

**Hari Kishan Etc. Vs. Hari Ram**

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**SooperKanoon Citation :** [sooperkanoon.com/681793](http://sooperkanoon.com/681793)

**Court :** Delhi

**Decided On :** May-29-1970

**Reported in :** ILR1970Delhi163

**Judge :** P.N. Khanna, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) - Order 21, Rule 37

**Appeal No. :** Election First Appeal No. 221-D of 1965

**Appellant :** Hari Kishan Etc.

**Respondent :** Hari Ram

**Advocate for Pet/Ap. :** Daljit Singh and; G.N Aggarwal, Advs

**Judgement :**

**P.N. Khanna, J.**

(1) The decree-holder-respondent filed an application under Rule 37 of Order 21 and section 151 of the Code of Civil Procedure, for the arrest of the appellant-judgment- debtors (two brothers on the ground that they possess sufficient means to pay the decretal amount, but have refused and are reluctant to pay the same. The learned Sub-Judge, before whom the said execution application was contested by the appellants agreed with the respondents; and ordered that each of the appellant- judgment-debtors be detained in the civil prison for a period of 30

days from the date of the arrest. Warrants of arrest were ordered to be issued. The present execution first appeal has been filed by the appellant-judgment-debtors against the said order of the learned Sub-Judge.

(2) The decree in this case was passed on June 10, 1953 for the recovery of Rs. 11,680.00 and costs which amounted to Rs. 977.50. The decree-holder-respondent filed execution applications on several occasions, but no recovery could be made. A house belonging to the appellants was also attached, but was ultimately held to be exempt from attachment and sale, being the only residential house of the appellants. It was under these circumstances that the respondent felt obliged to file the aforesaid application under Rule 37 of Order 21 of the Code of Civil Procedure for the arrest of the appellants.

(3) The respondent-decree-holder examined two witnesses, AW1 Amar Nath, and AW2 Rameshwari Dass, besides himself. It was stated by them that the appellants were receiving rent from the tenants in their three storeyed house. Hari Kishan, appellant was said to be employed in a shop, but Rishiram, the other appellant, was said to be running a shop dealing in electrical goods. The goods in the said shop were stated to be worth Rs. 15,000.00 to Rs. 20,000.00. None of the witnesses has any personal knowledge about Rishiram's ownership of the said electrical goods shop. One of the witnesses stated that the rent from the house was to the extent of Rs. 350.00 per month. The decree-holder stated that the rent was Rs. 250.00 per month. Hari Kishan, appellant was said to be in receipt of a salary of Rs. 250.00 per month.

(4) On the side of the appellants, Hari Kishan, one of them, himself came into the witness-box and produced two other witnesses, RW1 Nem Chand, and RW2 Arjan Dass. Hari Kishan himself supported by the other witnesses stated that he was drawing a salary of Rs. 150.00 per month and had six children to support. He, however, denied that Rishiram was the owner of an electrical goods shop. Rishiram was said to have one child. It was also stated that the total rent received from the house was Rs. 42 per month. Rishiram, the other appellant, did not come in the witness box.

(5) The learned trial court was unable to accept the evidence of the parties as adequate and convincing. It felt that the attitude of Harikishan, appellant, was evasive, while Rishiram, the other appellant, had avoided, coming into the witness box. This, according to it, was enough to draw an inference adverse to the appellants. From a copy of the house tax assessment order for the year 1955, it found that the appellants were receiving rent amounting to Rs. 195.00 p.m. It, therefore, accepted the respondent-decree-holder's version that the house fetched Rs. 250.00 per month as rent. It also accepted Rs. 150.00 per month to be the salary of Harikishan, appellant. From this, it came to the conclusion that the total income of Harikishan was more than Rs. 247.50 per month.

(6) The learned trial court also found that the appellants were not debtors within the definition of the term under the Punjab Relief of Indebtedness Act, 1934, as extended to the Union Territory of Delhi, the total assets of the appellant including the three storeyed building, being of a value of more than Rs. 5,000.00 each. They were, therefore, not exempt from arrest or imprisonment in execution of a money decree. It, further held that although the residential house itself was exempt from attachment, its income could be taken into consideration for deciding the paying capacity of the appellants. It was under these circumstances that it came to the conclusion that both the appellants possessed sufficient means to pay the decretal amount of a substantial part thereof and that they have refused or neglected to pay the same. It accordingly ordered them to be detailed in civil prison as stated above.

(7) The learned counsel for the appellants, invited my attention to the respondent's application under Order 21, Rule 37 of the Code of Civil Procedure. The allegation in the said application are to the effect that both the appellants are possessed of means and have sufficient cash and jewellery and other attachable goods. It was further stated that the appellants on getting scent of the intended attachment proceedings have removed all their goods, without leaving a simple attachable item available to the decreeholder. It was under these circumstances that the prayer for the detention of the appellants was made. No allegation was made in the application about the income of the appellants from the house property or about Rishiram being the owner of a shop dealing with the electrical goods or of

any other specific property of any value. The learned counsel submitted that in view of this, the evidence led in the case. about he income from house property or from other sources could not be looked into, as that was never the basis of the respondent's application.

(8) The learned counsel further relied on *Jogendra Missir v. Ramnandan Singh*, : AIR1968 Pat218 ; *K.V. Matha Pathar v. R. S. Mani Rao*, Air 1956 Mad 580 ; and *Ch. Harpal Singh v. Laid Him Lal*, : AIR1955 All402 : for the proposition that it was for the decree-holder to lead his evidence in support of his application for execution and such evidence should have reference to the grounds, which according to the decree-holder would justify the arrest of the judgment-debtors. It was when the decree-holder had prima fade proof in support of his application, that the judgment-debtor was to be given an opportunity of showing cause why he should not be committed to the civil prison.

(9) The learned counsel for the respondent-decree holder submitted on the other hand that the failure of one of the appellants to come in the witness box was enough to invite a presumption against him and for this he relied on *M/s. Chaki Mat Kukam Chand v. Punjab National Bank Ltd.* ; and *(Pathuri) Subramanya Sastry v. (Pathuri) Lakshmi naracamma* Air 1958 AP.22; He, therefore, submitted that the failure of Rishiram to come in the witness box was enough to raise a presumption against the appellants, that if he had appeared as a witness, he would have been obliged to admit that the appellants were possessed of sufficient means to pay the decretal amount.

(10) It is, however, clear that the initial burden of proving that .the judgment-debtors are possessed of sufficient means is on the .decree-holder. If is only when by prima jade proof of judgment-debtor is shown to be possessed of means that he can be called upon to show cause why he should not be committed to the civil prison. In the present case, the evidence led by the parties has not been found satisfactory by the learned trial court. There was, therefore, no basis to hold that the appellants are possessed of sufficient means to enable them to pay the decretal amount. Harikishan, appellant, has been held by the learned trial court to be earning about Rs. 247.50 per month both from his salary and his share of the

rental income. Even if this be accepted as correct, of which there does not appear to be sufficient evidence on record, it cannot be ignored that he has six children to support. It cannot be said, therefore, that he is possessed of sufficient means to pay the decretal amount. No proof is forthcoming about Rishiram being the owner of the shop of electrical goods or of any other property. The decreeholder-respondent, in any case, has failed to explain why he has not been able to attach the goods lying in the shop, if there is one. No other evidence is forthcoming to show that the appellants are possessed of sufficient means to pay the decretal amount. Their detention, therefore, cannot be ordered merely on surmises.

(11) In the result, I do not find any substance in the findings of the learned executing court. The appeal is, therefore, accepted and the order under appeal is set aside. In the circumstances of the case, however, there shall be no order as to costs.