

Dharmalingam Vs. Pavalkodi

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Court : Chennai

Decided On : Jul-06-2004

Reported in : (2004)3MLJ572

Judge : V. Kanagaraj, J.

Acts : [Constitution of India](#) - Articles 11 and 21; Code of Civil Procedure (CPC) - Sections 51 - Order 21, Rule 37

Appeal No. : Civil Revision Petition (NPD) No. 1448 of 2003 and C.M.P. No. 15722 of 2003

Appellant : Dharmalingam

Respondent : Pavalkodi

Advocate for Def. : None

Advocate for Pet/Ap. : P. Valliappan, Adv. for ;Sarvabhauman Associates

Judgement :

ORDER

V. Kanagaraj, J.

1. The above Civil Revision Petition is directed against the fair and decretal order dated 7.8.2003 made in E.P. No. 70 of 2002 in O.S. No. 729 of 1994 by the Court

of Subordinate Judge, Kallakurichi.

2. Tracing the history of the above Civil Revision Petition coming to be filed before this Court, what comes to be known is that the respondent herein filed the suit in O.S. No. 739 of 1994 on the file of the Court of Subordinate Judge, Kallakurichi and the said suit was decreed on 28.4.1995 and thereafter the respondent/decreeholder has filed a petition for execution in E.P. No. 70 of 2002; that in the execution petition an order of arrest was ordered on 7.8.2003, testifying the validity of the said order, petitioner has come forward to file the above Civil Revision Petition praying for the relief extracted supra.

3. Today, when the above Civil Revision Petition was taken up for consideration in the presence of the learned counsel for the petitioner, with no representation on behalf of the respondent, the learned counsel for the petitioner would submit that the petitioner is a man of no means; that sufficient materials have been placed before the lower Court to the effect that the petitioner is a man of no means and that he is a cooly eking out his daily bread by doing cooly work. The learned counsel would also press into service the landmark judgment delivered by the Hon'ble Apex Court reported in *Jolly George Varghese v. Bank of Cochin* : [1980]2SCR913 wherein it is held:

' The words which hurt are 'or has had since the date of the decree, the means to pay the amount of the decree.' This implies, superficially read, that if at any time after the passing of an old decree the judgment-debtor had come by some resources and had not discharged the decree, he could be detained in prison even though at that later point of time he was found to be penniless. This is not a sound position apart from being inhuman going by the standards of Art. 11 (of the Covenant) and Art. 21 (of the Constitution). The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. 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. Here considerations of the debtor's other pressing needs and straitened circumstances

will play prominently. We would have, by this construction, sauced law with justice, harmonised Sec. 51 with the Covenant and the Constitution.

The question may squarely arise some day as to whether the Proviso to Sec. 51 read with O.21, Rule 37 is in excess of the Constitutional mandate in Art. 21, and bad in part. In the present case since we are remitting the matter for reconsideration, the stage has not yet arisen for us to go into the virus, that is why we are desisting from that essay.

In the present case the debtors are in distress because of the blanket distraint of their properties. Whatever might have been their means once, that finding has become obsolete in view of later happenings. Sri Krishnamurthi Iyer for the respondent fairly agreed that the law being what we have stated, it is necessary to direct the executing court to re-adjudicate on the present means of the debtors vis-a-vis the present pressures of their indebtedness, or alternatively whether they have had the ability to pay but have improperly evaded or postponed doing so or otherwise dishonestly committed acts of bad faith respecting their assets. The Court will take note of other honest and urgent pressures on their assets, since that is the exercise expected of the Court under the proviso to Sec. 51. An earlier adjudication will bind if relevant circumstances have not materially changed.'

The said decision has been followed by this Court in a case reported in K.M. Kannu Gounder v. Mahboob Ali Sahib and another

In such condition when a man is not having any means to clear off his debts, he cannot be arrested and hence this Court is left with no choice but to allow the above Civil Revision Petition following the proposition held by the Hon'ble Apex Court and other upper forums and hence the following order:

In result,

(i) the above Civil Revision Petition stands allowed;

(ii) the fair and decretal order dated 7.8.2003 made in E.P.No. 70 of 2002 in O.S.No. 729 of 1994 by the Court of Subordinate Judge, Kallakurichi is set aside;

(iii) however, in the circumstances of the case, there shall be no order as to costs;

(iv) consequently, C.M.P.No. 15772 of 2003 is closed.

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