

**Khemchandra Vs. Budhsingh**

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**SooperKanoon Citation :** [sooperkanoon.com/754277](http://sooperkanoon.com/754277)

**Court :** Rajasthan

**Decided On :** May-12-1960

**Reported in :** AIR1961Raj243

**Judge :** Sarjoo Prosad, C.J. and; C.B. Bhargava, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 51 - Order 21, Rule 40;  
[Evidence Act, 1872](#) - Sections 115

**Appeal No. :** Civil Execution First Appeal No. 5 of 1960

**Appellant :** Khemchandra

**Respondent :** Budhsingh

**Advocate for Pet/Ap. :** U.L. Gupta, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

Sarjoo Prosad, C.J.

1. This appeal has been presented by the decree-holder and is directed against the order dated 1st December, 1959, passed by Shri Sohan Nath Modi, District Judge, Kotah. It arises out of an execution case in which the decree-holder prayed for execution of the decree by arrest and detention in prison of the judgment-debtor Budhsingh.

2. In September, 1958, the Umed Smarak Samiti, Kotah obtained a decree for Rs. 30,000/- against Budhsingh Bapna, the respondent judgment-debtor, and others. The appellant Khemchan-dra, who was Secretary of the Umed Smarak Samiti, Kotah, presented the execution petition in question. The ground on which he prayed for arrest and detention of the judgment-debtor Budhsingh was mainly that the decree was in respect of a sum of money for which the judgment-debtor was bound in a fiduciary capacity to account.

It is not necessary to mention the other grounds on which the prayer was founded- A preliminary decree in this case appears to have been passed against the judgment-debtor Budhsingh for rendition of accounts in respect of the amount belonging to the decree-holder and in the custody of the judgment-debtor and then after the preliminary decree the final decree followed. It is obvious, therefore, that the judgment-debtor was bound in a fiduciary capacity to account to the decree-holder in respect of the amount decreed.

The court below has overruled the contention of the decree-holder that the relationship, which subsisted between the parties, was merely that of a banker and a customer. As found in the suit in which the decree was passed, the judgment-debtor was the Vice President of the Umed Smarak Samiti and in that capacity he was authorised to withdraw monies belonging to the Samiti from the Kotah Co-operative Bank which was the banker of the Samiti at that time.

In that capacity the judgment-debtor withdrew certain sums from the Co-operative Bank from the account of the Samiti and deposited the same in his own firm namely Ganeshdas Hamirmal. Having regard to these facts, there could, therefore, be no doubt that the judgment-debtor was bound in a fiduciary capacity to account for the money in respect of which the decree was passed against him. Therefore under Section 51(c) of the Code of Civil Procedure, the decree-holder was entitled to execute the decree by process of attachment of the person of the judgment-debtor and by his detention in civil prison.

The court, however, thought, in the circumstances of the case, it would be much more expedient in the interest of realisation of the decree that instead of sending the judgment-debtor to civil prison, he should be allowed some reasonable time

within which to pay the decretal amount by instalments. The court directed that a sum of Rs. 15,000/- should be deposited by the judgment-debtor forth-with in part satisfaction of the decree and that he should be given six months' time to pay up the balance of the decretal amount failing which he was to be arrested and detained in civil prison. It is against this order that the decree-holder has preferred the appeal.

3. It may be observed that Rs. 15,000/- was deposited immediately by the judgment-debtor on the understanding that a further sum of Rs. 5,000/- will also be paid as early as possible. All this money has been already accepted by the decree-holder in part satisfaction of the decree. Learned counsel for the decree-holder relies upon the provisions of Order 21, Rule 40 of the Code of Civil Procedure and submits that the order passed by the court below is erroneous and in contravention of its provisions. According to the contention of the learned counsel, the court had no jurisdiction to allow time to the judgment-debtor to pay up the decretal amount in instalments as directed by the Court. Reliance has been placed by the learned counsel upon Sub-rule (3) of Order 21, Rule 40 and the proviso to that sub-rule. The sub-rule runs as follows:

'(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.'

The learned counsel argues that the utmost the court could do was to direct that the judgment-debtor should be placed 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 that

period if the decree was not sooner satisfied.

According to him, only fifteen days' time should be given to the judgment-debtor to pay up the decretal amount and the order of the court below permitting him to pay up the balance of the decree within six months from the date of the order is clearly an infringement of the rule and beyond the jurisdiction of the court. There are, however, two answers to the contention of the learned counsel. In the first place, the decree-holder has himself accepted the part payment of the amount in satisfaction of the decree.

This was clearly in accordance with the order passed by the court below and, in our opinion, he is now estopped from challenging the order on that account. The order assumes more or less the character of a consent order. Rule 40 of Order 21 has to be read with Section 51 itself and the object of these provisions is to execute the decree, though the manner in which the assistance of the court is sought is by arrest and detention of the judgment-debtor.

The primary duty of the court, however, is to see that the amount is realised and paid to the decree-holder and it is open, therefore, to the court to adopt such reasonable procedure as it considers necessary in order to effectuate that purpose. Therefore although, strictly speaking, the order, which has been passed by the court, may not be according to the letter of the law as provided in Rule 40, nevertheless the court has been discharging an appropriate function of an executing court in making the order that it did.

In this connection, our attention has been drawn to a decision in *V.P. Madhavan Nambiar v. Chaldean Syrian Bank Ltd.*, (S) AIR 1955 Mad 409 where a Division Bench of that Court almost on parallel facts took a similar view of the matter. The learned Judge, who delivered the judgment, observed in that case that it was a recognised practice in England in appropriate cases not to make an order of committal to prison on the first application but to order payment by instalments.

There is no impediment to this practice being adopted in suitable cases under Section 51, Civil Procedure Code read with Order 21, Rules 39 and 40, although specifically they do not contemplate an order for instalments. The fixation of

instalments after an enquiry into the capacity of the judgment-debtor to pay is much more advantageous to the decree-holder and also fairer to the judgment-debtor, who, being not in a position to discharge the decree in full, can certainly pay something towards the satisfaction of the decree.

The fixation of the instalments helps to bridge the wide gulf between the dismissal of an execution petition and the commitment to prison of a judgment-debtor, who while in a position to pay instalments cannot discharge the decree in full as he has no immediate means to do so. In this case, as we find, Rs. 20,000/- had already been paid by the judgment-debtor towards the satisfaction of the decree and in full compliance with the order of the court.

4. Learned counsel for the respondent also gives an undertaking that the balance of the decree will be paid before the period fixed under the order passed by the District Judge expires, namely that the entire decretal amount should be paid by the end of May. In these circumstances, we think that there has been a substantial compliance with the law the function which an executing court has to discharge as such in order to obtain satisfaction of the decree.

5. We are in respectful agreement with the observations made in the above case and we do not see any reason to interfere with the order made under appeal. We accordingly dismiss this appeal, but in the circumstances of the case, we make no order as to costs.