held to be an empty expression especially, when the matter involves human rights. This satisfaction of the Court to invoke the power should find place in the order and it should be apparent from the face of the record and therefore, it is necessary for the Court to record certain reasons as to why it is satisfied that the power under the proviso to Rule 37(1) of Order 21 CPC has been invoked. An order without reasons has been held to be an order in violation of the principles of natural justice. This Court in K.AL.R.M. R.M.Alagappan v. Rajaguru & Co., (1985) 1 MLJ 331, after referring to the Judgments of the Hon'ble Supreme Court in Jolly George Varghese and another V. The Bank of Cochin, AIR 1980 SC 470, Rama Narayan Agarwal v. State of U.P. (1983) 4 SCC 276, held thus:- "6..... In this case, nothing is found in the impugned order that the judgment-debtor is having funds or that he is purposely delaying to pay the decretal amount. Under these circumstances, I am of the view that the impugned order of the executing Court has to be set aside and it is accordingly set aside and this civil revision petition is allowed."

8. In view of the above reasons, this Court is satisfied that the order passed by the executing Court is to be set aside.

9. In the result, the Civil Revision Petition is allowed and the order passed by the Executing Court is set aside. No costs.

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