

(1987) 06 KL CK 0048
In the High Court Of Kerala
Case No : C.R.P. No. 2733 of 1984-A

D. Viswanathan and Another	Vs	APPELLANT
The Karnataka Bank Ltd.		RESPONDENT

Date of Decision : 08-06-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 37, 51

Citation : AIR 1988 Ker 274

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Advocate : V.V. Surendran, for the Appellant;

Final Decision : Allowed

Judgement

S. Padmanabhan, J.—Judgment-debtors are the revision petitioners. Revision is directed against an order rejecting their objection to personal execution on the ground of no means and ordering warrant against them.

2. Decree is for payment of money. First defendant is said to be the principal debtor and second defendant the surety. But it is undisputed that under the suit document as well as under the provisions of the decree they are jointly and severally liable.

3. Pursuant to notice under Order 21, Rule 37 both of them filed objection stating that they are not liable to personal execution because they have no means to pay the decree amount or any portion of it. In the affidavit filed by the decree-holder there was an allegation that first defendant is having a business and income from it and hence he has means to pay the decree amount. In the counter-affidavit the first defendant did not specifically say that he has no business but said he has no income and means to pay the decree debt and therefore he is not liable to be arrested and detained.

4. Without calling upon the decree-holder to adduce evidence or taking or considering any evidence from him the learned Subordinate Judge said :

"In allegation of the petitioner that the first respondent is having a business is not specifically denied. That means, the first respondent is having a business and if the first respondent is having a business, it is up, to him to prove the volume of business. That having been not done, an adverse inference will have to be drawn against him. Thus as far as the first respondent is concerned his plea of no means falls to the ground. I, therefore, hold that the first respondent is possessed of sufficient means to pay the decree debt".

The objection of the second defendant was disposed of on the following terms :

"The first respondent is the principal debtor and second respondent is the surety. It is well settled proposition of law that plea of, no means to a surety is not available. Plea of no means is, therefore, unavailable to a surety and that being so, the contention of the second respondent that he cannot be proceeded with by arrest and detention in civil prison cannot be countenanced with".

5. These "well settled propositions of law" came from a senior civil judicial officer. In the first place when the decree is for payment of money jointly and severally against two or more defendants there is no question of one being a principal debtor and the other a surety. Both are equally liable for the entire amount and the decree-holder is entitled to realise the amount from any of them. Even on the basis of the document creating liability the creditor need not be concerned with who is the principal debtor and who is the surety so long as the liability is co-extensive. There cannot be any discrimination between them in the matter of liability, of course depending on the terms of the document of transaction creating liability. If in this case second defendant has any claim against the first defendant on account of payment of the decree amount that is not a matter arising in execution and it has to be enforced elsewhere. I am not aware and I was not shown any "well settled proposition of law" that in a money decree personal execution could be ordered against a person without affording him an opportunity to show cause why he should not be committed to the civil prison and when he shows cause, without the requisite satisfaction, simply on the ground that he is a surety: From where the execution court got the inspiration of the "well settled proposition of law" is not known. If such a legal proposition is accepted the position of a surety must be taken to be worse than that of the principal debtor. In preference to the principal debtor it may be in favour of the surety that Courts may in deserving case be inclined to show some equity.

6. u/s 51 of the CPC when the decree is for payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to civil prison, the Court, for reasons recorded in writing, is satisfied (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree (1) is likely to abscond or leave the local limits of the jurisdiction of the Court, or (2) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or (b) that the

judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof or neglects or has refused or neglected to pay the same, or (c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account. We are not concerned with contingencies (a) (1) and (2) or (c) because there is no such case for either side. The dispute is whether condition (b) exists or not. In relation to Clauses (b) and (c) the object or effect of obstructing or delaying execution of the decree is not relevant.

7. Whether the first defendant was the original debtor and whether second defendant has only stood surety for him, the execution court is concerned only with the liability under the decree and see whether personal execution could be had against them. It is the decree-holder who wants personal execution. When his allegations for that purpose are denied it is for him to satisfy the court that conditions for ordering personal execution are there. Even in cases where the judgment-debtor did not come forward to oppose personal execution the satisfaction of the conditions by the Court, is necessary and that satisfaction has to be provided by the decree-holder by affidavit or otherwise. In the absence of the satisfaction of the court he is the person who suffers by refusal of personal execution. Personal execution is not by way of penalty for non-payment of the decree amount. It is to enforce payment of the decree. By sending a penniless man, who did not do any act of dishonesty, to civil prison, no purpose is going to be served and the only result is that the decree-holder could shell out good money after bad money and have the satisfaction that his debtor is sent to civil prison. When denied, the burden of providing that the circumstances as are applicable u/s 51 exist is on the decree-holder. Strict proof may not be required. On the materials placed the execution court may be entitled to draw an inference as regards the statutory requirements. Anyhow such materials, whatever be the nature and scope, will have to be supplied by the decree-holder in order that the execution court gets the requisite satisfaction which has to be recorded in writing with the reasons. That is a condition precedent to execution by arrest and detention.

8. Under the proviso to Order 21, Rule 37, even without issuing a notice the court can issue warrant and bring the judgment-debtor if it is satisfied 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. That is only to procure his otherwise impossible presence. Even in such a case actual commitment to civil prison is only when the decree-holder satisfies the court of the existence of the circumstances permitting arrest and detention in execution of the decree. The view taken by the execution court that the second defendant is foreclosed from raising any objection regarding means and proof of the existence of the statutory conditions as against him is not required by reason of himself being a surety cannot be accepted.

9. Both defendants denied existence of the statutory conditions alleged as

against them by the decree-holder for personal execution and the decree-holder has not adduced any evidence also. So far as this case is concerned, what is required to be proved is that the judgment-debtors have or had since the date of the decree, the means to pay the decree amount or some substantial portion of it and they refused or neglected to, pay. The question is not whether first defendant is having a business or not. When he completely denies means it is means from all sources. What the court is concerned is whether he is having the capacity. When he denies that capacity it is to be proved by the decree-holder. The attitude taken by the execution court that the business was not specifically denied and therefore he must be held to have a business from which he is having income is not a practical approach in consonance with the object and spirit of Section 51 and Order 21, Rule 37 which are intended to see that judgment-debtors not possessed of sufficient means who did not commit any acts of mala fides envisaged in these provisions should not be detained in prison. It is too much for the execution court to say that judgment-debtor has to prove the volume of his business and its income. Solely for the reason that the business was not specifically denied even when he totally denies his income from any source. Such a burden of proof is unknown to law. The adverse inference drawn by the execution court is further more ridiculous. Even taking for granted that omission to deny existence of the business is capable of raising an inference that first defendant is having a business, does it automatically follow that the business is profitable and there is means. Can there be a presumption that all businesses are profitable and is it possible on that basis to shift the burden which is on the decree-holder ? The answers must be in the negative. Placing burden on the judgment-debtor to prove no means is unknown to law.

The order suffers from material irregularity in the exercise of the jurisdiction and it resulted in prejudice also. The civil revision petition is allowed and the order set aside without costs. The matter is remanded for disposal afresh on the merits in the light of what is stated above.