

(1992) 08 KL CK 0020
In the High Court Of Kerala
Case No : C.R.P. No. 2090 of 1991-H

P. Krishnan

APPELLANT

Vs

The Metal Industries Ltd.

RESPONDENT

Date of Decision : 28-08-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 51

Citation : (1992) 08 KL CK 0020

Hon'ble Judges : P.K. Balasubramanyan, J

Bench : Single Bench

Advocate : C.P. Damodaran Nair and D. Krishna Prasad, for the Appellant; K.T. Sankaran, for the Respondent

Judgement

P.K. Balasubramanyan, J.—In this revision arising from an order in execution, the Petitioner is the judgment-debtor. The Petitioner was an employee of the Respondent. The Petitioner was in charge of the cash of the business run by the Respondent. While the Petitioner was thus in charge, according to the Respondent, he misappropriated certain amounts entrusted to him for the purpose of payment of salary to other employees and also did not properly account for some of the other amounts which came into his hands. The Petitioner having denied the liability, a suit, O.S. 96 of 1987 on the file of the Subordinate Judge's Court of Ottappalam was filed by the Respondent for recovery of a sum of Rs. 35,571.28 with future interest. In the plaint, the Respondent company inter alia stated that the Petitioner was an employee of the Respondent company and he was in charge of the cash and accounts of the company and that therefore he was a trustee for the Respondent's amounts and he had a fiduciary responsibility towards the Respondent. The plaint claim was denied by the Petitioner. The Petitioner pleaded that he was merely a salesman and was neither a Cashier nor an Accountant and that he had no charge of the accounts of the Respondent or of the moneys of the Respondent. The trial Court by judgment dated 31st August 1988 decreed the suit finding that even going by the admissions of the Petitioner he was in charge of the cash and accounts of the

Respondent and that he had not even repudiated on earlier occasions the allegation of the Respondent that he was a Cashier and Accountant of the Respondent. The Court also held that the Petitioner had handled the cash of the company as a Cashier. The suit was decreed overruling the contentions of the Petitioner for the sum claimed in the plaint with future interest at 6 per cent per annum.

2. The Respondent put the decree in execution. The Respondent realised a portion of the amount due under the decree by sale of one item of property which it attached and sold in execution. For the balance amount due under the decree the present Execution Petition, E.P. 91 of 1990 was filed by the Respondent. The Respondent reiterated that the Petitioner was liable in a fiduciary capacity to the Respondent and he was deliberately refraining from paying off the balance decree amount and that he is liable to be arrested and detained in civil prison. The Petitioner opposed the claim of the Respondent. The Petitioner repudiated the claim that he was bound in a fiduciary capacity to account to the Respondent. He pleaded that he cannot be arrested in execution of the decree as he has no means to pay the decree amount and that he had not neglected to pay the same. The executing Court by the order under challenge has overruled the Objections of the Petitioner and has held that he is liable to be arrested without any evidence on the side of the decree holder regarding his means in view of the fact that he was bound in a fiduciary capacity to account for the decree amount to the Respondent and in view of Clause (c) of the proviso to Section 51 of the Code of Civil Procedure. It is this order that is challenged by the Petitioner in this Civil Revision Petition.

3. Sri Prasad, counsel for the revision Petitioner-judgment debtor submits that the Petitioner was only a Sales Assistant in the employment of the Respondent and that it cannot be held that he had any fiduciary capacity towards the Respondent or that he can be arrested even without evidence of his means to pay and his neglect to pay the decree amount. He attacks the order of the Court below by pointing out that the Court below could not have ordered, his arrest without evidence on the side of the Respondent-decree holder regarding his means to pay the debt and since it has not been established that he has the means to pay the decree amount, the order of the Court below directing his arrest is one without jurisdiction. Sri Prasad also submits that even assuming that Clause (c) of the proviso to Section 51 of the CPC is attracted and it be held that he is liable to be arrested since he was bound in a fiduciary capacity, even then he cannot be arrested without the condition of Clause (b) of the said proviso also being satisfied and that in that view also the order of the Court below is one without jurisdiction. Sri Sankaran, counsel for the Respondent-decree holder counters this argument by submitting that the Petitioner was the Cashier and Accountant of the Respondent and was in charge of the cash and the accounts of the Respondent, that he had misappropriated the cash entrusted to him and that therefore he was clearly bound in a fiduciary capacity to account for the amount to the Respondent, that the adjudication in the suit was on the basis that he was

the Cashier of the Respondent and that would mean that he had a fiduciary capacity to account for the amounts received by him on behalf of or from the Respondent and that no further evidence is contemplated or needed for the executing Court to hold that the Petitioner was bound in a fiduciary capacity to repay the decree amount. He also controverts the submission of Sri Prasad that even if Clause (c) of the proviso to Section 51 of the CPC is satisfied it has to be shown further that the Petitioner had the means to pay the debt and had neglected to pay and submits that once Clause (c) of the proviso to Section 51 of the CPC is shown to be attracted, an order for arrest has necessarily to follow without any further enquiry. He therefore submits that the order of the Court below is correct and is well within its jurisdiction and requires only to be confirmed.

4. The revision Petitioner was a servant of the Respondent. As can be seen from the adjudication in the suit the Petitioner was in charge of the cash and the accounts of the Respondent. The decree is for the amounts received by the Petitioner on behalf of the Respondent and the amount that came into his custody on behalf of the Respondent for payment of salary to the other employees of the Respondent. The contention of the Petitioner that he had nothing to do with the cash or accounts or that he had not received any amount on behalf of the Respondent or from the Respondent has been negated by the decree itself. Whatever may be the designation of the office or post held by the Petitioner, broadly put, he was a servant of the Respondent who was in charge of the accounts of the Respondent and who had been entrusted with cash by the Respondent and who had collected money on behalf of the Respondent and who had failed to account for the same. The question is whether on the basis of these facts it could be postulated that the Petitioner Was a person bound in a fiduciary capacity to account for the amounts to the Respondent?

5. Sri Prasad submits with reference to the decision of the Supreme Court reported in Prem Ballabh Khulbe Vs. Mathura Datt Bhatt, that even a partner in a firm who had failed to account for the profits or the amounts due to the firm has not been held to be a person bound in a fiduciary capacity to account to the other partners and that it has been held that clause (c) of the proviso to Section 51 of the CPC is not applicable to such a partner. He points out that there is no evidence in this case to show the existence of any special relationship between the Petitioner and the Respondent as envisaged in the decision of the Supreme Court referred to above and that in the absence of any such evidence the mere fact that certain amounts belonging to the Respondent came into the hands of the Petitioner cannot lead to the conclusion that the Petitioner was bound in a fiduciary capacity. Sri Prasad also points out that the decision reported in Velayudhan v. State Bank of India 1988 (1) KLT 491 referred to by the Court below has been overruled by a Division Bench of this Court in the decision reported in Francis v. Central Bank of India 1990 (2) KLT 983. He submits that the order of the Court below under the circumstances cannot stand. Though the decision reported in 1988 (1) KLT 491 has been overruled by the Division Bench

in the decision reported in 1990 (2) KLT 983, the Division Bench has not disagreed with the propositions enunciated in the decision reported in 1988 (1) KLT 491 that "a person having duty, created by his undertaking to act primarily for Anr. 's benefit in matters connected with such undertaking has fiduciary obligation. The expression fiduciary capacity is not restricted to technical or express trusts, but includes also such offices or relation involving the imparting of a confidence on the strength of which one person has acted". The Division Bench on the other hand has clearly observed at page 990 that "there can be no controversy that for the purpose of Clause (c) of the proviso to Section 51, there need not be an express trust; it could as well be an implied trust or a quasi-trust. All that is necessary is that the decree must be for a sum of money for which judgment-debtor was bound in a fiduciary capacity to account". The Division Bench went on to consider what exactly was the meaning to be attributed to the words "judgment debtor was bound under fiduciary capacity to account". After referring to the definition of "fiduciary" in various Law Dictionaries and the relevant provisions of the Indian Trusts Act, the Division Bench decided in that case that a surety may not come within the ambit of Clause (c) of the proviso to Section 51 of the CPC because it cannot be held that a surety was bound in a fiduciary capacity. The question in this case would be as to the status of a servant-Cashier, Accountant, Sales Assistant or by whatever name he is called-of the employer entrusted with the money, and could it be said that he is a person bound in a fiduciary capacity to account for the money that came into his hands?

6. In the decision reported in Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, the Supreme Court has postulated that fiduciary relationship involves dominion over property and a liability to account is the hallmark of fiduciary relationship and a surety does not have such an obligation or dominion over the property. As can be seen, the liability to account appears to be the essential requirement for postulating a fiduciary relationship between the parties. The question then would be, did the Petitioner have dominion over the moneys entrusted to him or that came into his hands? What are the obligations of a servant in the position of the Petitioner vis-a-vis his employer has been the subject-matter of various decisions. In Robb v. Green (1895) 2 Q.B. 315. A.L. Smith, L.J. said that there is an implied term in a contract of service that the servant undertakes to serve his master with good faith and fidelity. The same view was reiterated by Lord Greene, M.R. in Hivac Ltd. v. Park Royal Scientific Instruments Ltd (1946) 1 A.E.R. 350. In Vokested v. Heather (1945) 62 R.P.C. 135 it was observed that the obligations of confidence in the case of master and servant were based on the contract of employment either on the express terms of such a contract or on the terms which the law would imply having regard to the relationship of the parties and to the subject matter with which the contract was concerned. Lord Denning M.R. stated in the decision reported in 1948 (2) All. E.R. 28:

In my judgment, it is a principle of law that, if a servant takes advantage of his service and violates his duty of honesty and good faith to make a profit for

himself, in the sense that the assets of which he has control, the facilities which he enjoys, or the position which he occupies, are the real cause of his obtaining the money as distinct from merely affording the opportunity for getting it, that is to say, if they play the predominant part in his obtaining the money, then he is accountable for it to his master.

In appeal from the said judgment reported in *Re Reading's Petition of Right* (8) (1949) 2 All. E.R. 68 Lord Justice Asquith observed as follows:

...When a servant or agent by a breach of duty damnifies his master or principal, the latter can, of course, recover in an ordinary action for breach of contract for any loss he has actually suffered, but there is a well established class of cases in which he can so recover whether or not he has suffered any detriment in fact.

These are cases in which the servant or agent has realised a secret profit, commission or bribe, in the course of his employment, and the amount recoverable is a sum equal to such profit. In most of these Cases it has been assumed that the Plaintiff, in order to succeed, must prove that a "fiduciary relation" existed between himself and the Defendant and that the Defendant acted in breach of this relation, but the term "fiduciary relation" in this connection is used in a very loose, or, at all events, a very comprehensive, sense.

His Lordship went on to state that if a servant or agent so acts,

he is bringing his duty to the Plaintiff and his own interest into conflict, in derogation of the fiduciary bond, and cannot be heard to say that duty prevailed and the Plaintiff suffered no loss. The Plaintiff, whether actually harmed or Scathless, is conclusively presumed not only to have been damnified, but to have been damnified to an extent measured by the amount of the secret profit received by the Defendant: See per James L.J. in *Parker v. Mekenna* (10 Ch. appeal 124). This amount the Plaintiff can recover either as money had and received to his use or as an equitable debt.

7. Applying this principle, the question in the present case is whether the Petitioner having not accounted for the amounts due to the Respondent and having misappropriated a part of the amount made over to him by the Respondent for payment of salary to the other employees of the Respondent did not have a fiduciary relation with the Respondent? He did have the liability to account for the amounts received by him on behalf of the Respondent or from the Respondent for payment of salary to the other employees of the Respondent. He did have dominion over the funds that came into his hands. He did have a duty to carry out the direction to pay the salary to the other employees. The funds did belong to the Respondent. Applying the test indicated earlier there cannot be any doubt that the Petitioner was bound in a fiduciary capacity to account to the Respondent for the amount covered by the decree in this case.

8. Sri Sankaran points out the following statements contained in Blacks Law Dictionary in explaining the fiduciary relation;

What constitutes a fiduciary relation is often a subject of controversy. It has been held to apply to all persons who occupy a position of peculiar confidence towards Ors. , such as a trustee, executor, or administrator, director of a corporation or society...medical or religious adviser...husband and wife...an agent who appropriates money put into his hands for a specific purpose of investment collector of city taxes who retains money officially collected; ...one who receives a note or other security for collection....

He also points out that these propositions has been accepted by the Division Bench in the decision reported in 1990 (2) KLT 983 and he draws a parallel by pointing out that the Petitioner was a servant or agent who appropriated the money put into his hands for the specific purpose of payment of salary to the other employees of the Respondent. He therefore submits that the Petitioner cannot but be held to be a person bound under a fiduciary capacity to account for that amount. I am inclined to accept this submission of Sri Sankaran. The decision reported in K.P. Ambadi v. K.M. Balan 1958 KLT 801 also supports the proposition that it is unnecessary for the purpose of Clause (c) that there should be an express trust. It is enough if there is a quasi trust or a fiduciary position involving a liability to account in relation to Anr. party. If confidence is reposed in the Petitioner when the moneys were handed over to him for payment of salary to the other employees of the Respondent and the Petitioner misappropriated that money and did not disburse the salary, there cannot be any doubt that he had committed a breach of trust vis-a-vis his employer in respect of the money entrusted to him. Going by the test laid down in 1958 KLT 801 there cannot be any doubt that the Petitioner was in a fiduciary capacity to account for the amount. I am therefore in agreement with the executing Court that the Petitioner was bound in a fiduciary capacity to account for the amounts due under the decree and hence Clause (c) of the proviso to Section 51 of the CPC is attracted to the case on hand.

9. The alternate contention of Sri Prasad based on the decision reported in P.V. Mathew v. Bank of Cochin Ltd. 1982 KLT 274 by Mr. Justice M.P. Menon postulating that there must also be contumacious conduct on the part of the Petitioner before he could be arrested notwithstanding the fact that Clause (c) of the proviso to Section 51 of the Code is attracted cannot be accepted in the light of the Division Bench decision reported in 1990 (2) KLT 983. In the said decision, after referring to the decision reported in "Tulsidas Mundhra v. The Official Liquidator AIR 1983 Cal. 493 the Division Bench has held that:

the three clauses of the proviso to Section 51 contemplate situations which either go far beyond or are different from mere inability to fulfil a contractual obligation. Clause (a) deals with a case where judgment-debtor is guilty of contumacious conduct. Equally so is the case of Clause (b). Clause (c) deals not with the conduct of judgment-debtor after decree but the special position he occupied viz-a-viz the decree holder with reference to the subject matter of the dispute. The three situations contemplated under the proviso are not so much

defenses for the judgment-debtors as they are restrictions on the power of the Court to order detention. The Court can exercise the power to order detention in a situation contemplated by any one of the three clauses. If the decree is for a sum for which judgment debtor is bound in a fiduciary capacity to account, the Court can order detention of the judgment-debtor in prison even if he has or had no means to pay and this has nothing to do with mere inability to fulfil a contractual obligation. There is no violation of Article 11 of the covenants. There is no jurisdiction to hold that even if the decree is of a nature contemplated in Clause (c) of the proviso, the condition in Clause (b) must also be satisfied.

10. In the light of the authoritative pronouncement of the Division Bench referred to above it is not necessary to refer to the decisions of the Madras High Court and the other High Courts which have taken the view that the clauses in the proviso to Section 51 of the CPC are not cumulative and it is enough if one of the conditions is satisfied.

11. In the view I have taken that the Petitioner was bound in a fiduciary capacity to account for the decree debt to the Respondent, it cannot be said that any further evidence of the means of the judgment-debtor or his inability to pay would arise for consideration. Therefore the plea that evidence was not taken by the Court below and hence the order requires to be set aside cannot be accepted. The relationship as admitted and as found in the judgment in the suit clearly establishes the status of the Petitioner vis-a-vis the Respondent and that status has been found by me to be that of a fiduciary. If that be so under Clause (c) of the proviso to Section 51 of the CPC the Petitioner is liable to be arrested. The order of the Court below is therefore correct and well within its jurisdiction.

12. On the facts and in the circumstances of the case I feel that the Petitioner should be given an opportunity to pay the balance amount due under the decree in six equal monthly installments. The first instalment is to be paid on or before 1st October 1992. The subsequent installments are to be paid by the first of every succeeding month until the entire decree is satisfied. If any one of the installments is defaulted, the Petitioner will be arrested and detained in civil prison as ordered by the Court below.

Subject to the above direction, the Civil Revision Petition is dismissed.