

**EXECUTION OF DECREE , ORDER BY ARREST AND DETENTION OF JUDGMENT
DEBTOR IN CIVIL PRISON**

BY

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INTRODUCTION:

One of the modes of execution of a decree or order is by arrest and detention of JD_r in prison such period not exceeding the period specified in Section 58, where arrest and detention is permissible under the provision, (vide Section 51 (c) CPC). Though the law permits such mode, detaining a person in civil prison is an order of the Court in violation of human right of the individual. Therefore the judge made-law has placed several controls on the powers of the executing Courts while ordering arrest and detention in this mode of execution. Relevant provisions in the CPC may once be refereed before dealing with the intricate questions of law and procedure in this regard.

Section 55 – Arrest and detention: (1) 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.

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State Government entitled to exempt certain persons from arrest: The State Government may, by notification in the Official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the State Government in this behalf.

JDr under arrest shall be informed of his right to apply to be declared as insolvent: Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he may be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

JDr shall be released to facilitate him to apply insolvency: Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to the civil prison in execution of the decree.

Sec.58 – Period of Detention: (1) Every person detained in the civil prison in execution of a decree shall be so detained:

- (a) Where the decree is for the payment of a sum of money exceeding Rs.5000/- for a period not exceeding three months, and
- (b) where the decree is for the payment of a sum of money exceeding two thousand rupees, but not exceeding five thousand rupees – for a period not exceeding six weeks

When he shall be released (Proviso)

- (i) on payment of the amount to the officer in charge of the civil prison, mentioned in the warrant: or
- (ii) the decree against him is otherwise satisfied: or
- (iii) On the request of the DHr at whose instance the JDr is detained: (He shall not be released without order of Court in cases of (ii) and (iii)
- (IV) A JDr released in the above contingencies shall not be discharged from his liability but shall not be liable to be rearrested under the same decree)
- (v) On the omission of DHr to pay the subsistence allowance:
 - (vi) On the ground of serious illness – (a) he may be released by the Court if the JDr is not in a fit state of health: (b) By the State Government on the ground of

existence of any infectious or contagious disease: or (c) by the committing Court or by its superior Court – on the ground of his suffering from any serious illness. (Sec.59 (1) to (3):

- A JDr released under this section may be re-arrested but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by Sec.58 (Sec.59(4)).
- Women shall not be arrested and detained in the civil prison in execution of a decree for the payment of money. (Sec.56)
- No person shall be detained in civil prison if the decree for the payment of money where the total amount of the decree does not exceed two thousand rupee. (Sec.58(1A))
- Judge, Magistrate or other judicial officer – while going to, presiding in, or returning from his Court: (Sec.135(1))
- Parties, their pleaders, mukhtars, revenue agents and recognized agents, their witnesses acting in obedience to a summons – Where any matter is pending before a tribunal having or believed to have jurisdiction – while going to, or attending or returning: (except in process issued by such tribunal for contempt of Court or the JDr) (Sec.135(2))
- Member of either House of Parliament, Legislative Assembly or a Legislative Council of State, Legislative member of a Union Territory – during continuance of any meeting such House etc., (Sec.135A(1)(a))
- A member of any committee of either House of Parliament, or the Legislative Assembly of a State or Union Territory or the Legislative Council of State - during continuance of any meeting such committee : (Sec.135A(1)(b))
- A member of a committee of either House of Parliament, or a Legislative Assembly or Legislative Council of State – during continuance of a joint sitting, meeting, conference or joint committee of the Houses of Parliament or Houses of the State Legislature as the case may be and during the forty days before and after such meeting, sitting or conference. (Sec.135 A (1)©)

Procedure to arrest a person who resides outside district: (Sec. 136)

Where an application is made that any person shall be arrested not relating to execution of decrees, and he resides outside the local limits of jurisdiction of the Court to which the application made, the Court may, in its discretion, issued a warrant of arrest and send to the District Court within the local limits of whose jurisdiction such person resides, a copy of warrant or order, together with the probable amount of the cost of arrest. The District Court to which warrant/order was sent cause the arrest to be made by its own officers or by a Court subordinate to

itself and shall inform the Court which issued the warrant of arrest (Sec. 136 (2)); The Court making such arrest shall send the person arrested to the Court by which the warrant of arrest was issued unless the person under arrest shows –

- Cause to the satisfaction of the former Court why should not be sent to the later Court; or
- He furnishes sufficient security for his appearance before the later Court; or
- For satisfying any decree that may be passed against him may that Court; (Sec. 136 (3))

Notice to JDr to show-cause against detention in prison (Or.21 R. 37)

1. Where the application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a JDr 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:

Proviso: 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 JDr 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 if the DHr so requires, issue a warrant for the arrest of the JDr.

What the warrant of arrest shall direct: (Or. 21 Rule 38): Every warrant for the arrest of the judgment debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid; or unless satisfaction of the decree be endorsed by the decree-holder on the warrant in the manner provided in Rule 25(2) above. (A.P. Amendment).

If JDr appears in obedience to the Notice – Procedure: (Or. 21 R. 40)

When a JDr appears before the Court in obedience to a notice 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 to showing cause why he should not be committed to the civil prison.

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1. Pending the conclusion of the inquiry under sub-rule (1) the Court may, in its discretion, order the JDr 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.
2. 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 JDr an opportunity of satisfying the decree, the Court may, before making the order of detention, leave the Jdr 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.

3. A Judgment debtor released under this rule may be re-arrested.
4. When the Court does not make an order of detention under sub-rule (3), it shall disallow the application and, if the JDr is under arrest, direct his release.
5. During the temporary absence of the Judge who issued the warrant under Rule 37 or 38, the warrant of committal may be signed by any other Judge of the same Court or by any judicial officer superior in rank who has jurisdiction over the same locality or where the arrest is made on a warrant issued by the District Judge, the warrant of committal may be signed by any Subordinate Judge or District Munsif empowered in the above cases shall also have the same powers as the Judge who issued the warrant in respect of passing such orders may be appropriate under sub-rules (1), (3) and (5) of this Rule.
6. No. JDr shall be committed to the civil prison or brought before the Court from the custody to which he has been committed pending the consideration of any the matters mentioned in sub-rule (1) unless and until the decree – holder pays into Court such sum as the Judge may think sufficient to meet the travelling and subsistence expenses of the JDr and the escort.

Contents of Application for execution by arrest and detention:

- Or. 21 R. 11 (1): It is enabling the DHr to make oral application for execution by the arrest of JDr prior to the preparation of a warrant if he is within the precincts of the Court, and this shall be made at the time of the passing of the decree.
- Or. 21 R. 11 (2) written application: It shall contain the particulars mentioned in the provision.
- Or. 21 R. 11 – A affidavit to be filed with the EP for arrest:: Where an application is made for the arrest and detention in prison of the JDr, it shall state or be accompanied by an affidavit stating the grounds on which arrest is applied for.

Order 21 Rule 11 became redundant in view of Rule 11-A

Rule 11 of Order 21 is overridden by Rule 11A as per the amendment introduced by Act 104/1976 w.e.f. 1.2.1977 Rule 11 became redundant in view of Rule 11A. When in case of EP for arrest, the Rule 11A insists filing of affidavit stating the ground for the arrest; it is manifest that oral application if no more permitted.

Case law on the topic

1. In **B. Gangadharam Vs D. Shiva Shankar Reddy, 2011 (3) ALD 831**, our Hon'ble High Court held that "it is only in exceptional cases where the executing court satisfied that the Judgment Debtor is absconding from local limits of the Court that it can dispense with the notice under order 21 rule 22 of CPC.
2. In **Goparaju Venkata Satyanarayana Vs Pallapragada Naga Venkata Subramanyamurthy, 2006 (4) ALD 98**, our Hon'ble High Court held that "appearance of the JDr" means his physical appearance before the Executing Court on the day fixed by the Court enabling the DHr to conduct the means enquiry in the presence of JDr.
3. In **kasi Subbaiah Mudali Vs Kasi Veeraswamy Mudali, 2002 (3) ALT, 240**, our Hon'ble High Court held that "according to Rule 37", which mandates that once the JDr appears before the court in obedience to the notice or brought before it on being arrested, the Court shall proceed to hear the JDr and take all evidence in the presence of the judgment debtor. The JDr shall be provided with a fair opportunity of showing cause as to why he should not be committed to civil prison. Rule 40 envisages almost an uninterrupted enquiry in the matter. This is the reason why it provides for detention of the JDr in the custody of an officer of the Court or releasing on furnishing security pending conclusion of the enquiry under sub-rule (1) Any order of arrest to be made after conclusion of the enquiry under sub rule (1) of Rule, 40, is once again subject to Section 51 CPC.
4. In **Kalidindi Ramaraju Vs Vijaya Bank, 2002 Suppl. (2) ALD 300** our Hon'ble High Court evolved some principles while dealing with the petition filed under order 21 rule 37 of CPC as follows:
 - a) Passing cryptic orders not based on reasons have to be avoided
 - b) Courts are expected to be cautious while making order of arrest in execution of decree since it involves personal liberty;
 - c) Proper opportunity has to be given and necessary enquiry has to be made while making an order of arrest;
 - d) Courts may also examine whether other modes of recovery are available to the decree holder and in necessary to order arrest for recovery of the amount and whether judgment debtors are willfully and intentionally neglecting to discharge the decree debts and Court may examine the relevant circumstances also in this regard;

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- e) Even while making an order of arrest in default of appearance of the judgment debtors, Courts have to Prima facie satisfy themselves on the material placed before them that an order of arrest can be made;
 - f) Courts shall also fix the period for which the judgment debtors are to be kept in detention.
5. In **Jolly George Varghese and another Vs The bank of Cochin, 1980 (2) SCC 360** the Hon'ble Supreme Court of India held that "if the judgment debtor bona fide is unable to pay off his debts, an order for his detention in prison and execution of the decree against his person would be violative of Article 21 of the Constitution of India and also the spirit of Article 11 of the International Covenant on Civil and Political Rights. The executing Court is required to enquire into the present financial position and ability of the judgment debtor to satisfy the debt. There shall be an element of dishonesty or bad faith in liquidating the liability for such an extreme measure.
 6. In **Kovvuri Mallikarjuna Reddy Vs Kota Shankara Rao, 2003 (6) ALD (NOC) 112** our Hon'ble High Court held that "a simple default of the JDr 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. Section 51 CPC emphasized the need to establish not mere omission to pay but an attitude of refusal as demand verging on dishonest disowning of the obligation under the decree.
 7. In **P. Subba Rayadu Vs Kattamuri Sri krishna 2008(4) ALD 454**, our Hon'ble High Court gave clarification regarding how to assess the means of the JDr as follows: "Explanation to Section 51 CPC, while defining the power of the Executing Court, explains that "in the calculation of the means of the judgment debtor for the purposes of clause (b), there shall be left out of account of any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree. It is thus clear that while assessing the means of the JDr for the purpose of execution of a decree by committing the JDr to civil prison, the property which is exempted from attachment under any law or custom have the force of law cannot be taken into consideration. Section has specifically exempted some items like houses of agriculturist, wages of labourer or a domestic servant etc., Those items of property even if possessed by the JDr, they cannot be treated as means to enable him to pay the decree debt.
 8. In **G. Sudhakara Reddy Vs Jahnvi Chit Fund Pvt., Ltd., 2006 (4) ALT 665**, wherein, our Hon'ble High Court held that "The executing Court can not presume means possessed by JDr without sufficient evidence.
 9. In **S. Ismail and another Vs Agraseni Chit Funds Pvt., Ltd., 2004(5) ALD 138**, wherein our Hon'ble High Court held that " the executing Court shall follows the procedure prescribed under rule 40 of order 21 and it cannot straight away order the arrest under 21 rule 37 of CPC.

10. In **Badrachalam Satyanarayana Vs Lotla Varalaxmi, 2004 (1) Andhra Weekly Reports 565**, wherein our Hon'ble High Court held that "opportunity of hearing of the JDr is imperative before ordering arrest. In the said case the executing Court passed an order at the stage under order 21 rule 37; " JDr called absent. No evidence is contemplated before arrest. Hence arrest JDr by 5-12-2012. In the said circumstances our Hon'ble held that "the above said order is patently erroneous because 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 as to why he should not be committed to civil prison. Without following this procedure, the Court has simply mentioned that no evidence is required to be received before arrest. The order of arrest was held to be invalid and does not stand for scrutiny in the light of the failure of the executing Court to follow the procedure indicated in Rules 40 of Order 21.
11. In **K. Prabhakar Reddy Vs P. Saida Rao, 2011 (5) ALD, 460** wherein our Hon'ble High Court held that" the JDr is a practicing advocate having sufficient means but avoiding to pay the E.P. Amount, such conduct of a practicing advocate is deplorable, therefore directed the Bar Council of A.P. to examine the conduct of said advocate weather it is desirable to continue such a person in the Noble profession.

Model Steps: - Under Order XXI, Rules 37, 38 CPC (within two years)

7-12-2004: Issue R.37 notice to Judgment – Debtor by 07-01-2005.

7-01-2005: JDr called present and furnished security for his appearance. For counter of JDr 07-02-2005.

(After service of arrest notice (R.37), if JDr did not appear, arrest has to be ordered under Order XXI, Rule 38 C.P.C.)

Arrest JDr by 07-02-2005

07-02-2005: Arrest warrant returned unexecuted as the JDr refused to come to Court. For steps by 14-02-2005. (Within 7 days)

14-02-2005: E.A.No.x/2005, Petition for police aid filed by the DHr. and allowed. Arrest JDr with police aid by 14-03-2005.

Order XXI, Rr.22 and 37 Cr.P.C., (*if more than two years*)

07-12-2004 : Issue R.22 notice to JDr. By 07-01-2005

07-01-2005 : Notice served. JDr. present. For counter 07-02-2005

07-02-2005 : Counter filed. Heard both sides; Objections on Rule 22 notice overruled. Issue R.37 notice by 07-03-2005.

07-03-2005 : JDr present in person. His counter is filed. For enquiry at request of both sides 09-03-2005

09-03-2005 : PW 1 and 2 and RW 1 are examined. Heard arguments of both the counsel; For orders 10-03-2005

10-03-2005 : Orders pronounced (*Vide* separate orders). In the result, the objections are overruled. The JDr is ordered to be detained in civil prison for a period of three (3) months on payment of requisite subsistence allowance. (If batta not paid, petition may be dismissed on the next date of hearing)

16-03-2005 : JDr is produced by bailiff. He is informed of his right to apply to the insolvency Court to adjudge him insolvent and to obtain interim protection. The JDr requested time for making such application to concerned Court. He is prepared to execute bond with a surety for the warrant amount. He is ordered to be released. For his appearance and/or for filing interim protection orders posed to 12-04-2005 (if the JDr is not willing to apply for I.P., on the request of DHr and on payment of subsistence, for 3 days or for a reasonable period within a week, detention may be ordered, entrusting the custody of JDr to the bailiff to facilitate him to secure the money for payment. After that period of detention, the JDr has to be sent to civil prison on payment of allowance by the DHr. IF allowances are not paid JDr may be discharged from arrest and EP may be closed.)

12-04-2005: Counsel for JDr filed Memo that the JDr filed I.P., and produced interim protection order. Hence the execution petition is closed as no further proceedings can be taken in this E.P., (If IP is not filed the JDr may be detained for 3 to 5 days with the bailiff to facilitate him to secure money to pay under the warrant; or sent him to civil prison on payment of allowance. If allowance is not paid, the bonds executed by JDr may be discharged and further proceedings in the EP will be closed)

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