

Ganesh Vs. Sankaran and anr.

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Court : Chennai

Decided On : Apr-03-2006

Reported in : III(2007)BC28

Judge : P. Murgesen, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 51 - Order 21, Rules 21, 30, 35 to 40 and 80; [Constitution of India](#) - Article 21

Appeal No. : C.R.P. (NPD) (MD) Nos. 952 and 953 of 2005, CMP Nos. 6624 and 6625 of 2005 and VCMP Nos. 45 and 46 o

Appellant : Ganesh

Respondent : Sankaran and anr.

Advocate for Def. : K. Sreekumaran Nair, Adv.

Advocate for Pet/Ap. : T.R. Rajaraman, Adv.

Disposition : Petition allowed

Judgement :

ORDER

P. Murgesen, J.

1. The revision petitioner in both the revisions is the judgment debtor/defendant in O.S. No. 18 of 1998 and O.S. No. 15 of 1998. The respondents are the respective plaintiff in both the suits.

2. The respondent/plaintiff in both the suits obtained decree in the said suits. After obtaining decree, they filed execution petitions respectively in E.P. Nos. 18 and 19 of 2005 on the file of the learned Subordinate Judge. Kuzhithurai under Order 21 Rules 37 and 38 of Code of Civil Procedure to arrest the judgment debtor for realisation of the decree amount. The learned executing Court passed an order on 6.9.2005 ordering the arrest of the judgment debtor by 27.9.2005. The impugned order reads as follows:

Part satisfaction for Rs. 15,000/- recorded. Arrest by 27.9.2005.

Challenging the order of the executing Court, the judgment debtor in both the execution petitions, has filed the civil revision petitions.

3. The case brings forcibly to mind the dictum of Their Lordships of the Privy Council in *Court of Wards v. Maharajah Kumar Ramaput* 14 Moo Ind App605 at p. 612(A), that the woes of an Indian litigant begin only after he has obtained a decree.

4. Learned Counsel appearing for the petitioner in both the revision petitions has submitted that the order of executing Court is not correct on two grounds, firstly, the decree holder must have filed a petition for attachment of property, then only he can file a petition for arrest and secondly, the executing Court has not recorded the reasons for ordering arrest.

5. In support of his contention, learned Counsel for the petitioner relied on the following decisions:

In *K.M. Kannu Gounder v. Mahboob Ali Sahib and Anr.* : AIR2003 Mad362 , the Principal Bench of this Court has held that 'so far as the choice whether the decree holder could adopt and file execution petition for attachment or for arrest is concerned in the recent times, it has been arrived at by the upper forums of law that prior to embarking upon arrest, the other procedures kept open, such as

attachment, etc. should be exhausted.

6. In *Ganesh Nadar V. v. K. Chellathaiammal* 100 Law Weekly 431, it is mentioned in the headnote as follows:

CPC, 51 (c) and Order 21, Rule 38-Arrest-Refusal or neglect to pay, what is-Merely because J.D. is paying meagre amounts, or he did not file a counter, or because he possesses immovable property, and order for arrest cannot be made-Arrest cannot be sought as a lever to force payment without taking recourse to proceeding for attachment and sale of immovable property.

and held as follows:

It is open to the decree holder to file a petition for attachment and sale of the immovable property. The decree holder in this case has not taken recourse to those provisions. It is obvious that he is utilising the provisions of Order 21 Rule 38, CPC, merely as a lever to force payment without taking recourse to the proceedings for attachment and sale of the immovable property.

7. In those decisions, it was pointed out that the decree holder must proceed against the property of the judgment debtor prior to embarking upon his arrest.

8. The claim of the petitioner was resisted by the learned Counsel for the respondent in both the revisions. He submitted that the respondent/decreed holder can choose any mode of execution and he cannot be compelled to file a petition for attachment only.

9. To strengthen the case of the respondent in both the revisions, the learned Counsel relied on the following decisions:

In *Hargobind-Kishan Chand v. Hakim Sing and Co.* AIR 1926 Lahore 110, it has been held that 'the statutory law leaves no doubt whatsoever that is for the judgment creditor to decide whether he should execute the decree for the payment of money by the arrest of judgment debtor or by the attachment and sale of his property, or both; and that while the Court has discretion to refuse execution against the person and property simultaneously, it has no authority to decline to

make an order of committal to prison on the ground that the decree holder should proceed in the first instance against the property of judgment debtor.

10. In the decision reported in *A.K. Subramania Chettiar v. A. Ponnuswamy Chettiar* : AIR1957 Mad777 , it has been held as follows:

Simultaneous execution both against the property and person of the judgment debtor is allowed under Order 21 Rule 30, Civil Procedure Code. But the Court has a discretion under Order 21 Rule 21, Civil Procedure Code to refuse simultaneous execution and to allow the decree holder to avail himself of only one mode of execution at a time. Where a decree holder presses for arrest of the judgment debtor, the Court cannot, except as provided by the Proviso to Section 51, CPC compel the decree holder to proceed against his property or to accept payment by instalments.

11. In *A. Chetty v. A. Rangan* (2002) 1. M.L.J. 546, it has been observed that 'the decree holder is at liberty to seek for any mode of relief which is easier for him to recover the decree amount.'

12. In *State Bank of India v. Indexport Registered and Ors.* : AIR 1992 SC1740 , the Hon'ble Supreme Court has held that, 'Moreover, it is the right of decree holder to proceed with it in a way he likes'.

13. In the judgment reported in AIR 1926 Lah 110 (supra), in the headnote it is mentioned as follows:

Civil Procedure Code-Order 21 Rule 80-Judgment creditor is to decide whether execution should be taken against the person or property of judgment debtor-Court, though it has discretion for refusing simultaneous execution against both, cannot decline to order execution against person in the first instance.

and held as follows:

the difficulties of a litigant in India begin when he has obtained a decree and it is a matter of common knowledge that far too many obstacles are placed in the way of a decree-holder who seeks to execute his decree against the property of the

judgment debtor. The Legislature has consequently provided for the execution of a decree for money by the arrest of the judgment debtor, and there is neither justice nor equity in forcing the judgment creditor to proceed against the property, a remedy which is not only dilatory but often proves infructuous, when he has the right of availing himself of an efficacious mode of recovering his lawful due.

14. These decisions would show that the decree holder has got right to choose the mode of execution. Our Hon'ble Supreme Court pointed that the decree holder is at liberty to choose any mode of relief. In view of the decision of the Hon'ble Supreme Court. I am of the considered view that the decree holder cannot be compelled to choose a particular mode of execution, So the decree holder is at liberty to file this execution petition.

15. The learned Counsel for the petitioner has strongly urged that the executing Court must conduct inquiry and give a finding as to the means of judgment-debtor before ordering arrest but in this petition, the executing Court has not conducted any inquiry and there is no evidence about the means of judgment debtor. But in this case, the Executing Court has not given reasons before ordering arrest. So the order of the Executing Court is liable to be set aside.

16. In support of his contention, he relied on the following decisions reported in:

(i) Jolly George Varghese v. Bank of Cochin (1980) SCC 470, and pointed out the headnote, which runs as follows:

Civil Procedure Code (5 of 1908)-Section 51 read with Order 21 Rule 37- Detention-Arrest and detention in civil prison-Judgment debtor subsequent to the date of decree having no means to pay-Absence of mala fides and dishonesty-arrest and detention is violative of Article 11 of International Covenant on Civil and Political Rights and Article 21 of [Constitution of India](#).(ii) Mr. Tharmapitchai and Anr. v. A.C.A. Funds, Tirunelveli : 1995(2)CTC20 , and pointed out the following head note:

Civil Procedure Code, 1908-Section 51 Order 21, Rules 35 to 40- Execution proceeding for arrest and detention of judgment debtor- Factors to be considered

before ordering arrest and detention of judgment debtor-Court should record satisfaction regarding means of judgment debtor and then pass orders giving adequate reasons.in which it has been held as follows:

it is seen from the above that in an execution proceedings for a Court of Law to pass the order of arrest, attachment or otherwise for the relief moulded it should find out adequate reasoning to pass such an order in writing after arriving at its full satisfaction with regard to the means position of judgment debtor.

If that is so, then the onus is undoubtedly upon the decree holder to prove that the judgment debtor had enough means and where with all to discharge the decree in whole or part, but even then they did not discharge. This would mean, unambiguously and undoubtedly that the decree holder who wants to levy the execution Order 21, Cr.P.C. must bring his case and relief against the judgment debtor within the ambit of Section 51 of the Code of Civil Procedure and the ingredients of which are the sine qua non for any executing Court to mould the relief under Order 21 Rules 35 to 40 in executing the decree for the recovery of money. If not. for any reason or for the reason of want of evidence, it, is undesirable for the executing Court to order the arrest of the judgment debtor.

(iii) In *M. Muthuswamy v. Supasri Chit Funds, Coimbatore and Anr.* : 2000(2)CTC168 , it was held as follows:Code of Civil Procedure, 1908-Order 21 Rules 37, 39 and 40-Duty of executing Court before ordering arrest of judgment debtor-Executing Court shall hold an inquiry and give finding as to current means of judgment debtor to discharge decree before the order of arrest under Rule 37-Executing Court should follow procedure laid down in Rules 39 and 40-Order passed without conducting such inquiry and without following such procedure bad in law and set aside.

wherein it has been held in *Srinivas G. Shet v. Manipal Finance Corporation Ltd.* I (1998) BC 210, which is extracted as follows:

The Executing Court is first required to determine the amount of subsistence allowance to be paid by the decree holder for arrest and production of judgment debtor before it in execution of a money decree and that it is a condition precedent

for the decree holder to deposit the said amount into the Court before the arrest warrant is issued against the judgment debtor.

So, in the light of the decisions of the Supreme Court, the Executing Court must decide the means of the judgment debtor before ordering arrest.

17. Per contra, the learned Counsel for the respondent relied on the following judgments:

(i) In P.G. Ranganatha Padayachi v. The Mayavaram Financial Corporation Ltd. : AIR1974 Mad1 , a Division Bench of this Court and pointed out the following Index Note:

(A) Civil P.C. (1908)-Section 51, Order 21 Rule 37(2)-Order of arrest of judgment debtor-Reasons need not be stated for ordering arrest-It is necessary only while ordering subsequent detention- : AIR1957 Mad761 and AIR 1956 Mad 580, held not good law.and held that the order of arrest of the judgment debtor passed by the executing Court without giving a finding regarding the means of the judgment debtor to pass the decree amount is not one without jurisdiction. The executing Court is required to go into the means of the judgment debtor only after he is arrested and brought to Court and before deciding whether he has to be committed to prison or not in execution of the decree.

(ii) In Soundararajan v. Sayee Finance : (1986)1MLJ214 , wherein it has been held as follows:

There are two stages in the execution of a decree so far as Section 51 (c) of the Civil Procedure Code is concerned. They are (1) arrest and (2) detention in civil prison. The proviso shows that it refers only to execution by detention in prison and the Court must be satisfied with the conditions enunciated therein only when an order for detention in civil prison is made by the Court. The inhibition in Section 51 is not applicable when ordering arrest of the judgment debtor.(iii) In K.N. Gangappa and Anr. v. A.M. Subramanya Mudaliar : AIR1988 Mad182 , wherein it has been mentioned in the headnote, which runs as follows:

Civil Procedure Code (V of 1908)-Section 51 -Execution petition for arrest-Judgment debtor absent-Arrest ordered on the ground that the judgment debtor had sufficient means to pay-Proviso to section applies only to order of detention in prison not arrest.(iv) In A. Mani v. A. Chandranath : (1993)1MLJ597 , it is mentioned in the headnote which runs as follows:(B) Civil Procedure Code (V of 1908)-Section 51 Proviso and Order 21, Rules 37(1), 37(2), 40(3) and 40(4)-Arrest of judgment debtor for non-payment of decree amount when can be ordered-Court should give a finding that reason for such order exists-Nature of inquiry to be held.

18. In the above cited case, the decision reported in AIR 1980 SCC 470 was relied on. So, as per the principles laid down by the High Court and the Supreme Court, the executing Court shall give reasons before ordering arrest. So the decision relied on by the respondent will not be helpful to the respondent, in view of the decision of the Hon'ble Supreme Court.

19. The executing Court shall hold an inquiry and give a finding as to the correct means of the judgment debtor to discharge the decree before ordering arrest under Rule 37 of the C.P.C. The executing Court should follow the procedure laid down in Rules 39 and 40 of the C.P.C. In these petitions, the Executing Court did not observe the principles laid down by the High Court in : 2000(2)CTC168 and by the Supreme Court in AIR 1980 SCC 470. Hence, the order of the Executing Court is liable to be set aside.

20. In the result, both the civil revision petitions are allowed and the fair and decretal order dated 6.9.2005 made in E.P. No. 18 of 2005 in O.S. No. 15 of 1998 and E.P. No. 19 of 2005 in O.S. No. 15 of 1998 respectively on the file of the Subordinate Judge, Kuzhithurai, is set aside. The Subordinate Judge, Kuzhithurai is directed to restore the said execution petitions and dispose of the same on merits and in accordance with law. Consequently, connected CMPs and VCMPs are closed.