
Constitutionality Of Provisions on Powers of Arrest & To Impose Costs of Arrest Under the CPC: A Legal Discourse

*Vaibhav Kartikeya Agrawal, Advocate.**

Abstract

Code of Civil Procedure (hereinafter 'CPC') is the parent law to provide procedure for adjudication of suits of civil nature all over the territory of India. Order XXI of CPC provides procedure for 'execution' of decree. Rule 30 of Order XXI of CPC provides that the decree for payment of money can be executed by arrest of judgment debtor or attachment of its property or by any of these means. Section 55 of CPC provides procedure for arrest and detention of the judgment-debtor in execution of a decree for payment of money. Proviso four to section 55 of CPC entails costs of arrest upon the judgment-debtor even after fulfilment of the decree for payment of money. This paper endeavours to contemplate the constitutionality of such imposition of the 'costs of the arrest' upon the judgment-debtor. The paper further endeavours to analyze the constitutionality of sub-rule (2) of rule 37 of Order XXI of CPC which mandates the Court of execution to issue a warrant of arrest to the judgment debtor in execution of the decree for payment of money on application of the decree holder. In my view, the observations and analysis in this paper would add to the legal jurisprudence.

* The author is an Advocate and has completed his B.A.LL.B., LL.M., from Guru Ghasidas Vishwavidyalaya, Chhattisgarh.

I. Introduction:

Code of Civil Procedure (hereinafter 'CPC') is the parent law to provide procedure for adjudication of suits of civil nature all over the territory of India. Order XXI of CPC provides procedure for 'execution' of decree. Rule 30 of Order XXI of CPC provides that the decree for payment of money can be executed by arrest of judgment debtor or attachment of its property or by any of these means. Section 55 of CPC provides procedure for arrest and detention of the judgment-debtor in execution of a decree for payment of money. Proviso four to section 55 of CPC entails costs of arrest upon the judgment-debtor even after fulfilment of the decree for payment of money. This paper endeavours to contemplate the constitutionality of such imposition of the 'costs of the arrest' upon the judgment-debtor. The paper further endeavours to analyze the constitutionality of sub-rule (2) of rule 37 of Order XXI of CPC which mandates the Court of execution to issue a warrant of arrest to the judgment debtor in execution of the decree for payment of money on application of the decree holder. In my view, the observations and analysis in this paper would add to the legal jurisprudence.

II. Powers Of Court to Issue Warrant of Arrest in Execution Of A Decree For Payment Of Money

Section 55 of CPC provides a general provision for arrest of judgment-debtor and states that "a judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, ...". This provision to arrest the judgment-debtor at any hour and on any day is subject to the provisions contained in rule 37 of Order XXI of CPC. Rule 37 of Order XXI of CPC specifically states that "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: ...". Sub-rule (2) of rule 37 of Order XXI of CPC states that if the judgment-debtor commits default in his appearance in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

Therefore, sub-rule (2) of rule 37 of Order XXI of CPC specifically mandates the Court to issue a warrant for the arrest of the judgment-debtor if the judgment-debtor commits default I obedience to the notice. However, it is imperative to note that such a mandate on the Court to issue a warrant is subject to the whim and fancy of the decree holder by the words "if the decree-holder so requires". This shows that the provision to some extent restricts the discretion of the Court to issue an impartial order and requires the affirmance of the decree-holder for the same. So, it is essential to obliterate the words 'if the decree-holder so requires' from sub-rule (2) of Rule 37 of Order XXI of CPC in order to ensure independence of power of adjudication of suits for execution of the decree for payment of money.

III. Constitutionality Of Provisions in Relation to Imposition Of Costs Of Arrest Upon The Judgment -Debtor:

Sub-section (1) of Section 55 of CPC states:

"(1) A judgment-debtor may be arrested in execution of a decree at, any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the State Government may appoint for the detention of persons ordered by the Courts of such district to be detained:

Provided, firstly that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise:

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found:

Provided, thirdly that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest:

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him."

Proviso four to section 55 of CPC states that "... where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the 'costs of the arrest' to the officer arresting him, such officer shall at once release him". This paper endeavours to contemplate the provision which imposes 'costs of the arrest' upon the judgment-debtor on following rationales:

1. The judicial system is a necessary attribute of the State exclusively established to provide justice to the people particularly its citizens;
2. Democracy is Government of the people, for the people and by the people.¹ Such a magnificent vision for a democratic government necessarily envisages absence of arbitrariness in governance.² This absence of arbitrariness is ensured by governance through rule of law. Dicey stated three attributes of rule of law, *i.e.*,
 - Equality Before Law;
 - Absence Of Arbitrariness; And
 - Separation Of Powers.
3. The concept of separation of powers was propounded by Montesquieu. He states that there should be division of powers between the three organs of government, legislature, executive and judiciary such that their powers do not overlap and are independent to function in their respective jurisdictions.

¹ Sir Abraham Lincoln defined Democracy in these terms.

² Governance and Development Report defines governance: *the manner in which power is exercised in the management of a country's economic and social resources for development*: available at: <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/604951468739447676/governance-and-development> (last visited 07.02.2023).

4. The exercise of police power by the State is a manifestation of sovereign virtue of 'justice'. It symbolizes the State obligation of the State to protect fundamental rights of its citizens.
5. Article 21 of the Constitution of India (hereinafter 'Constitution') provides for right to life. It states: 'No person shall be deprived of his life or personal liberty except according to the procedure established by law'. The term 'life' in Article 21 of the Constitution has been interpreted in *Maneka Gandhi v. Union of India*³ to include all amenities of life. So, such an interpretation imposes an increased negative obligation upon the State to ensure right to food, shelter, medical necessities, etc. for persons desirous and in need of it but the State could not require the beneficiaries to reconstitute or subrogate the State exchequer for the expenses incurred in fulfilment of necessities for them.
6. Similarly, if the State prosecutes for trafficking of children or child labor in discharge of its obligation to protect fundamental right against exploitation enshrined in Articles 23 and 24 of the Constitution, there cannot be any affirmative obligation upon the victims of child labor or the trafficked children to reconstitute of the machinery and expenditure employed by the State.
7. India is a welfare State. Preamble to the Constitution of India states establishment of Sovereign Socialist Secular Democratic Republic in order to confer justice social, economic and political to all its citizens.
8. The term 'socialist' in Preamble recognizes the State to regulate concentration of wealth in hands of few. Socialism means the State shall own and possess the wealth of all types and disburse it to the people entitled and people in distress without discrimination.
9. The power of arrest and detention is vested in the State to empower it for regulation of law and order. Such a power cannot be vested in any private person or enterprise, without express authorization of the State.
10. It is pertinent to note that the State does not acts as a profitable enterprise in exercise of its sovereign functions. This is the reason that the power to arrest or detain a person must not empower the state to impose costs of arrest.
11. State is formed out of population, territory, sovereignty and government.⁴ Out of these, it is the people for whose governance, the whole administration is accountable and could be formed or re-constituted. The power of arrest and detention are measures not to subjugate but reform. Out of the four theories, our judicial system prefers the reformatory theory of

³ AIR 1978 SC 597

⁴ Dr. Eddy Ashiwartham and K.K. Misra, *Political Theory* 60-61 (2011 Edn. reprint 2012, S. Chand).

punishment in all cases of crimes. Therefore, arrest and detention of a judgment-debtor in a civil prison is merely a measure to coerce for proper fulfilment of liability in a decree for payment of money.

12. This is a provision when Britishers invaded India and dominated its judicial system. Britishers provided judicial services or adjudicated the lis of native citizens of India primarily to continue their governance. In this regard, it is pertinent to note that the adjudication of disputes by judiciary was established for the officials and servants of the then East India Company, however, due to the rigorous suppression of political governance and oppressions, the British governors were obliged to extend the operation of judicial system for the benefit of nationals of then British India.⁵
13. Section 55 of CPC does not exempt the judgment-debtor from its penal liability to pay costs of arrest if the judgment-debtor only fulfils a part of the decree for payment of money. So, such imposition of costs of arrest would be contrary to the provisions of rule 30 and 31 to Order XXI of CPC which empowers the Court to provide time up to three months for cessation or sale of the property attached in execution of the decree for specific movable property. However, Section 55 of CPC aims to impose costs of arrest even if the judgment-debtor fulfils the decree for payment of money immediately.
14. Rule 30 of Order XXI of CPC empowers the Court to attach the property of the judgment debtor in a decree for payment of money.⁶ So, if the property of judgment-debtor is attached in pursuance of the decree for payment of money, PC nowhere provides that the judgment-debtor could be made liable for the cost of ware house where the property of the judgment-debtor is kept.
15. It would be in the nature of double jeopardy to accuse the judgment-debtor for costs of arrest whether or not he fulfils the decree for payment of money.

⁵ The Company emphasized in its directives that the charter of 1753 was principally designed for the government of the Europeans, and that the Hindus and the Muslims having their own special customs must be left free to dispose of their cases themselves lest difficulties might arise by their customs being broken. Under the Charter, the Mayor's Court could take cognizance only of those cases among the Indians which were brought before it voluntarily by both parties. M.P. Jain, M.P. JAIN OUTLINES OF INDIAN LEGAL AND CONSTITUTIONAL HISTORY 45 (6th edn. 2006, reprint 2009).

In case of adjudication of lis of Indian citizens of British India, it is stated, 'But the India inhabitants had no such reciprocal means to obtain redress against the British subjects against whom cases could be file only in the Supreme Court at Calcutta. see *Id* at 130.

⁶ Rule 30 of Order XXI of CPC states: 'Every decree for the payment of money, including a decree for the payment of money as an alternative to some other relief, may be executed by detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both'.

16. Proviso four of Section 55 of CPC requires the judgment-debtor to pay the costs of arrest in case where the decree is for the payment of money and the judgment-debtor pays the amount of the decree. This provision therefore, envisages that if the judgment-debtor is arrested and detained in the civil prison for any number of days, the judgment-debtor would be at penal liability to fulfil the costs of arrest to the prison authorities. Such an obligation upon the judgment-debtor cannot be imposed statutorily for the reason that:

- There is no corresponding provision in CPC to seek enforcement of the penal liability for costs of the arrest if, the judgment-debtor defaults in payment of such costs of arrest.
- The liability of costs of arrest cannot be enforced merely as any liability for a lawful debt or land revenue for the reason that such a liability is of the nature of double jeopardy;
- Rule 39 of Order XXI of CPC requires the decree-holder to deposit the sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the court. Further, if the judgment-debtor is committed to civil prison in execution of a decree, sub-rule (3) of rule 39 of Order XXI of CPC states that "The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month". Therefore, it would be against the tenets of natural justice if the Court requires subsistence allowance for the costs of arrest from the decree holder under rule 39 of Order XXI of CPC and subsequently, require the judgment-debtor to fulfil the costs of arrest.
- If judgment-debtor fulfils the decree for payment of money, the Court is bound to issue an order for the release from arrest, but there is no corresponding provision to require the Court to state the costs of arrest. So, the imposition of costs of arrest upon fulfilment of the decree for payment of money by the judgment-debtor would be at the whim and fancy of the prison authorities.

Therefore, in light of these averments, it could be inferred that the proviso four to section 55 of the Code of Civil Procedure must not require the judgment-debtor to pay costs of arrest even if the judgment-debtor fulfils the decree for payment of money.

IV. Conclusion:

India is Sovereign, Socialist Secular Democratic Republic. Section 55 of CPC provides provisions on arrest and detention. Proviso four to section 55 of CPC states that if the judgment-debtor fulfils the decree for payment of money, it shall be obligatory to deposit the costs of arrest to the prison officer.

Such imposition of costs of the arrest is against the basic concept of judicial system for the reason that, firstly, our criminal justice system is based on theories of reformatory justice so, in a suit of civil nature, the State cannot prosecute beyond the tenets of criminal jurisprudence; secondly, the decree holder is required to deposit subsistence allowance for the term of arrest of the judgment-debtor, so the imposition of costs of the arrest would be an additional sum for which there is no beneficiary; thirdly, such an imposition of costs of the arrest would amount to double jeopardy for the judgment-debtor; fourthly, if the judgment-debtor defaults in payment of the costs of the arrest, the State cannot further detain and is bound to release the judgment-debtor. Therefore, the term "costs of the arrest" must be expunged from proviso four to section 55 of CPC in order specifically to reflect the over-arching power of our judicial system.

Sub-rule (2) of rule 39 of Order XXI of CPC states that "[W]here 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". The term 'if the decree holder so requires' with the term 'shall' in sub-rule (2) of rule 37 of Order XXI of CPC specifically seeks to impose mandate on the Court to on the whim and fancy of the decree holder and is probably an interference on the impartiality and independence of the Courts of Law. So, it would be beneficial to expunge the term 'if the decree holder so requires' from sub-rule (2) of rule 37 of Order XXI of CPC.

These provisions require review because 'Law is the product of human reason and is intimately related to the notion of purpose_...' ⁷ An analysis of the judicial method shows that law is not a body of rules, but an organic body of principles with an inherent power of growth. ⁸ Sir Friedmann writes in his *Legal Theory* (1967): This is for the reason that 'Every legal system is oriented towards certain purposes which it seeks to implement. In this sense, every legal system is of necessity a "purposeful enterprise". ⁹ Therefore, these amendments would make the provision in consonance with the notion of welfare State and the goals enshrined in the Preamble to the Constitution of India.

⁷ G.W. Paton, A TEXT-BOOK OF JURISPRUDENCE 4 (3rd ed. 1964).

⁸ Sir Henry Maine stated '...the sign of a progressive human society is whether law keeps on growing after its codification'. see M.P. Jain, M.P. JAIN OUTLINES OF INDIAN LEGAL AND CONSTITUTIONAL HISTORY 501 (6th edn. 2006, reprint 2009).

⁹ Friedmann, W., (5th edn. 1967) *Legal Theory* 21 (London, Stevens and Sons).