

Dasan @ Devadasan Vs. Dharmajan

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Court : Kerala

Decided On : Jul-18-2007

Reported in : 2007(3)KLJ184

Judge : Pius C. Kuriakose, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11 and 51 - Order 21, Rules 37 and 40

Appeal No. : CRP No. 949 of 2004

Appellant : Dasan @ Devadasan

Respondent : Dharmajan

Advocate for Def. : P.K. Ashokan and; M.R. Venugopal, Adv.

Advocate for Pet/Ap. : K.G. Balasubramanian, Adv.

Judgement :

ORDER

Pius C. Kuriakose, J.

1. In this Civil Revision the judgment debtor impugns orders passed by the Execution Court in E.P. No. 180 of 2002 filed for the execution of a money decree directing the judgment debtor's arrest and detention on the basis of a finding that

the judgment debtor in spite of means has willfully neglected to pay off the decree debt.

2. The ground which is prominently raised in the memorandum is that E.P. No. 180/2002 was barred by principles of res judicata as envisaged by Explanation VII to Section 11 of the Code of Civil Procedure. Sri. K.G. Balasubramanian, the learned Counsel for the petitioner has placed before me a copy of the order dated 31-3-2000 passed by the court below in a previous Execution Petition filed by the respondent. That order is issued on the basis of a finding that the petitioner did not have the means to pay off the decree debt and also that the petitioner's health condition at that time will not permit him to undergo imprisonment. The learned Counsel would argue that principles of res judicata as clarified by Explanation VII to Section 11 apply and the earlier order operates as res judicata for the present Execution Petition.

3. Attractiveness of the arguments notwithstanding, I am not inclined to accept the same. Admittedly, the present Execution Petition is not time barred and the decree has not been satisfied in full yet Findings. In the earlier order that the petitioner does not have sufficient means to pay off the decree debt and that the petitioner's health condition will not justify his imprisonment in civil prison are findings rendered by the court with reference to the point of time when those questions were enquired into in that Execution Petition and the order thereon was passed. Those findings will not operate as res judicata for the present E.P. in which arrest is sought on the basis of the judgment debtor's financial position and wilful neglect at a much later point of time. In the present Execution Petition which is concededly not time barred, the prayer is to allow execution by arrest and detention of the judgment debtor on the allegation that the judgment debtor has acquired requisite means to pay off the decree debt and yet neglected to pay off the same. The present Execution Petition refers to the previous execution petition. Obviously, the case is that after the disposal of the previous Execution Petition the petitioner has come to acquire sufficient means to pay off the decree debt or substantial portion thereof and yet is neglecting to make payments. It is that case which was resisted by the petitioner. The petitioner did not contend before the Execution Court that the prayer for arrest is barred by res judicata. He only contended that the

allegation that he has acquired means is wrong.

4. The enquiry which was conducted by the Execution Court was an enquiry into the correctness of the allegations in the Execution Petition which were supported by an affidavit of the decree holder on the basis of which, notice under Rule 37 of Order XXI CPC was issued to the petitioner. The liability of the petitioner to arrest and detention had to be decided by the Execution Court in terms of Clause (b) under the proviso to Section 51 and on the basis of the enquiry which was held under Rule 40 of Order XXI of C.P.C. I find that in passing the impugned order the learned subordinate judge has correctly applied his mind to the above provisions. I do not find any jurisdictional infirmity about the finding that the petitioner has wilfully neglected to pay the decree despite his having acquired means. In fact the petitioner did not adduce any counter evidence at all before the Execution Court and therefore on the evidence on record the impugned order was perfectly justified.

5. Sri. K.G. Balasubramanian now submits that adequate opportunity' was not afforded to the petitioner for adducing counter evidence. Having regard to the above submission, I am inclined to grant an opportunity to the petitioner for adducing counter evidence, but only on conditions:

6. Accordingly, I set aside the impugned order and direct the Execution Court to grant one opportunity to the petitioner for adducing counter evidence on the matter on condition that the petitioner pays a sum of Rs. 10,000/- (Rs. Ten Thousand only) decree holder either directly or by depositing the same before the court below for payment to the decree holder within one month of his receiving copy of this order and continues to pay every month commencing from the 15th September 2007 a sum of Rs. 2,500/- (Rs. Two Thousand Five Hundred only) till such time as the enquiry is completed by the Execution Court. Once the initial payment of Rs. 10,000/- is made within the time frame set above, the learned Subordinate Judge will post E.P. 180/2002 for counter evidence of the judgment debtor and will complete the enquiry into the question whether the petitioner is having sufficient means and whether he has wilfully evaded payment. Fresh decision will be taken within three months of posting of the E.P; for enquiry. It is made clear that in the

event of the petitioner defaulting any of the payments ordered above, he will forfeit the benefit of this order in which event the impugned order will revive.

The Civil Revision Petition is disposed of as above.

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