

(2012) 03 KL CK 0184

In the High Court Of Kerala

Case No : Writ Petition (C) No. 22996 of 2010 (O)

C.K. Rajesh

APPELLANT

Vs

Aishwarya Trust, Kanichukulangara, Cherthala Taluk,
Alappuzha District-688001

RESPONDENT

Date of Decision : 01-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 105(3), Order 21 Rule 106, 151, 51

Citation : (2012) 03 KL CK 0184

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : T.K. Vipindas, Sri. S. Vinodkumar and Smt. Priya P.K, for the Appellant; G. Gopakumar (Cherthala), for the Respondent

Final Decision : Allowed

Judgement

K.T. Sankaran, J.—The petitioner is the judgment debtor in O.S. No. 62 of 2000 on the file of the Sub Court, Alappuzha. The decree was for payment of money. The decree holder filed E.P. No. 173 of 2002 before the Sub Court, Alappuzha for execution of the decree by arrest and detention of the judgment debtor in civil prison. The defendant was residing within the limits of Mararikulam North Village. That Village was within the jurisdiction of the Sub Court, Alappuzha. Later, Mararikulam Village was included within the jurisdiction of the Sub Court, Cherthala. It would appear that E.P. No. 173 of 2002 was transferred to the Sub Court, Cherthala. It is stated by the decree holder in the counter affidavit that since delay was caused in getting the case transferred, he filed a fresh Execution Petition before the Sub Court, Cherthala as E.P. No. 201 of 2009. The prayer in the Execution Petition was to realize the decree amount of Rs. 5,48,389/by arrest and detention of the judgment debtor in civil prison. Notice was issued to the judgment debtor and the Execution Petition was posted for appearance of the judgment debtor on 3.12.2009. On that day, the judgment debtor did not appear and the executing court passed the following order:

Respondents accepted notice. No representation. Perused the affidavits, I am satisfied that JD-1 deliberately evading payment. Hence prayer allowed. Issue arrest warrant.

2. On 27.1.2010, the judgment debtor filed E.A. No. 44 of 2010 u/s 151 of the CPC to review the order dated 3.12.2009. In the affidavit accompanying the application, it was stated that on 3.12.2009, the judgment debtor was proceeding to the Court and to appear before Court. But, suddenly, he had a chest pain and he could not continue the journey. E.A. No. 44 of 2010 was dismissed by the order dated 29.5.2010, which reads as follows:

No apparent error on the face of record. Warrant issued with a finding on enquiry that judgment debtor has sufficient means to pay the decretal amount. Hence E.A. is dismissed.

3. The order dated 3.12.2009 does not satisfy the requirements of clause (b) of the proviso to Section 51 of the Code of Civil Procedure. There is no finding in the order dated 3.12.2009 that the judgment debtor has means to pay. But, there is a finding in one sentence that the judgment debtor was deliberately evading payment. E.A. No. 44 of 2010 filed by the judgment debtor was dismissed on the ground that there is no apparent error on the face of the record warranting a review of the order.

4. The Learned Counsel for the decree holder submitted that before the Sub Court, Alappuzha in E.P. No. 173 of 2002, the judgment debtor raised a contention that he was not having sufficient means to pay the decree debt. Evidence was adduced in that case and the executing court passed an order dated 5.4.2008 holding that the judgment debtor has sufficient means to pay the decree debt. The executing court directed the judgment debtor to remit the balance amount on or before 28.5.2008. It was also held that on failure of remittance of the amount, warrant will be issued. The counsel submitted that the same contention cannot be raised in the present Execution Petition, namely, E.P. No. 201 of 2009, Sub Court, Cherthala. It is not necessary to arrive at a finding in this Writ Petition on the contention raised by the counsel for the decree holder. That is a contention which has to be taken into account by the executing court in accordance with law.

5. The present Execution Petition was not posted for hearing. Therefore, the executing court could not pass an order under Rule 105(3) of Order XXI of the Code of Civil Procedure. The remedy of the judgment debtor was not to apply under Rule 106 of Order XXI of the Code of Civil Procedure, since no order was passed under Rule 105(3) of Order XXI of the Code of Civil Procedure. Therefore, it cannot be said that the executing court cannot condone the delay in filing the application. An application u/s 151 of the CPC can be filed even beyond 30 days. The court below was in error in thinking that the application was really for review of the earlier order. It is true that the word "review" is mentioned in the application. However, the application was filed u/s 151 of the Code of Civil

Procedure. The executing court should have considered that the earlier order was passed in the absence of the judgment debtor and he was not afforded an opportunity to contest the application. It is true that the judgment debtor was absent on the day fixed for appearance but that does not mean that he should not be given an opportunity to contest the Execution Petition at a later point of time, provided there are sufficient reasons for the same. The executing court did not say that the averments made in the affidavit in support of E.A. No. 44 of 2010 are false.

6. In the facts and circumstances of the case, I am of the view that an opportunity should be given to the judgment debtor to file a counter statement in the Execution Petition and to contest the case. Accordingly, the order dated 3.12.2009 in E.P. No. 201 of 2009 and the order dated 29.5.2010 in E.A. No. 44 of 2010 are set aside. The petitioner/judgment debtor shall file a counter statement within a period of one month from today. It is made clear that the executing court need not grant any adjournment at the request of the judgment debtor, unless the Court is satisfied that the judgment debtor is prevented by sufficient cause from appearing before Court. The parties shall appear before the executing court on 20.3.2012.

The Writ Petition is allowed as above.