

State of Kerala Vs. Devassy

State of Kerala Vs. Devassy

SooperKanoon Citation : sooperkanoon.com/720556

Court : Kerala

Decided On : Oct-07-1961

Reported in : AIR1962Ker258; 1964CriLJ101

Judge : Anna Chandy and; P. Govinda Menon, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 24, 24(2), 40 and 40(3); [Indian Penal Code \(IPC\), 1860](#) - Sections 225B

Appeal No. : Criminal Appeal No. 51 of 1961

Appellant : State of Kerala

Respondent : Devassy

Advocate for Def. : M. Bhaskara Menon, Adv.

Advocate for Pet/Ap. : Public Prosecutor

Disposition : Appeal dismissed

Judgement :

Govinda Menon, J.

1. The State has filed this appeal against the order passed by the Second Class Magistrate of Mukundapuram acquitting the accused in C. C. No. 708 of 1960 who was charged under Section 225-B of the Penal Code for having escaped from the

lawful custody of P. W. 1 in whose custody he had been detained.

2. In execution of the decree in O. S. 55/57 on the file of the Irinjalakuda Munsiff's Court an arrest warrant was Issued for the arrest of the accused. The endorsement of Pw. 2, Ext. P-1 on the back of the warrant shows that the accused was arrested and produced before the Nazir. Ext. P-6 is the signature of the accused In token of his having been arrested. The accused was produced before the Court and it was ordered that he be detained in the custody of peon Pw-1 for four days in order to enable him to pay up the decree amount. Accordingly the accused was in the custody of pw-1 when on the 12th December, 1959, midnight he escaped from custody. Enquiries were Said to have been made for the accused on the 13th and 14th, but getting no clue Pw-1 made a report to the Nazir Pw-5 on the 15th morning. On getting this report the Munsiff sent a communication Ext. P-7 to the Sub Inspector of police, Irinjalakuda to prosecute the accused. A case was registered and investigated and Pw-6 the Sub-Inspector of Police laid the charge sheet.

3. The accused when questioned admitted that he was arrested and produced before the Court. He stated that he had applied for time to pay up the decree amount, that time was allowed, that he was not detained in the custody of Pw-1 and that he did not escape from cus-tody as, alleged. He examined one witness in his defence. The learned Sub-Magistrate ac-quired the accuses on the ground that his detention in the custody of Pw-1 cannot be said to be lawful custody and escape even if true cannot amount to an offence.

4. As stated already the decree-holder had filed an execution -petition praying that for the realisation, of the decree debt from the judgment-debtor-accused he may be arrested and sent to the civil jail. Such arrest followed by the detention in civil jail is authorised by Section 35 of the Civil Procedure Code. Rule 24 of Order 21 prescribes the manner in which the process for the execution of the decree has to be issued. Clause (2) of Rule 24 states:

'(2) Every such process shall bear date the day on which it is issued and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be

executed.'

Every one of the conditions required by the clause has to be satisfied by the warrant issued for the arrest of the judgment-debtor which is also a process for the execution of the decree. It is not contended that there was no order of (the Court for the issue of the warrant or that the warrant was not properly dated and sealed With the seal of the Court. The warrant has been proved to have been signed by the Munsiff himself.

5. The warrant is issued in the name of the Nazir. It cannot be contended that the warrant having been issued to the Nazir should be executed by himself and that he is not empowered to delegate its execution to another.

In *Abdul Karim v. J. Bullen*, ILR 6 All 385 a warrant issued by a subordinate Court, directing the Nazir to arrest a judgment-debtor in execution of a decree, was entrusted by the Nazir to a subordinate for execution by indorsing his name upon it. His Lordship Straight, Offg. C. J., held that there is nothing in the Civil Procedure Code to prohibit a Nazir from authorising a deputy to execute a warrant of arrest for him, and that his indorsement must, be regarded as prima facie evidence of the authority of the person to whom the warrant is delivered, to execute it.

6. In Addison on Torts, p 675 it is stated that:

'if it be proved that by the ordinary course of business in the Under-Sheriff's office, the name of the officer who is to execute the writ is indorsed on the process, and the writ so indorsed is returned and filed, and the plaintiff offers in evidence a writ with the name of a bailiff indorsed, and 'proves that the Indorsement was made at the Under-Sheriff's office, or was made before it got there, and was afterwards adopted, then it will be prima facie evidence, that the person named in the indorsement, was the person authorised by the Sheriff to execute the writ.'

7. The decision in 6 All 385 has been followed in the case in *Dharam Chand Lal v. Queen-Empress*, ILR 22 Cal 596. Their Lordships referring to Section 251 of the Code of Civil Procedure corresponding to Rule 24 of Order 21 stated that the

words 'to be executed' in this section would seem to imply that it was not intended that the 'proper officer' should himself execute all warrants sent to him and that there is nothing in the Code which indicates in any way that warrants being either warrants of arrest or warrants of attachment or for distress and sale, are to be executed by the 'proper officer' in any manner different from the service of summonses.

8. So if the Nazir Pw-1 had made an endorsement on the back of the warrant authorising any particular process-server or Amin to effect the arrest there is no doubt that that particular person would have authority to go and effect the arrest. Unfortunately the warrant does not bear any endorsement by the Nazir authorising Pw-2, the process server to make the arrest. The Nazir when examined does not say that he had delegated his power and that he had endorsed it in the name of Pw. 2. Even in the Allahabad case it was stated that the authority might well be conferred in more clear and explicit terms than can be implied by the mere endorsement of the peon's name. Here not even that is proved. The materials on record are thus too meagre to justify the assumption that there was a proper delegation of authority which empowered Pw-2 to effect the arrest. At any rate there is certain amount of uncertainty and doubt left on this point.

9. The learned Public Prosecutor made a faint attempt to argue that even though there is no proper endorsement to Pw. 2 to arrest the judgment-debtor, Pw. 2's name is seen to have been written on the warrant and that the usual practice is only to write the name of the peon on the warrant. The fact that it has been the practice even if it were so will not make the endorsement proper, especially when the Nazir has not deposed in Court that he has endorsed over the warrant to Pw. 2. What he has stated is only that Pw. 2 produced the judgment-debtor-accused before him.

10. A warrant for arrest must be issued to some person for execution and where no name or description of that person is given in the warrant the person arrested can have no knowledge that the person who presents the warrant and demands the payment of the decree amount, and arrests Mm in default is legally authorised to do so. It may be that the person who is arrested is unable to read the warrant or

had no knowledge as to whether the warrant is or is not properly filled up, but it is the duty of the Court to issue a warrant in proper form and when the warrant is incomplete it has been held that no offence, under Section 225-3 is made out.

11. In *Jagannath v. Emperor*, AIR 1932 All 227 a warrant was issued to the Nazir and the Nazir without any endorsement made it over to a subordinate official and it was held that the warrant was defective and did not authorise the person, to arrest and accordingly an escape from custody in such a case is no offence. This case has been followed in a later decision, of the same High Court in *Fattu v. Emperor*, AIR 1932 All 692.

It is, therefore, extremely doubtful whether the arrest of the judgment-debtor-accused by Pw. 2 could be said to be a lawful arrest.

12. The next question is whether the detention of the accused in Pw. 1's custody is legal. Order 21, Rule 40 deals with the procedure for the production of the accused after arrest in Court. We are concerned with the proviso to Sub-rule (3) of Rule 40. It reads as follows:-

'Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the Court may, before making the order of detention, leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.'

So in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of detention, may leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding 15 days. There must, therefore, be an order of the Munsiff leaving the judgment-debtor in the custody of a particular officer of the Court and an order to produce the judgment-debtor at the expiration of the period specified. That would be clear from, Form No. 14-A in Appendix E in the First Schedule of the Civil Procedure Code.

13. We have gone through the records. There is no separate warrant as in Form No. 14-A nor do we find the Munsiff having made any Such endorsement. The Munsiff has not been examined and the Nazir when examined does not say that there was any such order or that the judgment-debtor was entrusted to the custody of Pw. 1 on the orders of the Munsiff, or that he endorsed the warrant of detention to Pw. 1. If the judgment-debtor had properly been left in the custody of the process-server on payment of detention batta and if he escapes while in such custody offence of escape from lawful custody would be made out

14. Authority for this position can be had in the case in Public Prosecutor v. Audinarayana Reddi, AIR 1933 Mad 278. In that case it was contended that there was no order in writing by the Munsiff that the judgment-debtor may be detained in the custody of the process peons It was held that Order 21. Rule 40 says nothing about the order having to be in writing. What the Munsiff did in that case was to note the order on the warrant as to the judgment-debtor's paying detention batta and limiting the period of such custody to two days. That was held to be sufficient. We are in respectful agreement with the view taken in, that case, but here there is no such endorsement made by the learned Munsif and no oral evidence has been led about the entrustment.

15. The learned Sub-Magistrate has relied on the decision reported in Emperor v. Madho Singh, AIR 1925 All 318 (2). It was held in that case that a Civil Court is not empowered to leave the judgment-debtor in custody of a peon after giving him time to pay up the decretal amount and such detention is not lawful custody within the meaning of the Penal Code. With respect we are unable to follow this decision. (16) In order that an offence under Section 225-B is made out the apprehension and detention must be lawful, that is to say the warrant on which the arrest was made and detention, was ordered must satisfy all due formalities of law. The statutory rules which involve penal consequences for infringement must be strictly interpreted and it is the duty of the prosecution to prove all the essential ingredients that constitute the offence. As the custody of the accused with the peon Pw. 1 is not proved to be legal custody, his escape will not amount to an offence. We have, therefore, to confirm the order of acquittal even though not for the reason stated by the learned Magistrate. The appeal is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com