

**Thampi Vs. Malathi**

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**Court :** Kerala

**Decided On :** Mar-23-2005

**Reported in :** 2005(4)KLT575

**Judge :** Plus C. Kuriakose, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 2(2), 2(3), 2(10) and 36 to 74 - Order 21, Rules 10, 11, 37 - Order 39, Rules 1, 2, 2A and 2A(1); ;[Constitution of India](#) - Article 227

**Appeal No. :** O.P. No. 15044 of 2002

**Appellant :** Thampi

**Respondent :** Malathi

**Advocate for Def. :** George Varghese Perumpillikuttyil and; V. Rajendran, Adv.

**Advocate for Pet/Ap. :** B. Gopakumar, Adv.

**Disposition :** Petition allowed

**Judgement :**

**Plus C. Kuriakose, J.**

1. This Writ Petition under Article 227 of the [Constitution of India](#) has been instituted by the second defendant in O.S.No. 289 of 1998 on the files of the

Munsiff's Court, Mavelikkara seeking to set aside Ext.P2 common order passed by the learned Munsiff on the original side, Ext.P3 execution petition and various orders passed on that petition including Ext.P5 order directing the arrest and detention of the petitioner and others and Ext.P8 order attaching the properties of the petitioner and others on the reason that the first respondent who is the plaintiff in the suit has abused the process of court in a manner as to cause serious prejudice and injustice to the petitioner.

2. The facts, according to the petitioner are that the first respondent filed the suit for settlement of accounts between him and the defendants and also for a direction to the defendants to issue a certificate cancelling the hypothecation noted in the Registration Book of the plaint schedule vehicle, a lorry, which was subject matter of a hire purchase agreement between the plaintiffs and one of the defendants in the suit. Along with the suit, on the application filed by the plaintiff as I.A.No. 1669 of 1998, the court passed an order of injunction restraining the defendants from dispossessing the plaintiff of the suit schedule vehicle. Later the plaintiff filed I.A.No. 2789/99 for a direction to the defendants to return the vehicle to the plaintiff alleging that in violation of the order of injunction passed on I.A.No. 1669 of 1998, the defendants forcibly dispossessed the plaintiff of the vehicle. The plaintiff also filed I.A.No. 2790/99 under Order XXXIX Rule 2A for initiating prosecution proceedings against the defendants for the alleged disobedience of the injunction order. According to the petitioner, he did not contest the suit. He was therefore set *ex parte* and long later Ext.P1 *ex parte* decree was passed in the suit against him. The other defendants, should also remained absent when the case was taken up for trial in the special list. The petitioner states that after passing Ext.P1 *ex parte* decree the court disposed of I.A.Nos. 2789/99, 2790/99 and 224/2000 which was yet another application under Order XXXIX Rule 2A filed by the plaintiff by passing Ext.P2 common order. Ext.P2, according to the petitioner, is the result of gross abuse of legal process. The petitioner had no notice of the prosecution petitions at all. Since the defendants including the petitioner remained *ex parte*, Ext.P2 could have been passed only after issuing notice to the defendants and giving them an opportunity to defend them on the applications. According to the petitioner, since the suit was decreed the order of temporary injunction which was allegedly violated did not survive any longer and therefore

Ext.P2 was issued totally without jurisdiction. The petitioner further states that after getting the certified copy of Ext.PI decree the plaintiff as decree-holder filed Ext.P3 execution petition under Order XXI Rules 10 and 11 of the Code for execution not of the decree but the common order Ext.P2. The petitioner filed Ext.P4 objections to Ext.P3 disputing the very maintainability of Ext.P3. According to him, on 15.6.2001, the execution court passed an order in the E.P. saying that the E.P. was filed on the basis of an order dated 6.3.2001. That order is Ext.P5 which refers to the order dated 6.3.2001 and according to the petitioner there was no order passed on 6.3.2001. It is against Ext.P5 that the 1st judgment-debtor has filed C.R.P.No. 1592 of 2001 and that C.R.P. is being considered separately. During the pendency of C.R.P.No. 1592 of 2001 which is directed against Ext.P5, the plaintiff decree-holder filed Ext.P6 attachment application seeking attachment of the entire properties of the petitioner. The petitioner complains that the execution court ignored Ext.P7 objections filed by him to Ext.P6 application and readily passed Ext.P8 order of attachment. According to the petitioner, Ext.P3 E.P. could not have been maintained for the execution of an order dated 18.12.1999 since that order merged into Ext.PI decree on 6.3.2000. Ext.P5 order directing the petitioner's arrest and detention could therefore not have been passed. Ext.P8 order is all the more illegal and without jurisdiction since the respondent had no order in his favour permitting attachment of the petitioner's properties.

3. On the above facts that the Writ Petition is filed for the reliefs already indicated on the various grounds raised in the Memorandum of Original Petition. Notwithstanding the long pendency of the O.P. the respondents have not filed any counter affidavit.

4. I have heard the arguments of Mr. B. Gopakumar, learned counsel for the petitioner. Mr. George Varghese Perumpillikuttyil, learned counsel for the first respondent and Mr. V. Rajendran (Perumbavoor), learned Counsel for the second respondent.

5. Mr. Gopakumar, learned Counsel for the petitioner submitted at the very outset that there cannot be a more ideal case than the present one for invocation of the supervisory jurisdiction of this Court under Article 227 of the Constitution since it is

obvious that legal process has been abused with gay abandon by the first respondent and the learned Munsiff went on passing orders which were sought for by the 1st respondent bothering not about jurisdiction, legality or propriety. According to Mr. Gopakumar, the objective and principle underlying Order XXXIX Rule 2A is to ensure enforcement of temporary injunction orders passed by the court and not to punish anybody for having caused disobedience of such orders. Since the suit already stood decreed by Ext.P1, there was no scope for passing orders in the nature of Ext.P2. Any temporary injunction order restraining or commanding redelivery could not have survived the suit which was decreed as prayed for, i.e. for settlement of accounts and cancellation of the hire purchase lien. In a matter which affects the personal liberty of the defendants, the learned Munsiff, according to Mr. Gopakumar, did not apply her mind at all but only mechanically copied down Sub-rule (1) of Rule 2A of Order XXXIX and this was clear from the period of detention determined by the learned Munsiff as 'not exceeding two months' which could be anything between one day and two months. The highly ambiguous nature of the above punishment itself will justify this Court's interference, according to counsel. The initiation of execution proceedings by way of Ext.P3 also came up for severe attack at the hands of the learned Counsel. According to him, execution petitions whether it be under Order XXI Rules 10 or 11 can only be petitions for execution of decrees. In the instant case, it is not the decree that was put in execution but the order Ext.P2. To enforce or to execute Ext.P2, i.e. to enforce the arrest and detention ordered under Ext.P2 on the reason that the defendants were evading arrest, the trial court itself could have been moved. According to counsel, execution of executable orders is to be done by the court which passed those orders, though it will be within the power of the court to have recourse to the procedure laid down under Order XXI while doing so. Ext.P4 statement of objections contained a very strong challenge against the maintainability of the E.P. and even a casual glance on the E.P. in the light of Ext.P4 objections would have deterred any knowledgeable court from continuing with the execution proceedings. Regarding Ext.P8, Mr. Gopakumar submitted that the same was per se without jurisdiction. The trial court had not passed any order of attachment of the petitioner's property as could be seen from Ext.P2. Neither Ext.P1 nor Ext.P2 order will enable the execution court to attach the petitioner's

property as is now done by the court through Ext.P8. Ext.P8 order, according to Mr. Gopakumar is an order which can be branded as a perverse one which occasions failure of justice. Counsel pointed out that there was no prayer even before the trial court for attachment and the writ petitioner was never allowed even a say on the question of his properties being proceeded against for the alleged violation of the injunction order. Ext.P8, therefore, it was argued has been passed in gross violation of the principles of natural justice. Learned counsel concluded his submissions by pointing out that the various orders passed by the trial court as well as the execution court starting from Exts.P2 to P8 are tainted to such an extent that all those orders are liable to be set aside under this Court's supervisory jurisdiction under Article 227 of the Constitution.

6. Mr. George Varghese Perumpillikuttyil would oppose Mr. Gopakumar's submissions and put up a very spirited defence of Ext.P2 order as well as the various orders passed by the execution court except Ext.P8. Counsel who fairly conceded that he was not able to support Ext.P8 submitted on the authority of the decision of the Supreme Court in T.M. Bagasarwalla v. H.R. Industries (1997 (2) KLT (SN) 14 (Case No. 14) that a person who disobeys an order of injunction passed by a civil court can be punished under Order XXXIX Rule 2A even if it is ultimately found that the civil court has no jurisdiction for entertaining and trying the suit. Orders passed by the courts without jurisdiction so long as these orders are in currency are to be obeyed, according to counsel. Counsel referred to the judgment of K.G. Balakrishnan, J. in Choorakadan alias Rayyappadan Sanku v. Antony : AIR1991 Ker44 and submitted that the proceeding under Order XXXIX Rule 2A for breach of injunction is separate and independent from the main proceeding, the suit and therefore it was not good argument that Ext.P2 was beyond the scope of Ext.P1 decree. Mr. George Varghese referred also to the judgment of this Court in Kochira Krishnan v. Joseph Desouza : AIR1986 Ker63 and submitted that violation of an injunction order or violation of an undertaking given to the court was a matter to be seriously and sternly dealt with since otherwise it will undermine the very basis of the rule of law and submitted further that the court in cases under Order XXXIX Rule 2A was concerned only with the question whether there was disobedience of an order while the order was in force. Counsel drew my attention to the facts of the case and submitted that Ext.P2 order

itself will reveal that earlier the court had passed an interim order of injunction restraining the defendants from forcibly take away the vehicle from the plaintiff and that in violation of that order the defendants took away the vehicle. According to counsel, the order would further reveal that the court directed the defendants to deliver the vehicle back to the plaintiff and that the defendants did not obey that order. The application for initiation of action under Order XXXIX Rule 2A was enquired into and disposed of in accordance with law. The Writ Petitioner, according to counsel, had engaged counsel and the counsel cross-examined the plaintiff who was examined as a witness in the application under Order XXXIX Rule 2A, submitted Mr. George Varghese. Ext.P2 was an appealable order against which the petitioner did not prefer any appeal. The period of detention presently fixed as 'not exceeding two months' is a mistake resulting from an omission which could have been got corrected by the learned Munsiff himself. Article 227 of the Constitution was not for correcting such mistakes at the instance of a party who did not request the court below to make such corrections. Ext.P1 decree, according to counsel, was passed on the assumption that the court will ensure that the writ petitioner and the co-defendants in the suit will comply with the court's earlier direction, to deliver back the vehicle. Ext.P1 decree, according to counsel, will become executable at the instance of the defendants only after they have obeyed the court's direction to return the vehicle. Setting aside Ext.P2 will be unjust since the same will enable the petitioner and his codefendants who are guilty of having violated the orders of the court to go scot-free. Learned counsel also submitted that he has no objection in this Court correcting the mistake in Ext.P2 and fixing a definite period of detention to be undergone by the petitioner and the co-defendants. Counsel justified the filing of execution petition since, according to him, Section 36 of the Code clearly provides that the provisions under Order XXI and Chapter III of the Code will apply to execution of executable orders also.

7. I have considered the rival submissions made at the bar. I have considered the pleadings and the materials placed on record which in this case are available on the side of the petitioner alone. Order XXXIX Rule 2A deals with the consequences of violation of injunctions or any other order passed by the court under Rules 1 or 2 of Order XXXIX. The court which has the power under Order XXXIX Rule 2A is either the court granting the injunction or any other court to

which the suit or proceeding for injunction is transferred. The consequence initially provided is attachment of the property of the person found to be guilty of disobedience or breach. The court has been given the discretion to order detention of the person in civil prison also. By now it is trite that the court has power under Order XXXIX Rule 2A to direct detention of the contumacious party in civil prison even though ordering his property to be attached. Ext.P2 is the order passed by the trial court on an application filed under Order XXXIX Rule 2A upon a finding that the writ petitioner and the co-defendants violated an order of injunction restraining them from taking away the vehicle from the plaintiff and a further order of injunction commanding them to deliver the vehicle back to the plaintiff. Disobedience of injunction and like orders passed by the court is a very serious matter and it is necessary that the persons who are guilty of such disobedience should be dealt with sternly. Having regard to the semi-penal nature of the 'proceeding, the result of which can affect the liberty of a person which is also something very important, it is necessary that the court deals with proceedings under Order XXXIX Rule 2A in a careful and not a casual manner. A reading of Ext.P2 order, I am afraid, shows that the learned Munsiff did not apply her mind to the extent required while passing the same. Reasons are not far to seek. Ext.P2 order is passed by the court in the absence of the petitioner and the co-defendants who have already been set exparte and against whom the court had already passed Ext.P1 decree.

8. Ext.P3 execution petition in this case has been filed under Order XXI Rule 10. Petitions under Order 21 Rule 10 can be filed by holders of decrees. Ext.P2 cannot be a decree as defined in Section 2(2) of the Code. Since Ext.P2 is an executable order, the first respondent plaintiff can claim to be a decree-holder as defined under Section 2(3) and the petitioner in as much as an executable order has been passed against him is a judgment-debtor as defined under Section 2(10) of the Code. The question that arises immediately is whether the first respondent who is a decree holder qualifies as a holder of a decree for the purposes of Order XXI Rule 10 for maintaining Ext.P3 execution petition against the petitioner who is undoubtedly a judgment-debtor. The C.P.C. does not define or delineate the distinctions between the decree-holders and holders of decree. In my view, decree-holders are persons in whose favour decrees or executable orders have

been passed by the court directly and in that way all of them so long as they retain their interest in the decree or executable orders will be holders of decrees also. But once they assign the decree or if by their demise or otherwise their interest in the decree devolves upon other persons, then the assignee decree-holders or the legal representatives will be holders of the decree though they will not be decree-holders coming within the definition of that term in the C.P.C. In this view of the matter, as far as the petitioner in Ext.P3 is concerned he is both a decree-holder (since the court has passed an executable order in his favour) as well as a holder of a decree.

9. Part II of the Code which contains Sections 36 to 74 deals with execution and Section 36 provides that the provisions of the Code relating to execution of decrees shall also so far as they are applicable be deemed to apply for execution of orders including payment under an order. Order XXI deals with execution and going by the heading of that order, the rules contained therein including Rules 10 and 11 shall apply to execution of decrees as well as execution of executable orders.

10. It is not essential for the holder of an executable order to file an execution petition under Order XXI Rules 10 or 11 for securing the fruits of the order passed in his favour or for ensuring compliance with the terms of that order. It will be possible for him to move the trial court itself to have such reliefs given to him by that court. In fact, in many cases including the present one, the trial court will be in a better position to appreciate the grievance of the holder of the order more effectively and grant him relief by applying the procedure laid down in Part III as well as Order XXI of the C.P.C. But if the holder of an executable order like the first respondent in this case opts to move the execution court itself by filing a petition under Order XXI Rule 10, in my view that petition will not be liable to be thrown out as not maintainable due to the reason that the petitioner seeks execution not of a decree but of an executable order.

11. Once the holder of an executable order opts to move the execution court itself by an application under Order XXI Rule 10 instead of moving the trial court, then it is necessary that his execution petition conforms to the requirements of any other

execution petition under Order XXI. The indispensable document which is to be produced along with an execution petition is the certified copy of the decree or the executable order as the case may be. Without that document it will not be possible for the execution court to be convinced that the E.P. is one which requires to be entertained. In the instant case the records reveal that it was not Ext.P2 which was produced along with Ext.P3. Curiously, what was produced along with Ext.P3 was the certified copy of Ext.P1 decree. Ext.P1 decree was concededly not executable and was not the decree which was sought to be executed as per Ext.P3 application. A quick glance through Ext.P3 would have easily convinced the learned Munsiff that the prayers in Ext.P3 had nothing to do With the terms of Ext.P1 decree which was produced along with the E.P.

12. Since I felt that to appreciate the arguments raised in this case, a perusal of the original side records relating to the case is necessary, I called for the entire trial side records including those relating to I.A.Nos. 2789/99, 2790/99 and 224/2000. The records revealed the following information:

13. The writ petitioner was set ex-pane in the suit on 29.8.1998. Two prosecution petitions under Order 39 Rule 2A which were filed by the first respondent as LA. Nos. 2790/99 and 224/2000 were filed long thereafter. Notice was not been given to the writ petitioner at all on the two prosecution petitions. Adv. Mr. P. Sethumohanan Pillai whose name is shown in Ext.P2 as the counsel for the writ petitioner also was counsel for the first defendant alone. The vakalathnama executed in favour of Adv. Mr. Sethumohanan Pillai was executed only by the first defendant. Notice of the prosecution petitions were given to Adv. Sethumohanan Pillai alone. The court was under the impression that Mr. Sethumohanan Pillai appears for the writ petitioner also and that the prosecution petitions were posted along with the suit with notice to the writ petitioner. Ext.P2 and for that matter every order passed by the trial Court on the prosecution petitions were passed as if Writ Petitioner had been given notice of all the petitions and had engaged Mr. Sethumohanan Pillai to defend him. Ext.P2 is liable to be set aside on the short reason that the same was passed without notice to the petitioners and hence violative of the principles of natural justice. Ext.P2 is bad also for the reason that the punishment imposed on the petitioner under Ext.P2 is vague in the sense that

it could be any period between one day and two full months. It was the duty of the court passing Ext.P2 order to have been specific and clear while determining the exact period of detention to be undergone by the petitioner. The matter pertains to the personal liberty of a person and should not have been dealt with in this casual a manner as the court passing Ext.P2 has done. Of course, under Ext.P5 the execution court has directed detention of the petitioner to a definite period of two weeks. The argument of the learnedCounsel for the 1st respondent is that the mistake done by the trial court while passing Ext.P2 has now been undone by the execution court. The argument certainly is attractive. But then, the matter was within the domain of the court which passed the executable order and not of the execution court. Ext.P2 will have to be set aside. Since Ext.P2 is being set aside, Ext.P5 also necessarily will have to be set aside. As for Ext.P8, the less said the better. The execution court passed Ext.P8 order of attachment of the immovable properties of the judgment-debtors as though a money decree had been passed against them and in spite of arrest notice under Rule 37 of Order XXI 'for the last three years' the decree-debt was not paid. The relevant portion of Ext.P8 order reads as follows:

'Decree for money. No amount paid so far in spite of the process under Rule 37 for the last 3 years. Here no objection that the property do not belong to him. Objection overruled. Property is attached. Issue order.'

The execution court ought to have seen that attachment was sought under Ext.P6 application as a prelude for the payment of compensation of a sum of Rs. 1 lakh on account of the alleged violation of the injunction orders. The prayer in the petitions under Order XXXIX Rule 2A which culminated in Ext.P2 was only for arrest and detention. Ext.P2 order under which the petitioner and the co-judgment-debtors were found guilty directs only arrest and detention. Attaching the properties for the purpose of compensating the decreeholder was clearly beyond the scope of Ext.P2 order which was sought to be executed under Ext.P3. The prayer for attachment being beyond the prayers in the prosecution petitions, the order Ext.P2 should never have been passed. As already stated, the learnedCounsel for the 1st respondent himself very fairly submitted that he is unable to support Ext.P8.

14. The supervisory jurisdiction of this Court under Article 227 is a visitorial jurisdiction which will be invoked only in exceptional situations. The jurisdiction will not be invoked merely because the order of the lower court or Tribunal is erroneous. As noticed by K.S. Radhakrishnan, J. in *Karthiayani and Ors. v. Ramanathan @ Makkunni and Ors.*, : AIR2005 Ker241 , the objective behind the conferment of supervisory powers to the High Courts under Article 227 is to ensure that the subordinate courts keep within the limits of their jurisdiction and that the jurisdiction is not being exercised by them in a manner not permitted by law leading to failure of justice or injustice. It is also trite that the limits of the supervisory jurisdiction, narrow though they may be, will certainly enable the High Court to correct or set aside those orders of the subordinate courts and tribunals which violate the fundamental rules of judicial procedure or are so highly unreasonable as can be branded as perverse orders in the sense that such orders will not ordinarily be passed by persons having reasonable knowledge of law and training in adjudicatory process.

15. Having scanned the entire records in this case thoroughly and having anxiously considered the rival submissions made at the Bar, I have no doubt in my mind that the invocation of the supervisory jurisdiction under Article 227 will be justified in this case. The result is that Ext.P2, Ext.P5 and Ext.P8 will stand set aside. The prosecutions petitions I.A.2790 of 1999 and 224 of 2000 will go back to the trial court. That court will give an opportunity to the petitioner who is the 1st respondent in those applications to file counter-affidavit and thereafter that court will conduct fresh enquiry into those applications. Revised orders will be passed by the court upon the prosecution petitions within a maximum period of four months from the day the parties appear before the trial court pursuant to this judgment. The parties will appear on the day the court reopens after midsummer recess. It is made clear that this judgment setting aside the orders passed by the execution court and Ext.P2 passed by the trial court will not stand in the way of the 1st respondent filing any application for execution of Ext.P1 decree. Ext.P1 decree will stand confirmed. It is made clear that I have not expressed any opinion about the liability of the petitioner or any of the defendants in the suit to be prosecuted for violation of the orders of injunction. While considering the prosecution petitions afresh on the basis of the directions contained herein, the court, I am sure, will not

ignore the principles laid down in Kochira Krishnan (supra) and any other binding judicial precedent which may be cited by either of the sides during the course of their arguments.

The Original Petition is allowed as above. No costs.

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