

(2001) 02 KL CK 0043
In the High Court Of Kerala
Case No : C.R.P. No. 357 of 2000

Muhammed

APPELLANT

Vs

Roniya Kuries and Money Lenders (P) Ltd.

RESPONDENT

Date of Decision : 14-02-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 48(2), 60, 60(1)

Citation : (2001) 2 ILR (Ker) 215 : (2001) 4 RCR(Civil) 756

Hon'ble Judges : M.R. Hariharan Nair, J

Bench : Single Bench

Advocate : Renjith Thampan and V.M. Krishnakumar, for the Appellant; Dinesh R. Shenoy and T.N. Manoj, for the Respondent

Judgement

M.R. Hariharan Nair, J.—The revision petitioner, who is the Judgment Debtor in O.S.No. 190/91 which is under execution in the Munsiff's Court, Irinjalakuda, is aggrieved that his application filed before the Court seeking to raise the attachment from his salary at the rate of Rs.330/- per mensem has been turned down by that court.

2. The contention of the petitioner, who is a postman, based on a salary certificate dated 24.7.99 produced along with C.M.P. No. 709/2000, is that for the purposes of S. 60 of the CPC his salary has to be taken as only Rs. 3,720/- consisting of Rs. 3,575/- as basic pay, Rs. 70/- as personal pay and Rs. 75/- as travelling allowance. According to him, the other elements relating to Dearness Allowance-Rs.1,144/- and Rs. 179/- House Rent Allowance are not part of the salary for the purpose of S. 60 of the C.P.C. The other contention of the petitioner is that the total amount recovered from his salary towards various decrees and also towards revenue recovery for the amounts due to the K.S.F.E. is Rs. 4,045/- even excluding the attachment in the present case and this is beyond the attachable portion of his salary. The learned counsel further submits that if correctly calculated in accordance with the guidelines in S. 60(1)(i) of the CPC, the total attachable portion will be Rs. 1,107/- as against Rs. 4,375/- which is

being deducted now including the attachment in the present case.

3. The learned counsel for the respondent submitted that the petition is hit by res judicata in view of the fact that only three months before filing the present petition, a similar application filed by the same petitioner before the execution court was dismissed on the merits. In this regard, the affidavit dated 17.3.1999 produced as Annexure R(1)(a) along with counter to C.M.P. No. 709/2000 is relied on. With reference to another salary certificate produced by the present respondent as Annexure R1(b) along with the same counter it is argued that there have been subsequent attachments also as aforementioned and that while fixing the amount attachable in the present case, the later attachments can only be ignored.

4. A perusal of the impugned order shows that the aspect of res judicata and the exact attachable amount have not been considered by the execution court. On the other hand, it took the view that the garnishee is the person who has to deduct the attachable portion from salary and send it to the court and mere attachment over the salary will not prejudice the right of the Judgment Debtor in moving the garnishee. If there is no attachable portion of salary, it was held, he has to keep the order till the expiry of the previous attachment and continue the subsequent attachment till the realisation of the decree debt. On the other hand, if there is attachable portion of salary, the garnishee will have to implement the order and send the amount to the court. It was from the above perspective that the execution court dismissed the application of the Judgment Debtor.

5. During hearing the learned counsel for the revision petitioner relied on Form No.19 prescribed under Appendix-E of the C.P.C. in support of his contention that no discretion is available with the garnishee and that once the attachment order reaches the garnishee, he is bound to implement it irrespective of the question whether there is attachable portion of the salary available or not. The said contention cannot be accepted in full in view of the provision in O.21, R. 48(2) of the C.P.C. which provides as follows:

"(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the appropriate Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment."

It is obvious from the above that even if the garnishee receives the attachment order in Form 19, it will still open to him to apply his discretion in the matter in accordance with the provision in O.21, R. 48(2) of the CPC.

6. The contention that the present petition is barred by res judicata can be considered only if the order as per which the earlier application was dismissed is produced in court. It has to be seen whether the averments in the petition and in the counter were the same as raised now and whether the decision was on the

merits. In the absence of those documents before this Court, it cannot be held that the petition is barred by res judicata.

7. Under S. 60(1)(i) of the CPC, salary to the extent of the first four hundred rupees and two thirds of the remainder is exempt. Kousalya Devi v. Praveen Bankers 1979 KLT 932 is authority for the proposition that House Rent Allowance and Dearness Allowances granted to the Central Government employees like the present petitioner are exempted of the purposes of S. 60(1)(i) of the C.P.C. If the sum of Rs. 1,144/- being received as D.A. And Rs. 179/- being received as H.R.A. are excluded as above, what can be said based on the salary certificate dated 24.7.99 produced by the petitioner is that only a sum of Rs. 1,107/- is available for attachment. The aforesaid certificate further makes it clear that at present there is a total recovery of Rs. 4,375/- inclusive of Rs. 330/- attached in the present case and Rs. 1,000/- attached under the Revenue Recovery Act.

8. A comparison of the salary certificates produced by the petitioner and the respondent along with C.M.P. No.709/2000 and along with the counter in the same petition respectively show that between 12.3.1999 and 24.7.1999 there have been new attachments. If the total attachable amount is limited as Rs. 1,107/-, only the later attachments can be left unimplemented, albeit for the time being. Which exactly are the attachments to be excluded is a matter for evidence because it will depend upon the dates when the attachment orders reached the garnishee.

9. In the circumstances, the impugned order is set aside and the matter is remitted to the execution court for fresh enquiry with opportunity to both sides to adduce relevant documents. If, on consideration of the relevant documents, the court comes to the conclusion that the total amount under attachment from the salary of the petitioner as on the date on which the attachment in O.S. No. 190/91 was issued exceeds Rs. 1,107/- and in case it is found that the present petition is now hit by res judicata, the court will be expected to withdraw the attachment. Of course, the garnishee has the discretion under O.21 R. 48(2) of the C.P.C.; but that does not mean that the court is left without any discretion in the matter. In fact, the discretion of the garnishee can come into play after the Court's discretion has been exercised.

10. After considering the evidence adduced by both sides and on a consideration of the fact of res judicata and the chronological order of the attachments in various cases, the court below will pass fresh orders. Attachment in the present case will stand suspended in the meantime.

The Civil Revision Petition is disposed of as above.