

Abdul Sathar vs Pathimuthu

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Court : Kerala

Decided On : Jan-29-2020

Judge : Honourable Mr.Justice K.Harilal,Honourable Mr.Justice C.S.Dias

Appeal No. : OP (FC)/324/2019

Appellant : Abdul Sathar

Respondent : Pathimuthu

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.HARILAL & THE HONOURABLE MR.JUSTICE C.S.DIAS WEDNESDAY, THE 29TH DAY OF JANUARY 2020 / 9TH MAGHA, 1941 AGAINST THE ORDERS IN E.A. NO.81/2017 & E.A. NO.01/2019 IN E.P. NO.65/2014 IN 183/2005 OF FAMILY COURT, ATTINGAL PETITIONER/ PETITIONER IN E.A. NO.01/2019 AND RESPONDENT IN E.A.81/2001/JUDGMENT DEBTOR: ABDUL SATHAR AGED 68 YEARS, S/O. MOHAMMED KUNJU, RESIDING AT K.K. HOUSE, NADAYARA , VARKALA, THIRUVANANTHAPURAM DISTRICT. BY ADVS. SRI.M.RAJENDRAN NAIR SMT.M.SANTHY RESPONDENTS/RESPONDENTS IN E.A.0`1/2019 & RESPONDENTS IN E.A 81/2017/DECREE HOLDER:

1 PATHIMUTHU AGED 60 YEARS, D/O. KUNJASAN, KUNNATHOORKONATHU, KEEZHTHONNAKKAL, NOW RESIDING AT K.K. HOUSE, NADAYARA, VARKALA, THIRUVANANTHAPURAM DISTRICT-695 001 2 SAFAR, AGED 30 YEARS, S/O. ABDUL SATHAR, RESIDING AT K.K HOUSE, NADAYARA, VARKALA, THIRUVANANTHAPURAM DISTRICT-695 001. 3 SAIFA, AGED 27 YEARS, D/O. ABDUL SATHAR, RESIDING AT K.K HOUSE, NADAYARA, VARKALA, THIRUVANANTHAPURAM DISTRICT-695 001. R1-3 BY ADV. SRI.LATHEESH SEBASTIAN THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 18-12-2019, THE COURT ON 29-01-2020 DELIVERED THE FOLLOWING:

C.R

JUDGMENT

Dias,J.

It has been said the difficulties of a litigant begin when he has obtained a decree observed the Honourable Supreme Court in Shyam Singh v. Collector, District Hamirpur, U.P and Others [1993 Suppl. (1) SCC 693].

2. Shyam Singh (supra) comes to our minds on hearing the two-decade anguish of the children of the petitioner in realising maintenance from him.

3. Is a fathers pensionary benefits exempted from being disbursed towards arrears of maintenance payable to his children is the question that emerges for consideration in this original petition.

4. The congealed facts are: The petitioner is the judgment debtor in E.P.No.65/2014 in O.S No.183/2005 of the Family Court, Attingal. The respondents in the original petition are the petitioner's wife, son, and daughter, respectively.

5. The respondents had filed O.S 183/2005 against the petitioner seeking maintenance allowance for the respondents 2 and 3.

6. Despite receipt of summons, the petitioner

did not choose to contest the proceeding. The petitioner was set ex-parte. The Family Court passed a decree on 30.12.2011, directing the petitioner to pay monthly maintenance allowance to the respondents 1 and 2 at the rate of Rs.2,000/- each. Although the petitioner filed an application to set aside the ex parte decree, the application was dismissed.

7. The 1st respondent filed E.P. No.65/2014

(Ext.P1) to execute the decree. An application was also filed to direct the petitioner's employer - the Kerala State Road Transport Corporation (K.S.R.T.C) to withhold the pensionary benefits payable to the petitioner. Subsequently, as per the order in E.A.81/2017, the Family Court directed the K.S.R.T.C to deposit an amount of Rs.1,94,533/-.

8. The petitioner had challenged the order

before this Court in O.P (FC) 435/2014. This Court, by judgment dated 30.1.2017, held that the Family Court had not committed any error in directing the K.S.R.T.C to deposit the arrears of maintenance. Nevertheless, this Court directed the petitioner to approach the execution court.

9. Taking a cue from the above

observation, the petitioner filed E.A No.1/2019 before the Family Court, to keep all further execution proceedings in abeyance, and that the deposited amount may not be disbursed to the respondents. The respondents opposed the application.

10. The Family Court, by the impugned

Exhibit P-5 order, dismissed the application, and allowed E.A No.81/2017, permitting the respondents to withdraw the amount of Rs.1,94,533/- deposited by K.S.R.T.C.

11. The Family Court observed in the

impugned order as follows: the original petition was instituted on 25.4.2001 before the Family Court, Thiruvananthapuram. After the present court was constituted, the case was transferred and renumbered as O.S 183/2005. The suit was decreed on 30.12.2011. The petitioner had filed an application to set aside the ex- parte decree,

which was allowed on condition that the petitioner

with the conditional order, and consequentially the application was dismissed. The petitioner challenged the order before the High Court in O.P(FC) No.435/2014. The High Court dismissed the original petition. As per the decree, a total

amount of Rs.3,70,000/- is due from the petitioner to the respondents. In E.A No.81/2017 filed by the 1st respondent to direct the K.S.R.T.C to deposit the withheld amount and disburse it to the respondents, the petitioner had stated that he had no objection. The petitioner's pensionary benefits are not attached but only directed to be withheld; therefore, there is no violation of any

statutory provision.

12. It is challenging the above order, that this original petition is filed under Article 227 of the Constitution of India.

13. Heard Sri.M.Rajendran Nair, the learned counsel for the petitioner and Sri.Latheesh Sebastian, the learned counsel for the respondents.

14. The learned counsel for the petitioner

argued that by virtue of Section 11 of the Pensions Act, 1871 (for brevity referred to as Act), no pension granted on account of the past services of an employee is liable to be attached by process of any court. He also relied on Section 60 (1) (g) of the Code of Civil Procedure (in short, Code) and argued that stipends and gratuities

allowed to pensioners are not liable to attachment. Hence, the impugned order is ex facie erroneous and, therefore, is liable to be set aside.

15. The learned counsel for the respondents

argued that the petitioner has been protracting the proceedings for the last two decades, by adopting all sorts of dilatory tactics, and he has refused to maintain his children. The original petition was filed as early as on 25.4.2001. The petitioner's application to set aside the decree was dismissed by the Family Court and confirmed by this Court. The petitioner was directed to pay

the entire arrears of maintenance to the respondents 2 & 3. At that relevant time, the petitioner who was in service maintained stoic silence. It is only after his retirement, that he has raised the farcical contention that his pension cannot be disbursed to his children. It is now that the petitioner has come up with the present

objection that his pension is immune from seizure/attachment under the Pensions Act and Section 60 (1) (g) of the Code. The Family Court rightly rejected the plea, taking note of the fact that the petitioner himself had stated that he had no objection in the amount being released. The decree has become final, but the petitioner is still

resisting the execution proceedings. The finding of the Family Court was confirmed by this Court. Therefore, the finding operates as res-judicata, and the petitioner is precluded from re-agitating a concluded issue by the principles of issue estoppel. The respondents 2 and 3 are prevented from enjoying the fruits of the decree for nearly a decade. The 1st respondent has struggled to nurture and educate the respondents 2 and 3. Hence the original petition may be dismissed.

16. We pin-pointedly asked the learned

counsel for the petitioner, whether the Pensions Act, 1871 was applicable in the territories which immediately before 1st November 1956 were comprised in the Part-B States?, as Section 1 of the Act excludes its operation in the erstwhile Part-B States. Admittedly, the petitioner and the respondents are residing within the said territory.

17. Section 1 of the Act reads thus:

Extent of the Act: In so far as it relates to Union Pensions, it extends to the whole of India and in so far as it relates to other pensions, it extends to the whole of India except (the territories which, immediately before the 1st November, 1956, were comprised in Part- B States)

18. The learned counsel for the petitioner argued that in view of the 7th amendment to the Constitution of India, the classification of States into three categories, i.e., Part-A, Part-B, and Part- C States, was abolished, and all the territories in India are now classified as States and Union Territories. We are unable to agree with the above submission for more reasons than one.

19. The Parliament by Act 3 of 1951 enacted

the Part-B States (Laws) Act, 1951 to extend the Acts and Ordinances specified in the schedule of the Act to be amended in the manner and to the extent therein specified, and the territorial extent of each of the said Acts and Ordinances.

20. Section 3 of the Part B States (Laws) Act, 1951 reads as follows:

Extension and amendment of certain Acts and Ordinances: The Acts and Ordinances specified in the Schedule shall be amended in the manner and to extent therein specified, and the territorial extent of each of the said Acts and Ordinances shall, as from the appointed day and in so far as in any of the said Acts or Ordinances or any of the provisions contained therein relates to matters with respect to which Parliament has the power to make laws, be as stated in the extent clause thereof as so amended.

21. The Pensions Act, 1871, is not seen

included in the schedule of the Part-B States (Laws) Act, 1951. Thus, there was no amendment to the application of the Act to other territories than what was mentioned in Section 1 of the Act.

22. The Law Commission of India, in its 53rd

report dated 4.12.1972, found that the Act was excluded from the areas formerly comprised in the Part-B States. It is apposite to extract paragraph 3 of the report:

3. Legislative competence: Before we proceed to discuss the Act in detail, we should indicate that the application of the Act is excluded from areas formerly comprised in Part B States. This is presumably because of the fact that while Union pensions - i.e. pensions payable by the Government of India or out of the Consolidated Fund of India - are within the competence of Parliament, the subject of State pensions - i.e. pensions payable by a State or out of the Consolidated Fund of a State - is within the exclusive competence of the States.

It is not very clear why the application of the Act to Part B States in respect of Union pensions was not decided upon. One possible reason might have been that this would have made the extent clause of the Act, rather complicated, and the distinction, though theoretically justified, would have looked inelegant. It is needless to say that even as regards areas to which the Act

extends at present, any amendment now to be made in the Act will be inapplicable to State pensions, because of the relevant legislative entry.

23. The Parliament, by Act No.20 of 1982 amended Section 1 of the Pensions Act, 1871, presumably on the recommendation of the Law Commission of India in its 53rd report.

24. The statement of object and reasons for the amendment and the amended Section 1 of the Act reads as follows:

The Pensions Act, 1871 applies both to Union pensions and State pensions. In so far as State pensions are concerned, State Legislatures alone have competence to make amendment to the Act. The Act does not extend to the territories which immediately before the 1st November, 1956 were comprised in Part-B States. Hence pensioners in these territories cannot avail of the protection provided in Section 11 of the Act against seizure, attachment or sequestration by process of any court at the instance of a creditor. It is therefore proposed to amend Section 1 of the Act so that the provisions of the Act in so far as they relate to Union pensions, extend to the whole of India. Amendment of Section 1- In section 1 of

the Pensions Act 1871 (23 of 1871) hereinafter referred to as the principal Act) for the words It extends, the words In so far as it relates to Union pensions, it extends to the whole of India and in so far as it relates to other pensions, it extends shall be substituted. Therefore, the Act was made applicable to the whole of India only in respect to Union pensions.

25. While so, the Government of Kerala promulgated the Kerala Service Rules - Part-III, for the purpose of regulating disbursement of pensions to its employees.

26. On 27.3.1984, the Government of Kerala

authorised K.S.R.T.C to pay pension to its employees as per Kerala Service Rules - Part III (read paragraph 5 of the decision in Chairman and Managing Director, KSRTC v. K.O.Varghese and Others [(2007) 8 SCC 231]).

27. Unquestionably, the petitioner is a

retired employee of the K.S.R.T.C. Thus, it is the Kerala Service Rules - Part III, that is applicable to the petitioner for disbursement of pension, and not Section 11 of the Pensions Act, 1871, as argued by the learned counsel for the petitioner.

28. It is profitable to extract Rule 124 of the Rules.

124. Liability for attachment: No pension granted or continued by Government on political considerations or on account of the past service or present infirmities or as a compassionate allowance and no money due, or to become due, on account of any such pension or allowance shall be liable to seizure, attachment or sequestration by process of any court in India at the instance of a creditor for any demands against the petitioner or in satisfaction of a decree or order of any such Court.
(emphasis supplied)

29. A close reading of the above Rule makes it evident that no pension shall be liable to seizure, attachment or sequestration by process of any court in India at the instance of a creditor for any demands against the pensioner.

30. The Stroud's Judicial Dictionary of Words and Phrases defines a creditor as follows: Creditor is, a person to whom a debt is payable.

31. Halsbury's Laws of England (Third Edition) Vol.2, Page 322 states that the obligation to make payments of alimony is not a debt or liability which is provable in bankruptcy.

32. In American Jurisprudence - Vol.6 (Revised) Page 802, paragraph 426, it is stated:

Alimony: Obligation for Support:- A claim for alimony is not one founded upon contract, express or implied, but on the natural and legal duty of the husband to support the wife. A judgment or decree for alimony is not provable as a fixed liability evidenced by a judgment, since it is always subject to modification by the court according

to the varying circumstances of the parties.

33. The Supreme Court of U.S.A in Vetmore v. Markoe [(1904) 49 Law Ed.390] observed as follows:

.....the doctrine that a decree awarding alimony to the wife or children or both, is not a debt which has been put in the form of a judgment, but is rather a legal means of enforcement of the obligation of the husband and father to support and maintain his children. He owes this duty, not because of any contractual obligation or as a debt due towards his wife, but because of policy of law which imposes the obligation upon the husband. The law interferes where the husband neglects or refuses to discharge his duty, and enforced against him by means of legal proceedings.

34. It is observed in Cadogan v.Cadogan [(1977) 1 W.L.R 1041] that a wife claiming financial relief in divorce proceeding is not a creditor of her husband.

35. The Honourable Supreme Court in Ramesh Chander Kaushal v. Veena Kaushal and

Ors. [AIR 1978 SC 1807] held that an order

directing payment of maintenance is a measure of social justice and specially enacted to protect women and children, and it falls within the sweep of Art.15 (3) of the Constitution of India and reinforced by Art.39.

36. In Chaturbhuj v. Sita Bai [2008 (1) KLT 41 (SC)] it was held that the object of payment of maintenance was to prevent vagrancy and destitution.

37. In Badsha v. Urmila Badshah Godse &

Anr [(2014) 1 SCC 188] it was held that, while dealing with applications of destitute wife or helpless children, the court is dealing with the marginalised sections of the society. The purpose is to achieve social justice, which is the constitutional vision enshrined in the Preamble of the Constitution of India. It is the bounden duty of courts to advance the cause of social justice. While interpreting a statute, the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. If this interpretation is not accepted, it will amount to giving a premium to the husband for defrauding the wife.

38. In Shamina Farooqui v. Shahid Khan [AIR 2015 SC 2025] it was declared that: the wife has

an absolute right of maintenance and the husband is not absolved from his obligation to provide maintenance merely on his plea of financial constraints, so long as he is healthy, able-bodied and capable for his own support.

39. This Court in Ivan Rathinam v. Milan

Joseph [2018 (2) KLT 884] held: the object behind directing a man to pay maintenance is to compel him to perform his moral obligation which he owes to the society in respect of his wife and children, so that they are not left beggared and

destitute on the scrapheap of society, and driven to a life of vagrancy, immorality and crime for their sustenance.

40. In the case on hand, the respondents

sought for withholding of the petitioner's pension to satisfy the decree for maintenance passed in favour of respondents 2 and 3 way back on 30.12.2011. Though the execution petition was filed in the year 2014, the petitioner has been procrastinating the same.

41. In light of the definition of the word creditor, and that payment of alimony is not a debt or liability and that it is not one founded on

a contract, express or implied, but is a legal means of enforcement of the obligation of the husband and father to maintain his wife and children, we hold that the respondents 2 and 3 cannot be branded or labeled as creditors of the petitioner. The liability of the petitioner to maintain his children is statutory and sacrosanct falling within the sweep of Art.15 (3) and Art.39 of the Constitution of India, as observed in Ramesh Chander Kaushal (supra).

42. The Parliament, in its wisdom, to protect

the neglected and impoverished women and children, has enacted several legislations, both personal and uniform, applicable to all cross- sections of the society, making it mandatory for a man to maintain his wife and children to alleviate destitution. If wives and children are treated as creditors falling within the exemption to Rule 124

of the Rules, it will render laws relating to payment of maintenance redundant. Such a suppressive interpretation cannot be permitted.

43. It is worthwhile to note that Parliament

has enacted Section 39 in the Transfer of Property Act, 1882, giving a person who has the right to receive maintenance a charge over the property belonging to the person bound to maintain such person.

44. This Court in *Sunitha v. Ramesh* [2010 (3)KLT 501] has held that the relationship between the husband and wife, ward and guardian falls within the meaning of fiduciary relationship.

45. In another illuminating judgment, this Court in *Radha v. Deputy Tahsildar* [2015 (1) KLT 423], held that the obligation of a husband, who has deserted his wife metamorphoses from a mere obligation into a legal obligation, and that the said right would have precedence over crown debt.

46. In view of our above findings and the law

declared in the above authoritative pronouncements, we have no doubt in our minds that the respondents 2 & 3 are not the creditors of the petitioner, falling with the sweep of Rule

124. The petitioner cannot defeat his children from realising maintenance from him, which is their indefeasible statutory right having precedence over the exemption under Rule 124 of the Rules. This court cannot remain a mute spectator to the agonizing delay that has occurred, and the machiavellian methods adopted by the petitioner to thwart the execution proceeding. Therefore, we reject the petitioner's contention that his pensionary benefits are exempted from attachment.

47. Now coming to the contention of the learned counsel for the petitioner that the stipend and gratuity payable to the petitioner is also exempt from attachment in view of Section 60 (1)

(g) of the of the Code.

48. Section 60 (1)(g) of the of the Code of Civil Procedure, 1908 reads thus:

60. Property liable to attachment and sale in execution of decree- (1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts,

shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-

debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf. Provided that the following properties shall not be liable to such attachment or sale, namely:-

(a) xxxxxxxxxx

(a) xxxxxxxxxx

(g) stipends and gratuities allowed to

pensioners of the Government [or of a local authority or of any other employer], or payable out of any service family pension fund notified in the Official Gazette by [the Central Government or the State Government] in this behalf, and political pension; (emphasis supplied).

49. In addition to our findings with reference to Rule 124 of Kerala Service Rules - Part III, we find that the Legislature has knowingly included the words family pension fund in Section 60 (1)

(g) of the Code. Therefore, it is held that wife and children do not fall within the fold of the

exemption to Section 60 (1) of the Code, as family pension fund that is payable to the family/dependents of the pensioner is exempted from attachment only by a person falling outside the purview of family. The above provision is almost analogous to Rule 124 of Kerala Service

Rules - Part III. Our findings on Rule 124 is equally applicable to Section 60 (1) (g) of the Code. So there is no legal bar for the respondents 2 and 3 to attach the stipend and gratuity of the petitioner. We hold that the respondents 2 and 3 have the first charge over the properties of the petitioner and their right to be maintained by the petitioner overrides all such exemptions in law.

We do not find any circumstances warranting

invocation of the supervisory jurisdiction of this Court as enshrined under Article 227 of the Constitution of India. Accordingly, we dismiss this original petition. We direct the Family Court to forthwith release the entire amount withheld by it to the respondents 2 and 3, and dispose of the execution proceedings, in accordance with law, as expeditiously as possible.

Sd/- K.HARILAL, JUDGE Sd/- C.S.DIAS, JUDGE ma/28.01.2020 /True copy/ P.S to Judge APPENDIX PETITIONER'S/S EXHIBITS: EXHIBIT P1 TRUE COPY OF THE EXECUTION PETITION DATED 30.12.2011 IN O.S. 183/2005. EXHIBIT P2 TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER DATED 20.3.2017 TO THE E.P. EXHIBIT P3 TRUE COPY OF THE PETITION E.A. EXHIBIT P4 TRUE COPY OF THE OBJECTION DATED NIL FILED BY THE 1ST RESPONDENT TO E.A. EXHIBIT P5 TRUE COPY OF THE COMMON ORDER DATED 10.4.2019 IN E.A. 81/2017 AND E.A.

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