

Thangal Vs. State of Kerala

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Court : Kerala

Decided On : Aug-04-1960

Reported in : AIR1961Ker331

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

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 24(2), 37, 37(1) and 38; [Indian Penal Code \(IPC\), 1860](#) - Sections 109 and 225B; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 236 and 237

Appeal No. : Criminal Revn. Petn. No. 208 of 1959

Appellant : Thangal

Respondent : State of Kerala

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : T.N. Subramonia, Adv.

Judgement :

Govinda Menon, J.

1. The petitioner was the 1st accused in C.C.67/59 on the file of the Sub-Magistrate of Ponnani. He was convicted by the learned Magistrate under Ss. 353 and 225B, I.P.C., and sentenced to rigorous imprisonment for 4 months under

Section 353 and rigorous imprisonment for 2 months under Section 225B. On appeal the District Magistrate of palghat set aside the conviction Under Section 353 I.P.C., but confirmed the conviction under Section 225B and reduced the sentence to a fine of Rs. 300.

This revision has been filed against the above said order. When the matter came up for hearing before our learned brother Velu Pillai, J., it was referred to a Division Bench on the ground that on one of the questions arising for decision in the case there was a conflict of opinion between the decisions reported in Fattu V. Emperor, AIR 1932 All 692 and Puna Mahton v. Emperor, AIR 1932 Pat.315.

2. The facts of the case necessary for the disposal of this petition are as follows:--

Pw. 7 in this case had obtained a decree in Small cause Suit No. 740/49 on the file of the Small cause Court, Kozhikode against the second accused in the case. It was transferred for execution to the Sub-Court at Ottapalam. The execution petition was filed before that court for the arrest of the judgment-debtor. Certified copy of the execution petition is Ext. D1. On 9th June 1958 the court waived notice and ordered arrest but notice was also ordered to be given to the judgment-debtor. The warrant Ext. P1 was entrusted to Pw. 4 the Amin and the notice Ext. P2 was entrusted for service to the Process Server Pw. 3.

3. Pws. 3 and 4 went with PW, 5 an agent of Pw. 7 to Pattambi on 10th June 1958. They found the judgment-debtor the second accused in the market selling fish. Ext. P2 was duly served on the second accused and he accepted the notice and affixed his thumb impression. Then Pw. 4 showed file warrant and notified the substance thereof to the second accused and duly effected his arrest. He refused to sign the warrant and an altercation ensued and there was some confusion and trouble and a large crowd gathered at the place.

The petitioner who was the President of the Panchayat on hearing about it came to the place and asked Pw. 4 as to how he was attempting to serve a warrant in the market without his permission. He directed the 2nd accused to go away saying that he would see about it. On being thus instigated and incited the 2nd accused struggled and escaped from the clutches of the. Amin. It is stated that the

petitioner then pushed out Pw. 4 out of the market.

4. Pw. 4 then went to Ottapalam Police Station and as the Sub-Inspector was not there he went to Shornur and gave the complaint Ext. P3 to the Circle Inspector of Police. The Circle Inspector forwarded the complaint to the Sub-Inspector of Police, Pattambi. The next day the Amin Pw. 4 returned the warrant unexecuted to the court stating that the judgment-debtor escaped after arrest at the instance of the petitioner. A copy of the complaint was also enclosed. The Sub-Inspector then questioned all the witnesses and a charge-sheet was laid against both the accused.

The learned Magistrate, as I stated earlier, convicted the petitioner for offences under Sections 225B and 353, I. P. C., but the learned District Magistrate, on appeal found that the offence under Section 353, I. P. G. had not been satisfactorily proved against the petitioner and acquitted him of that offence. He found that the petitioner had committed an offence under Section 225B holding that the 2nd accused had been legally arrested by Pw. 4 and that he escaped from his custody at the intervention and instigation of the petitioner.

5. The main point that was argued before us was that the apprehension of the 2nd accused in this case was not lawful because the warrant on which the arrest was made was not a legal or a proper warrant and that as there was no legal arrest, the escape from custody or rescue from such custody would not amount to an offence. Two reasons were advanced to substantiate this contention. Firstly, it was stated that the warrant was served simultaneously 'with the notice under Order 21, Rule 37 of the Code of Civil Procedure which is illegal and secondly that in the warrant of arrest the amount shown is not correct and that an arrest could not legally be effected for an amount in excess of what is shown in the execution petition.

6. Coming to the first objection, Order 21, Rule 37 Civil Procedure Code reads as follows;

'(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the

civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the court shall, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

Provided that such notice shall not be necessary if the court is satisfied by affidavit or otherwise, that, with the object or effect of delaying the execution of the decree the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the court,

(2) 'Where appearance is not made in obedience to the notice, the court shall, if the decree-holders so requires, issue a warrant for the arrest of the judgment-debtor.' Clause (1) of Rule 37 contemplates a case where notice is given to show cause why the judgment-debtor should not be committed to jail. Clause (2) says where appearance is not made in obedience to the notice, the court may issue a warrant. But the proviso to Clause (1) of Rule 37 says that in a case where the learned Judge is satisfied by affidavit or otherwise that, with the object or effect of delaying the execution of the decree the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the court, the court can issue a warrant of arrest.

7. in order that the act of the accused may amount to an offence under Section 225B, two prerequisites are to be satisfied, viz., (1) that Pw. 4 the Amin had the legal authority to arrest the second accused; and (2) the warrant Ext. PI on the authority of which he was making the arrest had been legally issued by a competent authority, Arrest followed by the detention in civil jail is authorised by Section 55 of the Civil Procedure Code. Rule 24 of Order 21 of the Code prescribes the manner in which the process for the execution of the decree has to be issued. Clause (2) of Rule 24 states:

'Every such process shall bear date of 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 these conditions has to be satisfied. It is not contended that there was no order of the court for the issue of a warrant for the arrest of the judgment-debtor in execution of the decree or that the warrant Ext. P1 issued in pursuance of that order was not properly dated and sealed with the seal of the court. It is also not contended that Pw. 4 is not an Amin of the court whose duty it is to execute such warrants or that the warrant Ext. P1 had not been entrusted to him for execution. We have the evidence that all formalities as contemplated by Clause (2) of Rule 24 of Order 21 were duly complied with. It therefore follows that the arrest in pursuance of such a warrant is legal.

8. In this case what happened was there was a simultaneous issue of notice and warrant. The question for decision is whether on that account it would make the warrant illegal. The argument is that having decided to issue a notice, the court should not have deprived the judgment-debtor of the opportunity which the notice affords him as stated by me there is no case that the court has no jurisdiction to issue a warrant of arrest or that the warrant of arrest is defective in any other way or that the Amin in executing the warrant did anything more than the duties imposed upon him or that he had effected the arrest otherwise than in good faith.

It may be that the court adopted an improper procedure. The court should either have issued a warrant of arrest or issued a notice giving the judgment-debtor a date on which to appear in court. If the notice is ordered the question of arrest would arise only when the judgment-debtor fails to comply with the notice. But we are not prepared to agree that on this ground the warrant of arrest which is otherwise valid and proper becomes defective.

9. The learned counsel for the petitioner has referred us to the decision in AIR 1932 All 692.

In that case a similar question arose for consideration and it was held that a warrant of arrest issued simultaneously with a notice calling, upon the judgment-debtor to appear is illegal and that the person cannot be said to be under lawful arrest and no offence under Section 225B. I.P.C., is committed. With great respect we are unable to agree with this view.

10. We are fortified in the view that we take by the decision in AIR 1932 Pat 315, where in a similar case it was held:

'Where a notice and warrant for arrest of the judgment-debtor were issued simultaneously by the executing court the apprehension of the judgment-debtor by the peon executing the warrant of arrest is a lawful apprehension however mistaken the executing court may have been in exercising its discretion to direct that apprehension and escape from and obstruction to that apprehension are unlawful acts under Section 225B, Penal Code, and the pushing of the peon by the accused not being justified in law amounts to an assault justifying his conviction under Section 353'.

11. To the same effect is the decision in Rajanikanta Saha v. Emperor, ILR 58 Cal 940: (AIR 1931 Cal 443), where it was held that the fact that a notice to show cause why the judgment-debtor should not be arrested is issued simultaneously with a warrant does not make the warrant illegal.

12. We have also been referred to a decision of the Cochin High Court in Kunhu Muhammad v. Ahamad, 34 Cochin LR 257. There a decree-holder who applied for attachment in execution of his decree put in a petition under Order 21, Rule 20 of the Cochin Civil Procedure Code, praying for the issue of an order of attachment and notice simultaneously to the judgment-debtor. The contention that was raised in the case was that the simultaneous issue of the notice and the order of attachment was illegal and the attachment consequently was null and void. Relying on the decisions reported in AIR 1932 Pat 315 and ILR 58 Cal 940: (AIR 1931 Cal 443) it was held:

'the issue of the notice along with the order of attachment is, no doubt, not contemplated by Rule 20. The decree-holder's prayer was in effect one invoking the power of the court under Sub-clause (2) to dispense with previous notice. The District Munsiff allowed the petition and seeing that he thought fit to dispense with previous notice, there can be no doubt that he purported to act under Sub-clause (2). The subsequent issue of a notice along with the order of attachment not being contemplated by the rule or any other provision of law has to be regarded only as superfluous, having been issued only in terms of the decree-holder's prayer. The

issue of such notice cannot have the effect of making the order of attachment illegal or void'.

We are in respectful agreement with the view expressed in all these decisions and we hold that even though the learned Judge had acted in an injudicial manner in issuing notice and arrest simultaneously the warrant of arrest on that ground does not become illegal.

13. Coming to the second objection, no doubt in the warrant of arrest Ext. P-1 it is stated that the judgment-debtor is to pay Rs. 751 and if that is not paid the arrest has to be effected. But in the separate column in Ext. P-1 it is shown that the principal amount was Rs. 539.70 and cost is Rs. 111.30 and when totalling the two figures it has been shown as Rs. 751. On scrutinising this it will be seen that the mistake has been committed in adding up the two figures.

Even assuming that the amount shown in Ext. P-1 is not correct that by itself would not affect the validity of the warrant, Under Order 21, Rule 38 the judgment-debtor has to pay the amount ordered to be paid in the warrant and if a mistake has been Committed in calculating the figure it is open to the judgment-debtor to take appropriate proceedings in court to see that the mistake is rectified and it does not make the warrant on that account illegal.

14. The only question that now remains for consideration is whether the petitioner could be found guilty under Section 225B, I. P. C. Section 225-PART 1) makes punishable escape or attempt to escape from any custody in which a person is lawfully detained or the rescue or the attempt to rescue any person from any custody in which that person is lawfully detained. The evidence of Pws. 3 to 6 which has been accepted by the courts below would conclusively show that the 2nd accused escaped from lawful custody when the petitioner asked him to go away and that he would see about it. We have no reason to doubt this testimony and therefore it can be taken as proved by the prosecution that the 2nd accused made good his escape at the instigation of the petitioner.

15. It is argued by the learned counsel for the petitioner that no overt act has been done by the 1st accused to forcibly rescue the 2nd accused from the custody of

the Amin and the oral incitement or instigation alone would not be sufficient to constitute the offence of rescuing from custody made punishable under Section 225B. I.P.C. There is considerable force in this argument. as stated in the commentaries in Gour's Penal Law

'The word 'rescue' has not been defined in the Code, but it is evidently used in the sense it has been used in English Law, as implying the act of forcibly freeing a person from custody against the will of those who have him in custody. Assisting another to escape from lawful custody is, in short, rescuing him. Rescue implies intention and the use of violence to effect the object desired.'

Therefore rescuing would certainly indicate some positive overt act on the part of the accused by which the liberation of the person arrested is effected. Whether there is any such act done by the accused in a particular case would depend On the facts of each case.

16. in this case the allegation made by the prosecution throughout has been that the petitioner only instigated the 2nd accused to escape and in consequence of that he escaped from custody. So the offence committed by the 1st accused is really abetment of escape by the 2nd accused, an offence punishable under Section 225B read with Section 109, I. P. C. The petitioner, no doubt, has not been specifically charged with abetment, but has only been charged with ' the substantive offence under Section 225B. a question therefore arises whether without the specific charge of abetment he could be convicted of such an offence.

17. this question has come up for consideration in various cases. in Balmukan v. State, AIR 1952 Raj 123 it was observed:

'Where the case is covered by Ss.' 236 and 237 of the Code of Criminal Procedure, and the accused has notice of all the facts which go to make up the charge of abetment, he can be convicted of the charge of abetment, even though the charge framed against him was only of the substantive offence. Where the evidence as to the charge of abetment of the offence of rape was all before the court in the statement of the girl, on which evidence the accused could have been charged of an offence under Section 376 read with S.' 109 for abetting the offence

of rape by other accused, the accused can be convicted under Section 376 read with Section 109.'

18. Reference was made in that case to the case in *Begu v. Emperor*, AIR 1925 PC 130, where their Lordships of the Privy Council have stated:

'a man can be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made.'

19. In *Jananada Charan v. Emperor*, 3-1 Cal WN 198 : (AIR 1929 Cal 807) it was held that:

'a person charged only with a substantive offence can be convicted of abetment thereof, if the facts proved justify such conviction and be such as were sufficient to give the accused notice of allegations of abetment in spite of the absence of a specific charge.'

20. In *Subbayya v. Emperor*, 23 Mad LJ 722 *Sundara Aiyer, J.*, stated:

'The question is what were the facts charged, if on these facts two charges could be framed, namely, the commission of the principal offence, and the abetment, then by virtue of provisions of Section 237, the accused may be convicted of the offence of the abetment though it was not charged separately against him.'

21. The Supreme Court also in *Bhagat Ram v. State of Punjab*, AIR 1954 SC 621 has held that in appropriate cases the conviction could be altered to one of abetment of an offence. In *Nani Gopal Biswas v. Municipality of Howrah*, AIR 1958 SC 141, the question arose whether an accused could be convicted of an offence although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. Their Lordships observed:

'the alteration of the conviction of the appellant from Section 299 to Section 300 of the Calcutta Municipal Act, 1923 read with Section 488 of the Act, was no alteration in the substance of the accusation but only in the section more properly applicable to the facts found.'

22. in this case the facts sought to be proved and found by the courts below remained the same even after the alteration of the conviction from the substantive offence under Section 225B to abetment of that offence. It has not been shown that the petitioner had in any way been prejudiced in the trial of the case as a result of the alteration of the section or that he was deprived of the opportunity, to make a proper defence if the right section had been mentioned in the charge that had been framed by the court. The learned counsel for the petitioner has also not been able to show that the accused has in any way been misled in his defence as a result of any such technical error.

23. as stated by their Lordships of the Supreme Court in *Willie (William) Slaney v. State of Madhya Pradesh*. (S) AIR 1956 SC 116:

'If the accused is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venial by the Code and the trial is not vitiated unless the accused can show substantial prejudice.'

24. a review of these authorities in our opinion clearly establishes that where the case is covered by Ss. 236 and 237 of the Code of Criminal Procedure and the accused has notice of all the facts which go to make up the charge of abetment he can be convicted of the charge of abetment, even though the charge framed against him was only for the substantive offence. The prosecution evidence in this case and the finding of the court was only that he instigated the 2nd accused to escape and therefore the courts below could have rightly framed a charge of abetment, in such a case the accused can certainly be convicted of the offence of abetment to escape, although there has been no charge in respect of it. We therefore confirm the conviction but alter the conviction to one under Section 225B read with Section 109, I.P.C.

25. We do not think that under the peculiar circumstances of this case the sentence is in any way excessive or calls for any interference.

26. in the result the conviction of the accused is confirmed, but altered to one under Section 225B read with Section 109 I.P.C. The sentence to pay a fine of Rs. 300 and in default to undergo rigorous imprisonment for one month is confirmed. The revision petition is dismissed.

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