

Raju Vs. Indian Overseas Bank

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Court : Kerala

Decided On : Jun-16-2006

Reported in : AIR2006Ker379; 2006(3)KLT387

Judge : K. Padmanabhan Nair, J.

Appeal No. : W.P.(C) No. 34635 of 2005

Appellant : Raju

Respondent : Indian Overseas Bank

Advocate for Def. : V. Philip Mathew, Adv.

Advocate for Pet/Ap. : Pauly Mathew Muricken, Adv.

Judgement :

K. Padmanabhan Nair, J.

1. The judgment debtor in E.P.No. 65/2003 in O.S.No. 35/2000 on the file of the Sub Court, Pathanamthitta is the petitioner in this Writ Petition. The respondent bank filed the suit for realisation of the money. The suit was decreed. The bank filed E.P.No. 65/ 2003 for realisation of an amount of Rs. 1,79,253/-. One of the modes of execution sought for was arrest and detention of the petitioner in civil prison. The petitioner did not appear before the executing court on receipt of the notice issued to him under Order XXI Rule 37. The decree holder filed an affidavit.

Warrant of arrest was issued against the petitioner on 22.3.2005. The petitioner was arrested and brought before the executing court on 21.10.2005. On that day the petitioner paid an amount of Rs. 5,000/- and E.P. was posted to 25.10.2005. On that day the petitioner paid another amount of Rs. 3,000/- and the E.P. was adjourned to 13.12.2005. The petitioner filed an objection on 21.10.2005 contending that he has no means to pay the debt. The petitioner filed E.A.No. 251/2005 before the executing court on 19.11.2005 praying that the executing court may consider the issue of means of the judgment debtor before further proceeding with the execution proceedings. He also filed E.A.No. 255/2005 to review the order by which the arrest warrant was ordered against him. That application was not accompanied by a petition to condone the delay. The learned Sub Judge dismissed E.A.No. 251/2005. the petition in which the prayer made was to consider the plea of his no means holding that 'since arrest warrant had already been issued against the judgment debtor after considering the means of the judgment, debtor, the application cannot be considered at this stage. Hence the same is dismissed'. The review petition was also dismissed on the ground that it was highly belated. Challenging those two orders, this Writ Petition was filed.

2. The learned Counsel appearing for the respondent raised a preliminary objection that no Writ Petition is maintainable against an order passed by the court below ordering arrest warrant. It is argued that the orders impugned in this Writ Petition are revisable. The main challenge in this Writ Petition is directed against the order dated 25.11.2005 dismissing E.A.No. 251/2005. The prayer in that E. A. was to consider the issue of the means of judgment debtor before further proceeding with execution proceedings. Even if that application was allowed the proceedings will not be terminated. So no revision is maintainable against that order. It is true that the order passed in E.A.255/2005 is revisable since that order is a final order. It is well settled position of law that the existence of alternate remedy alone is not a ground to dismiss the Writ Petition. This Writ Petition is pending from 13.12.2005 onwards. It is to be noted that Civil Revision Petition is also to be filed before this Court.

3. In this case the judgment debtor was brought before the court under arrest in pursuance of a warrant issued under Order XXI Rule 37(2) of Civil Procedure

Code. In such cases there is a mandatory duty cast upon the court to direct the decree holder to prove the means of the judgment debtor and also the circumstances specified under proviso to Section 51(c) of the Civil Procedure Code before ordering detention of the judgment debtor in civil prison. In spite of a petition filed by the judgment debtor to conduct an enquiry the executing court held that there is no need to conduct such an enquiry. It is well settled position of law that when an inferior court or Tribunal refuses to exercise the jurisdiction vested in it or acts without jurisdiction this Court can interfere and set aside the order under Article 227 of the Constitution of India. So, I overrule the objection raised by the learned Counsel appearing for the respondent that no Writ Petition is maintainable against the orders impugned in this case.

4. A perusal of the records shows that though notice was ordered against the petitioner he did not appear before the executing court. The decree holder filed an affidavit stating that the judgment debtor has got means and based on that statement, the executing court ordered arrest warrant. The petitioner was brought before the court under arrest. When such a person is brought before the court under arrest it has to follow the procedure prescribed under Order XXI Rule 40 of the Civil Procedure Code. The mere fact that the court below has ordered warrant of arrest relying on an affidavit filed by the decree holder alone is not a ground to hold that thereafter the court need not consider the plea of no means as held by the executing court. Order XXI Rule 40 is a mandatory provision. Rule 40 of Order XXI prescribes the procedure to be followed when the judgment debtor appears before the court in obedience of a notice under Rule 37 or brought under arrest. Order XXI Rule 40 reads as follows:

Rule 40, Proceedings on appearance of judgment-debtor in obedience to a notice or after arrest.-

(1) When a judgment-debtor appears before the Court in obedience to a notice issued under Rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an

opportunity of showing cause why he should not be committed to the civil prison.

(2) Pending the conclusion of the inquiry under Sub-rule (1), the Court shall release the judgment-debtor on his furnishing security to the satisfaction of the Court for his appearance when required and if the judgment-debtor fails to furnish the security ordered, the Court may order the judgment-debtor to be detained in the custody of an officer of the Court on the decree-holder depositing in Court the necessary amounts payable to the judgment-debtor and the officer of the Court in connection with such detention.

(3) Upon the conclusion of the inquiry under Sub-rule (1) the Court may, subject to the provisions of Section 51 and to the other provisions of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:

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.(4) xxx xxx xxx

(5) xxx xxx xxx.

5. It is obligatory in every case, on the court to give an opportunity to the judgment debtor to show cause why he should not be imprisoned before ordering his imprisonment in execution of a money decree. Such imprisonment of the judgment debtor cannot be ordered except in the circumstances specified in the proviso to Section 51 of the Civil Procedure Code. The procedure prescribed under Rule 40 is applicable when a person is brought under arrest also. It is to be noted that arrest by itself is not execution but only a preliminary process for detention. See Ramachandra Iyer v. Mathai 1965 KLT 261. The provision contained in Section 51(c) reads as follows:

51. Powers of Court to enforce execution.-- Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree-

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) by arrest and detention in prison for such period not exceeding the period specified in Section 58, where arrest and detention is permissible under that section;

(d) xxx xxx xxx

(e) xxx xxx xxx

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court for reasons recorded in writing, is satisfied. (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,-

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

6. In Mathai v. Kurian 1979 KLT 216 this Court has considered the procedure to be followed before ordering detention. It was held as follows:

If the judgment-debtor appears in obedience to notice or is brought before Court on arrest, the Court should conduct an enquiry as detailed in O. XXI, R. 40, The Court should hear the decree-holder and take all such evidence as may be produced by him in support of the application for execution. Order XXI Rule 40(1) does not dispense with taking of evidence even in cases where an affidavit has been filed under Order XXI, Rule 11-A. If any witnesses are examined, the judgment-debtor should be allowed to cross-examine them. Thereafter, the Court should give an opportunity to the judgment-debtor to show cause why he should not be committed to a civil prison. Upon the conclusion of the enquiry, the Court may make an order for the detention of the judgment-debtor and may cause him to be arrested if he is not already under arrest.

7. In this case an affidavit was filed by the decree holder and arrest warrant was issued. When the petitioner was brought before the court he filed an application to conduct an enquiry as contemplated under Rule 40. That application was dismissed. There is no finding to the effect that the circumstances specified in the proviso to Section 51(c) are established in this case. It is not possible to hold that there was compliance of Rule 40 of Order XXI in this case. There is failure to exercise the jurisdiction vested in the executing court.

8. It is settled position of law that unless the decree holder proves the means and also the circumstances specified under Section 51(c) of the Civil Procedure Code the judgment debtor who is brought before the court under arrest cannot be ordered to be detained in civil prison. The orders passed by the court below are in excess of the jurisdiction vested in it also. So the orders passed by the Court below on 25.11.2005 dismissing E.A.No. 251/2005 and E.A.No. 255/2005 in E.P.No. 65/2003 in O.S.No. 35/2000 are liable to be set aside. I do so.

In the result, the Writ Petition is allowed. The orders passed on 25.11.2005 by the learned Sub Judge dismissing E.A.No. 251/2005 and E.A.No. 255/2005 in E.P.No. 65/2003 in O.S.No. 35/2000 are hereby set aside. The learned Sub Judge, Pathanamthitta is directed to take back E.A.No. 251/2005 and E.A.No. 255/2005 to file and dispose of the same afresh as expeditiously as possible, in accordance with law.

