N. Ramachandra Iyer Vs. Thomas Mathai

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Court : Kerala

Decided On : Dec-22-1964

Reported in : AIR1966Ker65

Judge : P.T. Raman Nayar, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 51 - Order 21, Rule 37

Appeal No. : Second Appeal No. 1146 of 1964

Appellant : N. Ramachandra Iyer

Respondent : Thomas Mathai

Advocate for Pet/Ap. : T.S. Krishnamoorthy Iyer and; P.C. Chacko, Advs.

Disposition : Appeal dismissed

Judgement :

P.T. Raman Nayar, J.

1. In this case there was an inquiry as to means under Rule 40 of Order XXI of the Code after notice to the judgment-debtor under Rule 37 (1), and the concurrent finding of fact of the courts below is that the requirements of Cl. (b) of the proviso to Section 51 (the only requirement pleaded) for execution by detention in prison was not satisfied. The courts below were therefore, quite right in dismissing the

appellant decree-holder's application for the arrest ant! detention of the respondent judgment-debtor, and the decree-holder's appeal from the dismissal on the score that the proviso applies only to detention and that the judgment-debtor should have been arrested though not detained is as misconceived as his reliance on the decisions in Londa Abhayee of Pithapuram v. Badam Suryanarayana, AIR 1048 Mad 9 (1), B. K. Pulliiramiah v. IIajee Ibrahim Essak and Sons, AIR 1959 Mys 94 and Madhusudan v. Trirnbals. AIR 1961 Bom 23 is misplaced. It is quite clear from section 51 that arrest by itselfl is not execution any more than attachment by itself is. It is only a preliminary process for detention just as attachment is for sale. Detention in prison is the real execution under C1. (c) of Section 51 just as sale is the real execution under clause (b); and arrest or attachment as the case may be is only a preliminary step. There can be no arrest in execution where no detention is possible any more than there can be at-j lachment in execution where no sale is possible.' I have never heard of an application for mere arrest in execution without detention: and if one were made I should think it would forthwith be thrown out for the absurdity that it is. What is to be done with the judgment-dcbtor after he has been arrested if he cannot be detained? Released forthwith? And then the same game again and again ad libitum?

2. Sub-rule (1) of Rule 17 of Order XXI which (save in the circumstances mentioned in the proviso thereto) makes it obligatory on the Court to issue notice to the judgment-debtor to appear and show cause why he should not be committed to prison instead of issuing warrant for his arrest (after the substitution of 'shall' for 'may' by Section 3 of Act XXI of 1936, that is obligatory not discretionary, though the marginal note takes no notice of the amendment and still speaks of a discretionary power) emphasises that there can be no arrest where execution by detention is not permissible, although, in the circumstances mentioned in the proviso to the sub-rule and in Sub-rule (2), there can be arrest pending inquiry into the question whether or not execution by detention is permissible. Such arrest, pending inquiry was what was assailed in the cases relied upon by the appellant, and all that those cases decided was that arrest in those circumstances was permissible pending an inquiry under Rule 40 as to whether or not the judgment-debtor was liable to detention, not that, after it had been found that he was not, he could still be arrested in execution.

3. I dismiss the appeal.