

Kunchumerra Rawther Ali Rawther and anr. Vs. Mathai Thomas

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Court : Kerala

Decided On : Mar-05-1981

Reported in : AIR1982Ker10

Judge : K. Bhaskaran, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 51 - Order 21, Rule 37;
[Kerala Debt Relief Act, 1977](#) - Sections 2(4) and 3

Appeal No. : C.R.P. No. 1720 of 1979

Appellant : Kunchumerra Rawther Ali Rawther and anr.

Respondent : Mathai Thomas

Advocate for Def. : Gopalakrishnan, Adv.

Advocate for Pet/Ap. : K.N. Narayanan Nair and; K. John Mathew, Advs.

Disposition : Revision allowed

Judgement :

ORDER

K. Bhaskaran, J.

1. So far as the 1st petitioner (1st judgment-debtor) is concerned, the impugned order undoubtedly is wrong. In the year 1976 the 1st petitioner was found to be a

person having means to discharge the decree-debt or some substantial portion thereof, on that basis the Court below in a subsequent application has ordered issue of warrant for the arrest and detention of the petitioners in civil prison.

2. Sri K. N. Narayanan Nair, the counsel for the petitioners, submitted that a duty was cast on the Court to enquire into and record a finding on the question whether the judgment-debtors had the means to pay off the decree amounts or some substantial portion thereof at the time when the decree was put into execution and by which process his freedom of movements was threatened to be taken away. In other words, his argument is that it was the duty of the Court to ascertain the means of the judgment-debtor as it stood at the time when the present application for renewal of the execution was filed without resting content with the finding on the question on earlier occasion. In this connection he brought to my notice the well known observations of Krishna Iyer J., in *Jolly G. Varghese v. Bank of Cochin*, 1980 Ker LT 375 : (AIR 1980 SC 470). After having considered the matter in the light of Article 11 of International Covenant on Civil and Political Rights and the relevant provisions of the Code of Civil Procedure like Section 51 and Order XXI, Rule 37, what has been stated in paragraph 11 reads as follows:--

'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 reculant 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.'

Tested in the light of the observations of Krishna Iyer, J., referred to above, it is clear that the Court below was not justified in passing an order for the issue of warrant for arrest and detention of the 1st petitioner (1st judgment-debtor). However, the contention advanced by Sri Somasundaram who argued the case on behalf of the counsel for the respondent-decree-holder is that even assuming that a case for the issue of arrest warrant against the 1st petitioner had not been made out, that would not ipso facto absolve the liability of the 2nd petitioner (3rd judgment-debtor) who stood surety and was equally bound by the liability under the decree. The 2nd petitioner is seen to have contended only for the position that the 1st petitioner was a 'debtor' within the meaning of that term in Act XVII of 1977 and, therefore, neither he nor the 1st petitioner was under an obligation to pay the decree amount. This certainly is not the correct position in law.

3. Sri Narayanan Nair on behalf of the petitioner then submitted that in the event of this Court holding that if not the 1st petitioner, at least the second petitioner, was liable to discharge the decree amount, the 2nd petitioner might be given six months' time to discharge the entire amount due under the decree that was being put into execution. The 2nd petitioner is stated to be a school teacher; considering the willingness expressed by him to discharge the entire liability under the decree, and viewed in the background of his limited resources, I think, there is justification for granting the time as prayed for by Sri Narayanan Nair.

4. The result, therefore, is that the order impugned in this revision shall not be enforced as against the 1st petitioner -- 1st judgment-debtor. The 2nd petitioner (3rd judgment-debtor) is given six months' time from this date to discharge the entire liability under the decree. In case he commits default in doing so, the decree-holder would be at liberty to proceed against him for the recovery of the entire amount in a lump. The revision is allowed to the above extent. In the peculiar circumstances of the case I would direct the parties to bear their respective costs.