3. The other question that arises in the instant case is as to whether or not there is sufficient evidence against the appellant to connect him with the murder of the deceased. It appears that the deceased had been raped by more than one person and then thrown into the well. The post-mortem report shows that although no external injuries were found by the doctor on the person of the deceased but there were bruises and other kinds of injuries on her private parts. The evidence of PWs 4 and 5 merely shows that the appellant had assisted the other accused in dragging away the deceased and also perhaps in assisting the other accused in committing the rape on her. There is however no evidence to indicate the complicity of the appellant in the actual act of murder. The High Court in fact realised this fact and found that the idea of murdering the deceased did not occur to the accused at the time when the deceased was dragged but it may have developed and executed later. This is, however, a pure surmise and the appellant cannot be convicted on mere speculation. Mr. O. P. Rana, appearing for the State submitted that there is clear evidence of PW 9 that the appellant along with the other accused was found carrying the dead body and therefore it must be inferred that the appellant also shared the common intention to murder the deceased. The evidence of PW 9 cannot be accepted because he admits in his statement that in spite of being questioned by the police day after day he kept quiet and did not disclose these facts until four months were over. We have gone through the evidence of PW 9 and his evidence does not impress us on this point. Mr. Rana then submitted that since the appellant was a party to the dragging of the deceased he must be presumed to have committed the murder. In the case of circumstantial evidence no such presumption can be drawn unless the circumstances proved are completely incompatible with the innocence of the accused. The appellant therefore cannot be convicted of murder. For these reasons therefore we allow the appeal to this extent that we set aside the conviction and sentence of the appellant under Sections 302/34 and acquit him of these charges. But we maintain his conviction under Sections 376/34, Indian Penal Code, but reduce his sentence to the period already served as we understand that he has served more than four years. The appellant, if in custody, should be released forthwith.

4. The appeal is accordingly disposed of.

(1980) 2 Supreme Court Cases 360

(BEFORE V. R. KRISHNA IYER AND R. S. PATHAK, JJ.)

JOLLY GEORGE VARGHESE AND ANOTHER .. Appellants;

Versus

THE BANK OF COCHIN .. Respondent.

Civil Appeal No. 1991 of 1979†, decided on February 4, 1980

Civil Procedure Code, 1908 — Section 51 proviso and Order 21, Rule 37 — If judgment-debtor bona fide unable to pay off his debt, an order for his detention in prison in execution of the decree, held, would be violative of Article 21 of the Constitution as well as spirit of Article 11 of International

†Appeal by Special Leave from the Judgment and Order dated July 9, 1979 of the Kerala High Court in C. R. P. No. 1741 of 1979-A

Covenant on Civil and Political Rights — Earlier income of the judgment-debtor, immaterial — Executing court to enquire his present financial position and ability to satisfy the debt

In execution of money decrees, the executing court ordered for attachment of all immoveable properties of the appellant judgment-debtor and appointment of a Receiver for management of the attached properties and also issued warrant of his arrest and detention in civil prison under Section 51 and Order 21, Rule 37, C.P.C. The court passed these orders forbidding the enjoyment or even the power to alienate the properties by the judgment-debtor, without, however, making any investigation regarding the current ability of the judgment-debtors to clear off the debts or their mala fide refusal, if any, to discharge the debts. The High Court, in a short order, summarily dismissed the revision filed by the judgment-debtor against the order of arrest.

Allowing the appeal the Supreme Court

Held :

To cast a person in prison because of his poverty and consequent inability to meet his contractual liability is too flagrantly 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. As such, even though at any time after the passing of an old decree the judgment-debtor might have come by some resources but had not discharged the decree, he cannot be detained in prison under Section 51 read with Order 21, Rule 37, C. P. C., if at the later point of time he was found to be penniless. However, 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. (Paras 10 and 11)

In the present case the debtors are in distress because of the blanket distraint of their properties. Whatever might have been their means once, that finding has become obsolete in view of later happenings. The executing court is directed to re-adjudicate on the present means of the debtors vis-a-vis the present pressures of their indebtedness, or alternatively whether they have had the ability to pay but have improperly evaded or postponed doing so or otherwise dishonestly committed acts of bad faith respecting their assets. The court will take note of other honest and urgent pressures on their assets, since that is the exercise expected of the court under the proviso to Section 51. An earlier adjudication will bind if relevant circumstances have not materially changed. (Para 13)

Xavier v. Canara Bank Ltd., 1969 KLT 927, 931, 933, *approved*

Maneka Gandhi v. Union of India, (1978) 1 SCC 248; *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494; 1979 SCC (Cri) 155; *Sita Ram v. State of U. P.*, (1979) 2 SCC 656; 1979 SCC (Cri) 576; (1979) 2 SCR 1085 and *Sunil Batra v. Delhi Administration*, Writ Petition No. 1009 of 1979, decided on December 20, 1979, *relied on*

[The court, however, did not go into the question whether the proviso to Section 51 read with Order 21, Rule 37 is in excess of the Constitutional mandate

in Article 21 and bad in part in view of the order remitting the case for reconsideration.] (Para 12)

R/4733/C

Advocates who appeared in this case.

M. M. Abdul Khadar, Senior Advocate (*K. M. K. Nair*, Advocate, with him), for the Appellants;

K. M. Iyer, Senior Advocate (*V. J. Francis*, Advocate, with him), for the Respondent.

The Judgment of the Court was delivered by

Krishna Iyer, J.—This litigation has secured special leave from us because it involves a profound issue of constitutional and international law and offers a challenge to the nascent champions of human rights in India whose politicised pre-occupation has forsaken the civil debtor whose personal liberty is imperilled by the judicial process itself, thanks to Section 51 (Proviso) and Order 21, Rule 37, Civil Procedure Code. Here is an appeal by judgment-debtors — the appellants — whose personal freedom is in peril because a court warrant for arrest and detention in the civil prison is chasing them for non-payment of an amount due to a bank — the respondent, which has ripened into a decree and has not yet been discharged. Is such deprivation of liberty illegal?

2. From the perspective of international law the question posed is whether it is right to enforce a contractual liability by imprisoning a debtor in the teeth of Article 11 of the International Covenant on Civil and Political Rights. The Article reads:

> No one shall be imprisoned merely **on the ground of inability to fulfil a contractual obligation**. (emphasis added)

An apercu of Article 21 of the Constitution suggests the question whether it is fair procedure to deprive a person of his personal liberty merely because he has not discharged his contractual liability in the face of the constitutional protection of life and liberty as expounded and expanded by a chain of rulings of this Court beginning with **Maneka Gandhi** case[1]. Article 21 reads:

> 21. **Protection of life and personal liberty.**—No person shall be deprived of his life or personal liberty except according to procedure established by law.

A third, though humdrum, question is as to whether, in this case, Section 51 has been complied with in its enlightened signification. This turns on the humane meaning of the provision.

3. Some minimal facts may bear a brief narration sufficient to bring out the two problems we have indicated, although we must candidly state that the special leave petition is innocent of these two issues and the arguments at the bar have avoided virgin adventures. Even so, the points have been raised and counsel have helped with their submissions. We, therefore, proceed to decide.

4. The facts. The judgment-debtors (appellants) suffered a decree against them in O. S. 57 of 1972 in a sum of Rs.2.5 lakhs, the respondent-bank being the decree-holder. There are two other money decrees against the

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

appellants (in O. S. 92 of 1972 and 94 of 1974), the total sum payable by them being over Rs.7 lakhs. In execution of the decree in question (O.S. 57 of 1972) a warrant for arrest and detention in the civil prison was issued to the appellants under Section 51 and Order 21, Rule 37 of the Civil Procedure Code on June 22, 1979. Earlier, there had been a similar warrant for arrest in execution of the same decree. Besides this process, the decree-holders had proceeded against the properties of the judgment-debtors and in consequence, all their immoveable properties had been attached for the purpose of sale in discharge of the decree debts. It is averred that the execution court has also appointed a Receiver for the management of the properties under attachment. In short, the enjoyment or even the power to alienate the properties by the judgment-debtors has been forbidden by the court direction keeping them under attachment and appointing a Receiver to manage them. Nevertheless, the court has issued a warrant for arrest because, on an earlier occasion, a similar warrant had been already issued. The High Court, in a short order, has summarily dismissed the revision filed by the judgment-debtors against the order of arrest. We see no investigation having been made by the executing court regarding the current ability of the judgment-debtors to clear off the debts or their mala fide refusal, if any, to discharge the debts. The question is whether under such circumstances the personal freedom of the judgment-debtors can be held in ransom until repayment of the debt, and if Section 51 read with Order 21, Rule 37, C. P. C. does warrant such a step, whether the provision of law is constitutional, tested on the touchstone of fair procedure under Article 21 and in conformity with the inherent dignity of the human person in the light of Article 11 of the International Covenant on Civil and Political Rights. A modern Shylock is shackled by law's humane handcuffs.

5. At this stage, we may notice the two provisions. Section 51 runs thus :

> 51. Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—
>
> (a) by delivery of any property specifically decreed ;
>
> (b) by attachment and sale or by sale without attachment of any property ;
>
> (c) **by arrest and detention in prison ;**
>
> (d) by appointing a receiver ; or
>
> (e) in such other manner as the nature of the relief granted may require :
>
> Provided 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 recorded in writing, is satisfied—
>
> (a) that the judgment-debtor, **with the object or effect of obstructing or delaying the execution of the decree—**
>
> (i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) 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

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation. — In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account 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. (emphasis added)

We may here read also Order 21, Rule 37 :

37. (1) Notwithstanding anything in these rules, 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 :

Provided that 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.

(2) Where 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.

6. Right at the beginning, we may take up the bearing of Article 11 on the law that is to be applied by an Indian Court when there is a specific provision in the Civil Procedure Code, authorising detention for non-payment of a decree debt. The covenant bans imprisonment **merely** for not discharging a decree debt. Unless there be some other vice or mens rea apart from failure to foot the decree, international law frowns on holding the debtor's person in civil prison, as hostage by the court. India is now a signatory to this Covenant and Article 51(c) of the Constitution obligates the State to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another". Even so, until the municipal law is changed to accommodate the Covenant what binds the court is the former, not the latter. A. H. Robertson in **Human Rights — in National and International Law** rightly points out that international conventional law must go through the process of **transformation** into the municipal law before the international treaty can become an internal law.[2]

2. Page 13

> From the national point of view the national rules alone count. . . . With regard to interpretation, however, it is a principle generally recognised in national legal systems that, in the event of doubt, the national rule is to be interpreted in accordance with the State's international obligations.

The position has been spelt out correctly in a **Kerala ruling**[3] on the same point. In that case, a judgment-debtor was sought to be detained under Order 21, Rule 37, C. P. C. although he was seventy and had spent away on his illness the means he once had to pay off the decree. The observations there made are apposite and may bear excerption :

> The last argument which consumed most of the time of the long arguments of learned counsel for the appellant is that the International Covenants on Civil and Political Rights are part of the law of the land and have to be respected by the Municipal Courts. Article 11, which I have extracted earlier, grants immunity from imprisonment to indigent but honest judgment-debtors.
>
> The march of civilization has been a story of progressive subordination of property rights to personal freedom ; and a by-product of this subordination finds noble expression in the declaration that "No one shall be imprisoned, merely on the ground of inability to fulfil a contractual obligation". This revolutionary change in the regard for the human person is spanned by the possible shock that a resuscitated Shylock would suffer if a modern Daniel were to come to judgment when the former asks the pound of flesh from Antonio's bosom according to the tenor of the bond, by flatly refusing the mayhem on the debtor, because the inability of an impecunious obligee shall not imperil his liberty or person under the new dispensation proclaimed by the Universal Declaration of Human Rights. Viewed in this progressive perspective we may examine whether there is any conflict between Section 51, CPC and Article 11 of the International Covenants quoted above. As already indicated by me, this latter provision only interdicts imprisonment if that is sought solely on the ground of inability to fulfil the obligation. Section 51 also declares that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith, he incurs the liability to imprisonment under Section 51 of the Code, but this does not violate the mandate of Article 11. However, if he once had the means but now has not or if he has money now on which there are other pressing claims, it is violative of the spirit of Article 11 to arrest and confine him in jail so as to coerce him into payment. . . .

The judgment dealt with the effect of international law and the enforceability of such law at the instance of individuals within the State, and observed :

> The remedy for breaches of International Law in general is not to be found in the law courts of the State because International Law per se or proprio vigore has not the force or authority of civil law, till

3. *Xavier* v. *Canara Bank Ltd.*, 1969 KLT 927, 931, 933

under its inspirational impact actual legislation is undertaken. I agree that the Declaration of Human Rights merely sets a common standard of achievement for all peoples and all nations but cannot create a binding set of rules. Member States may seek, through appropriate agencies, to initiate action when these basic rights are violated; but individual citizens cannot complain about their breach in the municipal courts even if the country concerned has adopted the covenants and ratified the operational protocol. The individual cannot come to Court but may complain to the Human Rights Committee, which, in turn, will set in motion other procedures. In short, the basic human rights enshrined in the International Covenants above referred to, may at best inform judicial institutions and inspire legislative action within member-States; but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of judicial authority.

While considering the international impact of international covenants on municipal law, the decision concluded:

> Indeed the construction I have adopted of Section 51, CPC has the flavour of Article 11 of the Human Rights Covenants. Counsel for the appellant insisted that law and justice must be on speaking terms — by justice he meant, in the present case, that a debtor unable to pay must not be detained in civil prison. But my interpretation does put law and justice on speaking terms. Counsel for the respondent did argue that International Law is the vanishing point of jurisprudence is itself vanishing in a world where humanity is moving steadily, though slowly, towards a world order, led by that intensely active, although yet ineffectual body, the United Nations Organisation. Its resolutions and covenants mirror the conscience of mankind and insominate, within the member States, progressive legislation; but till this last step of actual enactment of law takes place, the citizen in a world of sovereign States, has only inchoate rights in the domestic Courts under these international covenants.

While dealing with the impact of the Dicean rule of law on positive law, Hood Phillips wrote — and this is all that the Covenant means now for Indian courts administering municipal law :[4]

> The significance of this kind of doctrine for the English lawyer is that it finds expression in three ways. First, it influences legislators. The substantive law at any given time may approximate to the "rule of law", but this only at the will of Parliament. Secondly, its principles provide canons of interpretation which express the individualistic attitude of English courts and of those courts which have followed the English tradition. They give an indication of how the law will be applied and legislation interpreted. English courts lean in favour of the liberty of the citizen, especially of his person; they interpret strictly statutes which purport to diminish that liberty, and presume that Parliament does not intend to restrict private rights in the absence of clear words to the contrary.

4. O. Hood Phillips: CONSTITUTIONAL AND ADMINISTRATIVE LAW, 6th Edn., p. 40

7. The positive commitment of the States parties ignites legislative action at home but does not automatically make the Covenant an enforceable part of the corpus juris of India.

8. Indeed, the Central Law Commission, in its Fifty-fourth Report, did cognise the Covenant, while dealing with Section 51, C. P. C.[5]:

> The question to be considered is, whether this mode of execution should be retained on the statute book, particularly in view of the provision in the International Covenant on Civil and Political Rights prohibiting imprisonment for a mere non-performance of contract.

The Law Commission, in its unanimous report, quoted the key passages from the **Kerala ruling**[3] referred to above and endorsed its ratio. 'We agree with this view' said the Law Commission and adopting that meaning as the correct one did not recommend further change on this face of the Section. It is important to notice that, interpretationally speaking, the Law Commission accepted the dynamics of the changed circumstances of the debtor:

> However, if he once had the means but now has not, or if he has money now on which there are other pressing claims, it is violative **of the spirit of Article 11** to arrest and confine him in jail so as to coerce him into payment.

This is reiterated by the Commission:[6]

> Imprisonment is not to be ordered merely because, like Shylock, the creditor says:[7]
>
> "I crave the law, the penalty and forfeit of my bond."
>
> The law does recognise the principle that "Mercy is reasonable in the time of affliction, as clouds of rain in the time of drought"[8].

9. We concur with the Law Commission in its construction of Section 51, C.P.C. It follows that quondom affluence and current indigence without intervening dishonesty or bad faith in liquidating his liability can be consistent with Article 11 of the Covenant, because then no detention is permissible under Section 51, C. P. C.

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[9] as developed further in **Sunil Batra** v. **Delhi Administration**[10], **Sita Ram** v. **State of U. P.**[11] and **Sunil Batra** v. **Delhi Administration**[12] 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

5. Page 38
6. *Ibid*, p. 41
7. MERCHANT OF VENICE, Act 4, Scene 1
8. Ecclesiasticus, 35 20
9. (1978) 1 SCC 248
10. (1978) 4 SCC 494: 1979 SCC (Cri) 155
11. (1979) 2 SCR 1085: (1979) 2 SCC 656: 1979 SCC (Cri) 576
12. W. P. No. 1009 of 1979, decided on December 20, 1979

one in prison is too flagrantly 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.

12. The question may squarely arise some day as to whether the proviso to Section 51 read with Order 21, Rule 37 is in excess of the Constitutional mandate in Article 21 and bad in part. In the present case since we are remitting the matter for reconsideration, the stage has not yet arisen for us to go into the vires, that is why we are desisting from that essay.

13. In the present case the debtors are in distress because of the blanket distraint of their properties Whatever might have been their means once, that finding has become obsolete in view of later happenings. Sri Krishnamurthi Iyer for the respondent fairly agreed that the law being what we have stated, it is necessary to direct the executing court to re-adjudicate on **the present means of the debtors** vis-a-vis the present pressures of their indebtedness, or alternatively whether they have had the ability to pay but have improperly evaded or postponed doing so or otherwise dishonestly committed acts of bad faith respecting their assets. The court will take note of other honest and urgent pressures on their assets, since that is the exercise expected of the court under the proviso to Section 51. An earlier adjudication will bind if relevant circumstances have not materially changed.

14. We set aside the judgment under appeal and direct the executing court to decide de novo the means of the judgment-debtors to discharge the decree in the light of the interpretation we have given.