A. Mani Vs. A. Chandranath

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Court : Chennai

Decided On : Dec-17-1992

Reported in : (1993)1MLJ597

Appellant : A. Mani

Respondent : A. Chandranath

Judgement :
ORDER

Abdul Hadi, J.

1. This civil revision petition by the judgment-debtor-respondent in R.E.P. No. 172 of 1990 on the file of the Subordinate Judge's Court, Krishnagiri, is against the order dated 2.12.1991 in the said petition for his arrest.

2. Admittedly, pursuant to notice under Order 21, Rule 37, C.P.C. the judgment-debtor appeared before the executing court and filed his counter to the said execution petition for his arrest and detention in prison. No doubt the petitioner was paying several amounts towards the decree amount on different dates, on which the execution petition was posted. But, on the abovesaid date 2.12.1991, he did not appear before court and he did not also pay a sum of Rs. 6,000 which he was directed to pay in the preceding hearing date. Therefore, he was set ex parte by the impugned order and the execution court below, observing

ordered arrest by 31.12.1991.

3. The learned Counsel for the petitioner submits that this order is against the procedure prescribed under Order 21, Rule 40, C.P.C. According to the said provision, when the judgment-debtor appears before court, pursuant to notice under Order 21, Rule 37, C.P.C. '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.' The contention of the learned Counsel for the petitioner is that the execution court has erred in not conforming to this provision by proceeding to hear the decree-holder and take such evidence as may be produced by him and then give the petitioner an opportunity of showing cause why he should not be committed to civil prison, and in ordering straightaway arrest simply stating that by way of affidavit of the decree-holder, the means of the judgment-debtor have been proved. As against this contention, the learned Counsel for the respondent-decree-holder submits that the impugned order could be justified pursuant to what is contained in Order 21, Rule 40(2), C.P.C. or under Order 21, Rule 37(2), C.P.C.

4. But, Order 21, Rule 40(2), C.P.C., interalia only says pending conclusion of enquiry under Sub-rule (1), the court may, in its discretion, order the judgment-debtor to be detained in the custody of an officer of court. This Sub-rule (2) of Rule 40 does not at all provide for order of arrest. However, it has to be seen whether in the light of what is laid down in P.G.R. Padayachi v. Mayavaram Financial Corporation : AIR1974 Mad1 , the impugned order could be sustained under Order 21, Rule 37(2), C.P.C. Order 21, Rule 37(1) and (2) run as follows:

37. Discretionary power to permit judgment-debtor to show cause against detention inprison:

(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-holder so requires, issue a warrant for the arrest of the judgment-debtor.

The abovesaid Division Bench case is also similar to the present one. There too, the executing court has notice under Order 21, Rule 37(1), C.P.C. to the judgment-debtor and he appeared before the court and filed a counter. However, the judgment-debtor offered to pay the decree amount and the executing court gave him time for payment. On the adjourned date, no payment was made and that is why the executing court passed the order of arrest, which was challenged before the Division Bench. In that context, the Division Bench upholds the order of arrest, inter alia observing as follows:

This order can only be under Order 21, Rule 37(2). The judgment-debtor had no doubt appeared in court in obedience to the notice sent under Rule 37(1), but on the adjourned date he defaulted. As already noticed though he had originally offered to pay the decree amount, he had failed to pay the same and there is nothing to show that the judgment-debtor was bodily present in the court on the date on which the order now in appeal was passed. Therefore, even though the judgment-debtor had originally appeared in court in obedience to the notice issued under Rule 37(1) on the date on which the order of arrest was passed, it must be deemed that the judgment-debtor had disobeyed the notice.

Therefore, what the Division Bench has held is that even though the non-appearance of the judgment-debtor is on an adjourned date of hearing after his original appearance pursuant to the notice under Order 21, Rule 37(1), C.P.C., it must be deemed that the judgment-debtor had disobeyed the said original notice, by his such non-appearance in a subsequent hearing. In the present case also even though originally the petitioner-judgment-debtor appeared before court and filed counter, he did not appear on the abovesaid date 2.12.1991 and the court below passed the abovesaid Order of arrest on the ground that the decree-holder's affidavit proved that the judgment-debtor had means to pay the decree-amount. Therefore, it cannot be said that the impugned order was without jurisdiction, as it could fall under Order 21, Rule 37(2), C.P.C. Apart from the abovesaid Division Bench decision in Madhusudan v. Trimbak : AIR1961 Bom23 also it was held so. The relevant observation therein is as follows:

It may be that the petitioner was present on the date originally mentioned in the notice and actuaily filed his written statement on that day but the matter was not taken up by the court on that day but on a subsequent day. Therefore, it was obligatory upon the petitioner to remain present on that date. By his failure to do so he brought upon himself the consequences provided by Sub-rule (2) of Rule 37 of Order 21.

In a similar situation in K.N. Gangappa v. A.M. Subramanya Mudaliar 100 L.W. 306, also order of arrest was upheld by this Court, though the said decision does not particularly refer to Order 21, Rule 37(2), C.P.C. The learned Counsel for the petitioner could not cite any decision contra on this point. At any rate, in view of the fact that the above referred to P.G.R. Padayachi v. Mayavaram Financial Corporation : AIR1974 Mad1 , is a Division Bench judgment, I am bound by it in so far as the aforesaid view held by it.

5. Thus, even though the executing court has got jurisdiction to pass an order of arrest in the above situation, the further question to be decided is whether before passing such an order of arrest, the court should give reasons therefor and in particular, whether the court should give necessarily a finding on any one of the reasons mentioned in the proviso to Section 51, C.P.C. One of the said reasons is that the judgment-debtor has or has had since the date of the decree, the means to pay the amount of decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same. In the present case, no doubt the impugned order, as already stated, observes that from the affidavit of the decree-holder it is proved that the judgment debtor had the abovesaid means. But, the learned Counsel for the petitioner submits that the executing court cannot merely go by what is contained in the abovesaid affidavit, but it should hold

enquiry as enjoined in Order 21, Rule 40(1), C.P.C. and come to the necessary conclusion and thereafter may pass an order of detention in prison, as well as order of arrest, as prescribed under Order 21, Rule 40(3), C.P.C. The said learned Counsel for the petitioner further points out that as on 2.12.1991 admittedly no such enquiry was held and that if at all such enquiry was sought to be made only subsequently on 6.3.1992. Therefore, according to the said counsel the impugned order is illegal. Order 21, Rule 40(1) and (3) no doubt runs as follows:

40 Proceedings on appearance of judgment-debtor in obedience to 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.

(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.

However, the learned Counsel for the respondent argues that the proviso to Section 51 will apply only to order for detention in civil prison and not for order for arrest and that therefore, in the case of order for arrest, the court need not give any reason and in particular, the court need not find that the judgment-debtor refused or neglected to pay the decree-amount despite having means. In this connection, she cited another ruling in the above referred to P. G. R. Padayachi v. Mayavaram Financial Corporation : AIR1974 Mad1 , itself. In the said Division Bench decision, it has also been held thus:

The provisions of the Code make a distinction between an order of arrest and an order of detention. There is nothing in Section 51 or in any other provisions of the Code that even before ordering arrest of the judgment debtor, the executing court should give him an opportunity to show cause against such an order and also record its reasons in support of its order. Such procedure is contemplated as per the proviso to Section 51, only before ordering the detention of the judgment-debtor in civil prison....Whether the executing court issues a warrant of arrest without notice or whether it issues such a warrant under Sub-rule (2) of Rule 37, the Code does not contemplate the court recording any reason in support of such an order of arrest.

6. But, in view of a subsequent Supreme Court decision, v/z., Jolty George Varghese v. Bank of Cochin : [1980]2SCR913 , with due respect to the said Bench, I have to hold that the said Division decision is no longer good law, in so far as it decides that the judgment-debtor's means to pay the decree debt need not be gone into before ordering arrest and that for that matter no reason need be given at all before ordering arrest. In the said Supreme Court case in execution of a money decree, a warrant for arrestor was made by the execution court on the ground that on an earlier occasion also, a similar warrant had been issued. The High Court in a short order, had summarily dismissed the revision filed by the judgment-debt- ors against the order of arrest. In that context the question before the Supreme Court was, whether the personal freedom of the judgment-debtors could be held in ransom until the repayment of the debt and if Section 51 read with Order 21, Rule 37, C.P.C. did warrant such a step, whether the provision of law was constitutional and in conformity with the inherent dignity of human person in the light of Article 11 of the International Covenant on Civil and Political Rights. While dealing with this question the Supreme Court set aside the judgment of the High Court and directed the executing court the decide de novo the means of the judgment-debtors to discharge the decree in the light of its interpretation placed on the abovesaid relevant provisions. In this context, the Supreme Court approved a Kerala decision in Xavier v. Canara Bank Ltd. 1969 K.L.T. 927 and the following observation therein:

Article 11 grants immunity from imprisonment to indigent but honest judgment-debtors... viewed in this progressive perspective we may examine whether there is any conflict between Section 51, C.P.C. and Article 11 of the International Covenants quoted above. As already indicated by me, this latter provision only interdicts imprisonment if that is sought solely on the ground of inability to fulfil the obligation. Section 51 also declares that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith, he incurs the liability to imprisonment under Section 51 of the Code, but this does not violate the mandate of Article 11. However, it' he once had the means but now has not or if he has money now on which there are other pressing claims, it is viola live of the spirit of Article 11 to arrest and confine him in jail so as to coerce him into payment....

Further, after quoting extensively from the abovesaid Kerala decision, the Supreme Court observes as follows:

Indeed, the Central Law Commission, in Its Fifty-fourth Report, did cognise the covenant, while dealing with Section 51, C.P.C.:

The question to be considered is, whether this mode of execution should be retained on the statute book, particularly in view of the provision in the International Covenant on Civil and Political Rights prohibiting imprisonment for a mere non-performance of contract.The Law Commission in its unanimous report, quoted the key passages from the Kerala ruling Xavier .v. Canara Bank Ltd., 1969 K.L.T. 927 referred to above and endorsed its ratio. 'We agree with this view said the Law Commission and adopting that meaning as the correct one did not recommend further change on this face of the Section. It is important to notice that, interpret atonally speaking, the Law Commission accepted the denamice of the changed circumstances of the debtor:However, if he once had the means but now has not, or if he has money now on which there are other pressing claims, it is violative of the spirit of Article 11 to arrest and confine him in jail so as to coerce him into payment.... We concur with the Law Commission in its construction of Section 51, C.P.C. It follows that quondam affluence and current indigence without intervening dishonesty or bad faith in liquidating his liability can be consistent with Article 11 of the Covenant, because then no detention is permissible under Section 51, C.P.C. Equally meaningful is the import of Article 21 of the Constitution in the context of imprisonment for non-payment of debts.... To be poor, in this land of Daridra Narayana, is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Article 11 of the Covenant/But this is precisely the interpretation we have put on the proviso to Section 51, C.P.C. and the lethal blow of Article 21 cannot strike down the provision, as now interpreted.

7. In this connection I have to point out that the abovesaid Xavier v. Canara Bank Ltd. 1969 K.L.T. 927, which was approved by the Supreme Court was also referred to in the above referred to P.G.R. Padayachi v. Mayavaram Financial Corporation : AIR1974 Mad1 . But, it was held that the said Kerala case is a case of an order of detention and not merely an order of arrest But, 1 may respectfully state that it is not difficult to gather from the above referred to observations in the Kerala decision that those observations would apply to a case of arrest also. In fact, as indicated above, the abovesaid extracted observation refers to order of arrest also along with order of detention. Anyway, in view of the above referred to principles enunciated in the above referred to Supreme Court decision., I am bound to follow the Supreme Court decision, rather than the abovesaid P.G.R. Padayachi v. Mayavaram Financial Corporation : AIR1974 Mad1 , so far as this aspect is concerned, (though as already indicated, I follow another reasoning of P.G.R. Padayachi v. Mayavaram Financial Corporation : AIR1974 Mad1 , in relation to the interpretation to be put to Order 21, Rule 37(2), C. P. C. since that reasoning does not conflict with the above referred to Supreme Court decision). I may also add that the said Supreme Court decision was also relied on in Alagappan v. Rajaguru and Co. : AIR1985 Mad353 and this Court set aside the order of arrest passed by the execution court since it was silent about the means of the judgment-debtor to pay or about himself wilfully evading to pay the decree amount.

8. In this connection I may also point out that Londa Abbayee of Pithapuram v. Badam Suryanarayana and others : (1947)1MLJ246 (Horwill, J.),B. K. Puttaramiah v. H.I.E. & Sons' A.I.R. 1959 Mys. 94, Namachivaya Mudaliar v. P. J. A. Manickavelu : AIR1972 Mad292 and Soundararajan v. Saiyee Finance : (1986)1MLJ214 'have also expressed similar view as that of P. G. R. Padayachi v. Mayavaram Financial Corporation : AIR1974 Mad1 , regarding the applicability of

the proviso to Section 51 to arrest orders. Therefore, with due respect, I state that those decisions also are no longer good law in view of the above referred to Supreme Court decision. On the other hand, I may also point out that there were also other decisions of this Court and other courts holding a contrary view which would accord with the above referred to principles enunciated in the Supreme Court decision. Some of them are, T. Kunhiraman v. Madhavan Nair : AIR1957 Mad761 , N. Ramachandra Iyer v. Thomas Mathai : AIR1966 Ker65 and Firm Prabhu Dyal v. Bhondu Mal A.I.R. 1938 Lah. 692. To illustrate in T. Kunhiraman v. Madhavan Nair : AIR1957 Mad761 , Panchapakesa Ayyer J. has observed thus:

The arrest of a citizen of the Indian Republic is a grave matter involving his fundamental rights Section 51, C.P.C. has clearly stated, among other things, that a judgment-debtor should not be ordered, to be arrested unless the court holds that he has had, since the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects to pay the same. This Court has held that the mandatory provisions of Section 51, C.P.C. must be complied with before arrest is ordered. The lower court does not say that in its opinion the judgment-debtor has had, since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and has refused or neglected to pay the same. The order of arrest is therefore illegal and has to be set aside. It is phenomenally brief and runs: 'Respondent called. Absent. Vakil reports no instructions. Arrest by '16.7.1955.' No reason whatever is given as to why arrest is ordered, and the mandatory provisions of Section 51, C.P.C. have been ignored. Mr. Sesha Aiyar says that as the petitioner was exparte, reasons need not be given. I am afraid I cannot agree. Under our law ex parte orders of arrest and orders of arrest after contest are exactly on the same footing, and Section 51, C.P.C., makes no difference whatever between the two cases. Arrest after contest or ex pane involves the same painful consequences to the man arrested.

In N. Ramachandra Iyer v. Thomas Mathai : AIR1966 Ker65 also, the relevant observation is as follows:

There can be no arrest in execution where no detention is possible any more than there can be attachment in execution where no sale is possible. I have never heard of an application for more arrest in execution without detention; and if one were made I should think it would forthwith be thrown out for the absurdity that it is. What is to be done with the judgment-debtor after he has been arrested if he cannot be detained? Released forthwith? And then the same game again and again ad libitumr?

9. It must also be noted that Order 21, Rule 37(1) will apply as per the very words used therein, only where the application is for the execution of a money decree by arrest and detention of 'a judgment-debtor who is liable to be arrested in pursuance of the application.' So, notice under Order 21, Rule 37(1), C.P.C. cannot be issued to the judgment-debtor, if he is not 'Liable to be arrested.' So far as I could see, while dealing with execution of money decree by arrest and detention, four situations are expressly and specifically mentioned in the Civil Procedure Code, where the execution court could order arrest and, even in these situations it has to be seen whether the judgment-debtor is actually 'liable to be arrested'. The first such situation is indicated in the proviso to Order 21, Rule 37(1), C.P.C. that is, where 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. In such a case, without issuing the notice under Order 21, Rule 37(1), C.P.C., straightaway the court can order arrest. The second situation is provided in Order 21, Rule 37(2), C.P.C., as indicated above, that is where appearance of the judgment-debtor is not made in obedience to the notice of the court under Order 21, Rule 37(1), C.P.C. and the decree-holder requires issuance of a warrant for the arrest. The third situation is under Order 21, Rule 40(3), C.P.C. that is, after the conclusion of the enquiry under Order 21, Rule 40(1), C.P.C. for detention in prison and, subject to Section 51, C.P.C. an Order for detention is passed. In such an event, the court can also pass an order of arrest, if the judgment-debtor is not already under arrest. The forth situation is mentioned in Order 21, Rule 40(4), C.P.C., which says that a judgment-debtor released under Rule 40 may be re-arrested. Even in the abovesaid four cases, before arrest order could be passed, the court should find that any one of the reasons mentioned in the proviso to

Section 51, C.P.C. exists, in the light of the construction placed by the Supreme Court in the abovesaid Jolly George Varghese v. Bank of Cochin : [1980]2SCR913 , on Section 51, C.P.C.

10. In the light of the abovesaid discussion and conclusions I must also state that an observation in my own judgment in Gokuldass v. Appandantha Nainar 1990 T.L.N.J. 25, requires a modification. In that case, the execution court below had ordered arrest by simply saying 'no substantial payment, arrest J.D.' In the said judgment, I set aside the order of arrest. No doubt, the said final decision in the said case is correct since it is clear from the above discussions that by a mere finding of no substantial payment, arrest order could not be passed. However, the following observation there, 'after the respondent has appeared before the court and has been also making several payments as stated above, no order of arrest could be made', is not quite correct, since I have now held, following P.G.R. Padayachi v. Mayavaram Financial Corporation : AIR1974 Mad1 , that such an order of arrest could be passed under Order 21, Rule 37(2), C.P.C., even if on any adjourned date of hearing, the judgment-debtor is not bodily present in the court and his such absence in court should be deemed to be disobedience of the original notice issued under Order 21, Rule 37(1), C.P.C.

11. Likewise, in my another decision in Ismail Bai v. M. Chinniah (1990)1 L.W 155, also a similar modification of a similar observation found therein is required. There, I also relied on the above referred to decision in Soundararajan v. Sayee Finance : (1986)1MLJ214 , which in turn relied on the abovesaid P. G. R. Padayachi v. Mayavaram Financial Corporation : AIR1974 Mad1 , to conclude that no reason need not be given while ordering arrest. I have already pointed out that the said ruling that no reason need be given while ordering arrest, is also not correct in the light of the abovesaid Jolly George Varghese v. Bank of Cochin : [1980]2SCR913 .

12. I have already pointed out in page 20 supra that even in a case where order of arrest is passed under Order 21, Rule 37(2), C.P.C. anyone of the reasons mentioned in proviso to Section 51 has to be proved. No doubt in such a case the said proof need not necessarily be in an enquiry as contemplated under Order 21, Rule 40, C.P.C, that is, by taking evidence as may be produced by decree-holder

etc, That is so, because Order 21, Rule 37(2), C.P.C. does not provide for any particular mode of enquiry. In other words, even by affidavit evidence, the execution court could come to the conclusion that the necessary proof is there for ordering arrest of the judgment-debtor. In the present case, the execution court below has found that from the decree-holder's affidavit, the means of the judgment-debtor have been proved. No doubt it also finds that the sum of Rs. 6,000 which the judgment-debtor was earlier directed to pay to the decree-holder, was not paid and that the judgment-debtor failed to appear before the court resulting in himself being set ex parte. But, yet there is no finding by the court below, as required under the proviso to Section 51, that there was also a refusal or neglect to pay the decree amount. Not can I conclude, merely because of the absence of the judgment-debtor on 2.12.1991 or his non-payment of the abovesaid Rs. 6,000, there was such refusal or neglect, particularly because admittedly the judgment-debtor in the present case had already paid in several instalments a substantial amount of the decree amount. Further, the Supreme Court has also observed in the abovesaid Jolly George Varghese v. Bank of Cochin : [1980]2SCR913 , thus:

The provision emphasises the need to establish not mere omission to pay, but an attitude of refusal on demand, verging on dishonest disowning of the obligation under the decree.

13. Further arrest under Rule 37(2) can be passed only 'if the decree holder so requires'. That is even though the E.P. itself is for arrest and detention before passing order under Rule 37(2), the court should once again ascertain from the decree holder whether he actually requires arrest. But on the present case, there is nothing to show about the said ascertainment and there is no finding to that affect.

14. The learned Counsel for the respondent also brought to my notice, the following facts that have happened subsequent to 2.12.1991 order: The judgment-debtor was arrested and brought before the court and he also made some more payments towards the decree amount and subsequently he was released. Then, P.W. 1, the decree-holder was examined and a second order of arrest was made

on 6.3.1992, when also, the judgment-debtor remained ex pane. So, according to the learned Counsel for the respondent, the earlier order dated 2.12.1991 has worked itself out and on that ground, the civil revision petition has to be dismissed. But, on the other hand, the learned Counsel for the petitioner argues that the order dated 2.12.1991 was an illegal order and if this Court declares it illegal, then the judgment-debtor could sue the respondent for damages for illegal arrest pursuant to 2.12.1991 order. So, according to the learned Counsel for the petitioner, the civil revision petition cannot be disposed of as infructuous in view of what has happened subsequently. 1 think there is some force in this argument of the learned Counsel for the petitioner, though my such an observation should not be taken as my opinion, anyway in favour of the petitioner with reference to any such suit. At any rate, 1 do not think that simply because pursuant to the order dated 2.12.1991, the judgment-debtor had been actually arrested subsequently or even because of the abovesaid subsequent events, the civil revision petition could be described as having become infructuous. This order no doubt will not affect the abovesaid subsequent order of arrest dated 6.3.1992.

15. The net result is, the impugned order of arrest dated 2.12.1991 is hereby set aside and this civil revision petition is allowed. However, in the circumstances of case, there will be no order as to costs.