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INTRODUCTION

MORALITY OF ARREST AND DETENTION IN CIVIL PRISONS AS A MODE OF EXECUTING A DECREE

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Abstract

All civil suits in India end with being brought to the execution court for being executed by the judgement-creditor. Among the many forms of executing the degree, the Civil Procedure Code, 1908 also provides for arrest and detention in civil prison among the execution proceedings for civil suits. This does not exist as a mode of executing the degree. Rather, arrest and detention under the Civil Procedure Code, 1908 merely acts as a tool at the hands of the judgement-creditor, of coercing the judgement-debtor to execute the degree if certain conditions mentioned in the law are met. The existence of this form of depriving person liberty by a civil court deciding on preponderance of probabilities has been a contentious and highly debated issue for it raises several questions of life and liberty under Article 21 and human rights under international conventions. This article will be venturing into this debate and will be arguing that the current form of arrest and detention existing in the Civil Procedure Code, 1908, is a flagrant violation of the right to life and liberty under Article 21 of the Constitution. It then proceeds to suggest alternatives to the current regime wherein arrest and detention can be done through appropriate procedures and standards of evidence.

The word execution has not been defined in any provision of the Code of Civil Procedure, 1908 ('CPC'). However, it has been understood by the courts and the legal fraternity in general, to mean the implementation or the enforcement of a decree or an order passed by the court.²⁰⁸⁸ Decree and order have been defined under the definition clause of the CPC, wherein the former refers to the "formal expression of an adjudication"²⁰⁸⁹ of a case by the court, or in other words, the final judgement, and the latter refers to the "formal expression of any decision of a Civil Court which is not a decree".²⁰⁹⁰ For the purposes of this project, I will only be concerned with the execution of a decree.

So, execution of a decree essentially means the judgement-creditor (or the decree-holder), enforcing the decree against the judgement-debtor, to receive the fruits of the decree from the latter, as pronounced by the court.²⁰⁹¹ This can include receiving an amount of money from the judgement-debtor, or transferring the property to the judgement-creditor, etc. Once this transaction is fulfilled as per the mandate of the decree and to the satisfaction of the judgement-creditor, the execution of the decree is said to be complete.²⁰⁹² The principles of executing a decree in all aspects are covered by elaborate provisions of the CPC, which include Section 36 to 74 (substantive provisions) and the entirety of Order XXI (procedural provisions).²⁰⁹³

Among the various modes of executing a decree, arrest and detention stands out as one of the most interesting, particularly in the context of this being a civil suit. This will be the main subject matter of this article, i.e., critically analysing the powers and procedures of

²⁰⁸⁸ Rahul Jain, Khushboo Rupani & Mahafirin Mehta, *Execution Of Decrees In India*, MONDAQ (Sep. 17, 2020), <https://www.mondaq.com/india/civil-law/985766/execution-of-decrees-in-india>.

²⁰⁸⁹ The Code of Civil Procedure 1908, s.2(2).

²⁰⁹⁰ The Code of Civil Procedure 1908, s.2(14).

²⁰⁹¹ C.K. TAKWANI, CIVIL PROCEDURE CODE (8th edn., EBC Publishers).

²⁰⁹² *Id.*

²⁰⁹³ Ghan Shyam Das v. Anant Kumar Sinha, (1991) 4 SCC 379.

executing a decree by arrest and detention in a civil prison, in the backdrop of Article 21 and the International Covenant on Civil and Political Rights ('ICCPR'). The main provisions which will be focussed on are Section 55, along with Section 56, 57, 58, 59 and Order XXI Rule 30 to 41.

To that effect, this article is divided into three sections. *Firstly*, this article will trace the history and reason for including arrest and detention as one of the modes of execution of a decree in the CPC. *Secondly*, this article will analyse the Indian position and standard on executing a decree through arrest and detention, particularly with respect to Article 21 and the ICCPR. *Thirdly*, this article will identify the consistency with which the original standing has been applied by the Indian courts. *Lastly*, this article will suggest a way forward to overcome the identified drawbacks with executing a decree through arrest and detention.

EVOLUTION OF ARREST AND DETENTION AS A MODE OF EXECUTION OF A CIVIL DECREE

EMERGENCE OF DEBT IMPRISONMENT

The CPC was framed during the British colonisation of India. So, much like many of the other laws framed during that time, even the CPC, and particularly Section 55, have roots in the common law and subsequent precedents. One such practice which is strikingly similar to the arrest provision under Section 55, is Debt Imprisonment. This was highly prevalent in England and is still prevalent in different countries around the world, like the US, Iran, etc.²⁰⁹⁴

This is a practice which can be traced to the Roman law, where imprisonment was one of the most common orders given against people who

weren't able to pay back their debt.²⁰⁹⁵ This however, did not distinguish between genuinely insolvent persons and those who concealed their assets to evade the repayment of the debt.²⁰⁹⁶ However, with the advent of the modern age and rise in capitalism around the world, the legal system also started moulding itself around this new sociological system. Capitalism as an economic system viewed the creation of wealth and production of good as one of the prime functions of the society. For that, development of new businesses, employing more labour, investing money, giving loans and credits were seen as highly important.²⁰⁹⁷

To that effect, creditors and money lenders, who lent money for the production of goods, were highly placed by the law and seen as sources of power and vehicles of expansion in the capitalistic society. On the other hand, indebtedness and arrears were seen to be analogous to weakness and debt, in general, was seen as hampering the growth of capitalism and instead, a symbol of the vanishing economic traditionalism.²⁰⁹⁸ Thus, these new values and moral hazards against the debtors, started viewing everything that the debtor had, like his money, his property, and even his own body, as something against which the creditor can take action. In this way, the capitalistic mentality of highly valuing credit and viewing everything as a commodity, led to the practice of debt imprisonment in various common law and civil law countries.²⁰⁹⁹

MISFEASANCE V. MISFORTUNE

While initially, all debtors were being grouped into the same category of being quasi-

²⁰⁹⁵ Jay Cohen, *The history of imprisonment for debt and its relation to the development of discharge in bankruptcy*, 3(2) J. Legal Hist. 153 (1982).

²⁰⁹⁶ *Imprisonment for Debt*, ENCYCLOPEDIA, <https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/imprisonment-debt>.

²⁰⁹⁷ Gustav Peebles, *Washing Away the Sins of Debt: The Nineteenth-Century Eradication of the Debtors' Prison*, 55(3) CSSH 701 (2013).

²⁰⁹⁸ *Id.*

²⁰⁹⁹ *Id.*

²⁰⁹⁴ IMPACT IRAN, IMPRISONMENT FOR DEBT (Islamic Republic of Iran June 2020).

criminals, there arose a slow change in attitude in this belief. With the rise in considerations for human rights and a better understanding of *mens rea* and crimes, the legal system started to segregate debtors into honest and dishonest categories, particularly in civil law adjudication.²¹⁰⁰ Not wanting to criminalise poverty by punishing those who were unfortunate to genuinely go bankrupt and those who acted in bad faith to become bankrupt, the law started to imprison only the latter while letting the former go free. This is essentially the 'can pay' principle which was emerging in law.²¹⁰¹

The manner of differentiating between the two categories of debtors, was by looking at whether the debtor was behaving in an "upstanding" manner with the money of the creditor.²¹⁰² Presence of this mode of distinction is also seen in the CPC, where the person is arrested if he had the means of repaying the decree amount and still didn't pay it, out of bad faith. While this practice of debt imprisonment has been abolished in England through Section 11 of the Administration of Justice Act 1970,²¹⁰³ it still remains in controversial existence in India, in the form of Section 55 of the CPC.

INDIAN POSITION ON EXECUTION OF A DECREE THROUGH ARREST AND DETENTION

As previously mentioned, the Indian law finds the presence of this form of executing a decree in Section 55 to 59 and Order XXI Rule 30 to 41. As against the debt imprisonment practice, arrest and detention under the CPC is not just limited to a decree for the payment of the debt money, but also for the specific performance of a contract or even for an injunction.²¹⁰⁴ So, the

reasons for ordering the imprisonment of the judgement-debtor are wider in India than the old common law principle.

OBJECT OF EXECUTING A DECREE THROUGH ARREST

Moreover, the object of ordering the imprisonment is slightly nuanced in the Indian scenario. The judgement-debtor is not being put into prison as a punishment for not being able to pay the debt. The CPC is only permitting the executing court to order the arrest and detention of the judgement-debtor as a manner, device or procedure for the satisfaction of the liability on his due to the debt.²¹⁰⁵ Unlike the former, this arrest and presence in the jail doesn't mean that it is a discharge of the liability and a replacement for the debt that it owed.²¹⁰⁶

It is only being ordered to coerce the judgement-debtor to comply with the decree of payment. So, in essence, the decree still remains the same, that is, a decree to the judgement-debtor to repay the amount to the judgement-creditor. But the manner of enforcing/executing this decree to make the judgement-debtor to comply with it, is by arresting and detaining him in a civil prison. Arrest is only being used as a coercive tool to make the judgement-debtor comply with the decree.²¹⁰⁷

This is the reason why the maximum duration of the jail period is three months for the payment of a sum more than Rs.5,000 and six weeks for the payment of a sum more than Rs.2,000 and less than Rs.5,000.²¹⁰⁸ Additionally, as per the CPC, when such a decree is against a company or a corporation, even then it can be executed through arrest and detention, in which case, the

²¹⁰⁰ Eli Hager, *Debtors' Prisons, Then and Now: FAQ*, THE MARSHALL PROJECT (Feb. 24, 2015), <https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq>.

²¹⁰¹ Haynes and Boone LLP, *Bring back debtors' prison? - Contempt of court and other sanctions for unpaid judgments or awards*, LEXOLOGY (Apr. 07, 2021), <https://www.lexology.com/library/detail.aspx?g=5dfe40a5-4690-49f0-a3bd-cd8b65990b56>.

²¹⁰² Peebles *supra* note 10.

²¹⁰³ Haynes and Boone *supra* note 14.

²¹⁰⁴ The Code of Civil Procedure 1908, Order XXI Rule 32.

²¹⁰⁵ Takwani *supra* note 4.

²¹⁰⁶ Subrata Roy Sahara v. Union of India, (2014) 8 SCC 470.

²¹⁰⁷ SUDIPTO SARKAR, SARKAR CODE OF CIVIL PROCEDURE (12 edn., Lexis Nexis).

²¹⁰⁸ The Code of Civil Procedure 1908, s.58(1).

directors and other officers of the company will be detained.²¹⁰⁹

EXEMPTIONS FROM BEING ARRESTED

However, there are certain kinds of judgement-debtors who are exempted from being arrested and detained in civil prisons. These exemptions are either absolute – in the case of women;²¹¹⁰ members of the legislature;²¹¹¹ and any person whose arrest might result in danger and inconvenience to the public²¹¹² – or conditional – in the case of judgement-debtors whose decretal amount is less than Rs.2,000;²¹¹³ judicial officers, who are returning from, presiding in, or going to their courts;²¹¹⁴ the parties, their pleaders, revenue agents, mukhtars, recognised agents and witnesses acting in accordance with a summons, while returning from, attending or going to the court.²¹¹⁵ The former means they cannot be arrested in executing a decree irrespective of the context and the latter means that they cannot be arrested only in the specified contexts, but otherwise, can be arrested.

INCONSISTENCY IN APPLYING THESE PROVISIONS

One of the first cases to elaborately lay down the principles of applying Section 51, and arresting and detaining a judgement-debtor for executing a decree was *Jolly George Varghese v. Bank of Cochin* (“*Jolly George*”).²¹¹⁶ This essentially laid that if the judgement-debtor, after the passing of the decree, had access to resources using which he could’ve discharged the decree, but he did not deliberately do so in bad faith, then he can be arrested and detained in civil prison even if at point he had no

resources. The court interpreted both Article 21 of the Constitution and Article 11 of the ICCPR, harmonised them with Section 51 of the CPC (emphasising on the phrase, “*had... 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*”²¹¹⁷), to reach this holding.

However, cases following this haven’t completely applied this ratio as it is mentioned. Different variations of this ratio have come up in subsequent cases. For instance, in the case of *Satish v. Gorakshnath Madhavrao Pund*,²¹¹⁸ at the Joint Civil Judge, Senior Division level of this case, the judge had actually not even followed the procedure for inquiry of the arrested judgement-debtor when he was brought before the court. He didn’t even give the judgement-debtor the opportunity to show cause why he shouldn’t be put in civil prison. This shows how the varied interpretation of the provisions relating to arrest and detention under Order XXI, led to a person losing his personal liberty and being put in prison without even being given a chance to be heard. This shouldn’t happen in any court, especially in a civil court where there is a preponderance of probabilities standard.

In another case of *Subrata Roy Sahara v. Union of India* (“*Sahara*”),²¹¹⁹ the Supreme Court interpreted the *Jolly George* ruling in a manner different from what was actually envisaged in the judgement. In *Jolly George*, it was specifically mentioned that the non-fulfilment of the decree, even when the judgement-debtor had the resources to do so, should have been made in bad faith or with a mala-fide intention. This aspect of bad faith and mala-fide intention was completely left out by the judges in *Sahara*. They just observed that the judgement-debtor had the means of paying the decree amount and didn’t do so, and hence could be arrested and detained in a civil prison.

²¹⁰⁹ The Code of Civil Procedure 1908, Order XXI Rule 32.

²¹¹⁰ The Code of Civil Procedure 1908, s.56.

²¹¹¹ The Code of Civil Procedure 1908, s.135A.

²¹¹² The Code of Civil Procedure 1908, s.55(2).

²¹¹³ The Code of Civil Procedure 1908, s.58(1A).

²¹¹⁴ The Code of Civil Procedure 1908, s.135(1).

²¹¹⁵ The Code of Civil Procedure 1908, s.135(2).

²¹¹⁶ (1980) 2 SCC 360.

²¹¹⁷ The Code of Civil Procedure 1908, s.51.

²¹¹⁸ (2009) 6 Bom CR 850.

²¹¹⁹ *supra* note 19.

This shows how in spite of there being a precedent on this matter of imprisonment in a civil prison, courts following *Jolly George* have come to see arrest as also being necessary in cases where they could have easily avoided the same, or at the least, given imprisonment through the right procedure and process.

CRITICAL ANALYSIS OF ARREST IN CIVIL CASES

VIEWING THROUGH ARTICLE 21, THE CONSTITUTION OF INDIA

Article 21 aims to safeguard individuals from being deprived of their lives or person except in accordance with the procedure as established by the law.²¹²⁰ In the context of Section 55 of the CPC, the question that arises is whether the arrest and detention in civil prisons violates Article 21. I seek to answer this in the negative, i.e., arrest in the execution of a decree is violative of the right to life under Article 21.

Arresting a person by the state is one of the highest deprivations of that person's life and liberty that exist, only behind the death penalty.²¹²¹ That is why this action has been commonly linked to criminal cases, and even in these cases, a person is ordered to be imprisoned only in the harshest of cases and after proving the same to the extent of beyond reasonable doubt. In other cases, where there is an option for penalty, courts in India and around the world, are taking the alternative options to imprisonment.²¹²² This is because individual liberty is recognised as one of the most fundamental and important human rights. Further, being arrested and placed into custody is considered as a great attack on the dignity of the individual.²¹²³

And in an age where human rights and liberties are placed at such a high position, the taking away of this human right requires the state to justify imposing imprisonment as a necessity for achieving some social objective, which cannot otherwise be achieved in any other less restrictive means.²¹²⁴ Moreover, such deprivations of human rights would only make sense in criminal cases where the standard of proof is beyond reasonable doubt.

However, in the case of the CPC, the arrest is merely being done as a mode of executing the decree. And since the mode of execution of the decree is in the hands of the judgement-creditor,²¹²⁵ it is essentially making the procedure such that the power vests with the judgement-creditor to decide whether the judgement-debtor should be imprisoned or not. Such a nonchalant attitude towards depriving someone of their personal liberty goes completely against the ethos of Article 21 of the Constitution, which is considered as one of the most expansive and dynamic rights available to all individuals.²¹²⁶

Furthermore, arrest is being used as a coercive tool to force the judgement-debtor to discharge the decree.²¹²⁷ It is not even being used as a punishment, but as an archaic tool of forcing a person to do something. This shows how the law is actually placing the fulfilment of a decree, and the payment of the money, much above the personal liberty and freedom of an individual. Moreover, the standard of proof in civil cases is preponderance of probabilities, which is much lower than the beyond reasonable doubt standard of criminal cases.

Ordering the imprisonment of an individual on such a low standard of proof would be going against the basic tenets of criminal law, which requires any such deprivation of life and personal liberty to only be given when there is no reasonable doubt regarding the liability of

²¹²⁰ The Constitution of India 1950, art 21.

²¹²¹ *Joginder Kumar v. State of UP*, (1994) 4 SCC 260.

²¹²² HANDBOOK OF BASIC PRINCIPLES ON PROMISING PRACTICES ON ALTERNATIVES TO IMPRISONMENT (UN Office on Drugs and Crime 2007).

²¹²³ *supra* note 34.

²¹²⁴ *supra* note 35.

²¹²⁵ The Code of Civil Procedure 1908, Order XXI Rule 10.

²¹²⁶ *Maneka Gandhi v. Union of India* (1978) 1 SCC 248.

²¹²⁷ *supra* note 19.

the accused.²¹²⁸ Furthermore, the onus is also reversed in such cases wherein, after the judgement-creditor makes an application for the arrest and detention of the judgement-debtor along with the decree, the execution court accepts this, and calls for the judgement-debtor to show cause as to why he shouldn't be put under arrest and detention. Hence, the provisions for arrest and detention in executing a decree is going against Article 21, in terms of life, liberty and due process of the law and is a flagrant violation of Article 21 of the Constitution of India.

VIEWING THROUGH ARTICLE 11, ICCPR

Article 11 of the ICCPR reads as, "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation".²¹²⁹ This is a provision which has a wide net of preventing arrest of any person who may fail in the fulfilment of any private law civil contractual obligation. Moreover, such rights are considered to derive their existence from the basic inherent dignity of any human person.²¹³⁰ This essentially means that any person, just by virtue of being a human being, is said to have these basic civil and political rights, which no state should take away from him.

The word "merely" has been interpreted to mean that this protection from arrest will only be given to those who have not been able to fulfil the contractual obligations solely due to their incapability of doing so. If there is any possible way by which they can fulfil the contract, but they have knowingly failed to do so, then they will not be guaranteed this safeguard.²¹³¹ This interpretation resonates with the interpretation of arrest and detention as evolved by the Indian Supreme Court as well. It

has been laid down that mere omission to pay would not deem a person to be arrested through Section 55, but there should be an attitude of refusal on demand, which verges on dishonestly disowning the obligations of a decree.²¹³²

While this may be so, I seek to argue that international law and covenants are not binding on the Indian state and judiciary, unless they have been incorporated into the municipal law. This has also been stated in the *Jolly George* case. From the point of view of the Indian state, the Indian laws are at a greater standing than any international covenant.²¹³³ Even within the Indian legal system, the Constitution is at a greater standing than any other laws. So, for that reason, and for the reasons that have already been stated in the previous subsection, the arrest and detention through execution of a decree, is violative of Article 21 of the Constitution of India, and hence, the CPC and the ICCPR will not have precedence over the Constitution.

THE WAY FORWARD

Due to all the reasons as previously stated, giving the power of sending a person to arrest to the judgement-creditor and the civil court, would be a great travesty considering how highly placed human dignity and personal liberty is in the Indian constitutional context. Moreover, due to the lack of proper binding of the precedents, *Jolly George* has been inconsistently applied by the courts to reach decisions which vary to a great extent, therefore, trivialising the loss of personal liberty of the judgement-debtor.

Instead, the colonial provisions of arrest and detention in a civil prison as a mode of executing a decree, under the CPC, should be struck down as being unconstitutional, particularly considering the expansive and

²¹²⁸ ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW (4th edn. Oxford University Press).

²¹²⁹ The International Covenant on Civil and Political Rights, art 11.

²¹³⁰ Christian Tomuschat, *International Covenant on Civil and Political Rights – Introductory Note*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (1966), <https://legal.un.org/avl/ha/icpr/icpr.html>.

²¹³¹ SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (3rd edn., Oxford University Press).

²¹³² *supra* note 29.

²¹³³ *supra* note 29.

dynamic nature of Article 21. However, this doesn't mean that individuals not discharging the decree maliciously or in bad faith, can be let go without any repercussions. Therefore, instead of pursuing the execution of the decree through arrest in a civil execution court itself, one of two options are available.

Firstly, the law can be amended such that instead of the civil court, the case goes to the criminal court which can then charge the judgement-debtor with offences like contempt of court and cheating. But this should be done as per the procedures of the CrPC, wherein the court will be able to decide the arrest of the judgement-debtor on the basis of *mens rea* and *actus reus* at a beyond reasonable standard of proof, instead of merely using this taking away his personal liberty just on the application by the judgement-creditor at a preponderance of probabilities standard. This would ensure such deprivation of liberty is done as per the proper criminal law due process. Once he is convicted in this court of maliciously not discharging the decree even when he had the means to do so, then the civil court can also proceed to take action against his property and assets to get the decree discharged.

Secondly, since the previous method might result in further delay in an already delayed civil law suit, there can be a special tribunal or special bench set up, exclusively for handling such cases of executing a decree through arrest and detention. Such tribunals/benches can adopt an expedited procedure, closer to criminal law, which deals with *mens rea*, *actus reus* and beyond reasonable doubt, than civil law. This would seem like a more realistic and efficient procedure wherein after the judgement-creditor has been granted a decree, he could apply to this special tribunal/bench to execute the decree through arrest and detention of the judgement-debtor.

This tribunal/bench could then conduct a mini-trial with an expedited criminal law procedure to ascertain the bad faith/malice on the part of the judgement-debtor and then, actually

convict him of an offence of contempt of court or cheating. After this, the civil court can then proceed against the property or assets of the judgement-debtor to discharge the decree. In both these cases, the ways by which the judgement-debtor can escape liability to be arrested could only be if he discharges the decree, or if he is insolvent.

Among the other exemptions from being arrested as mentioned in the CPC, only the conditional exemptions should be permitted. Absolute exemptions would lead to such persons to repeatedly not discharging their decrees without having any ramifications. Therefore, a new procedure involving criminal procedure to a certain extent, with fewer exemptions would be the ideal way of remedying the issue of arresting individuals for the lack of discharging their decree.

CONCLUSION

Arrest and detention are commonly understood to be concept linked to criminal law and liability. However, due to the practice of debt imprisonment which came about in England, arrest and detention also began appearing in civil cases, relating to contractual obligations and money repayment. Due to this practice, the same was also included in the CPC, by the British colonists, in the form of Section 55, which has been further expanded in Order XXI as well. This practice has continued to remain as a legal practice in India, despite it being abolished in England.

The main aim of this practice is to use arrest and detention as a coercive tool to force the judgement-debtor to fulfil the obligations of the decree. This trivialises the persona liberty of a human being to such an extent that the judgement-creditor can merely file an application, and if the court is satisfied, it will order the judgement-debtor to be arrested and detained in a civil prison. As I have explained in this project, such a conception of arrest and



deprivation of personal liberty of an individual is greatly violative of Article 21 of the Constitution.

Moreover, due to the improper interpretation of the *Jolly George* case, subsequent cases have either let a judgement-debtor who did have the means to repay, to walk free, and other times, committed a judgement-debtor who had no means of repaying to civil prison, without even giving him an opportunity of being heard. Therefore, it is suggested that such arrest and detention provisions for executing a decree should be struck down and instead an alternative mode of adjudicating these issues, should be developed, such that the criminal law mechanisms and the beyond reasonable doubt standard of proof should be met before ordering a judgement-debtor to be arrested and detained in civil prison, so that even when his personal liberty is deprived, it is according to a law which has the proper means to deciding the matter.