

(1992) 02 OHC CK 0025

In the Orissa High Court

Case No : Civil Revision No. 854 of 1990

Pankaj Mahakud @ Pankaj Matari

APPELLANT

Vs

Smt. Tara Mahakud

RESPONDENT

Date of Decision : 27-02-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 51
Evidence Act, 1872 — Section 114

Citation : AIR 1992 Ori 199 : (1992) 74 CLT 75

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : R.K. Mohapatra, K.B. Kar, B. Routray, U.K. Samal and R.K. Dash, for the Appellant;

Judgement

S.C. Mohapatra, J.—Direction for Civil imprisonment after arrest in an execution proceeding of decree for money is grievance of judgment-debtor in this Civil Revision.

2. Main ground of attack by Mr. R. K. Mohapatra, learned counsel for petitioner is that judgment-debtor having no means to pay direction is in violation of Section 51, C.P.C.

3. Decree-holder is wife of judgment-debtor. Satisfying the pre-conditions, she obtained decree for maintenance at the rate of Rs. 100/- per month. Judgment-debtor not having paid the same, she applied for execution of the decree by detention in Civil prison unless the decretal amount is paid. Despite valid service of notice, judgment-debtor not having appeared to raise objection as provided in Section 47, C.P.C. on 27-4-1989, order was passed to issue warrant of arrest for which requisites had been filed. Long four months after, Nazir returned the same unexecuted with report that Munda cheque is not available. It was directed to be reissued. On 6-11-1989 decree-holder filed a petition that in spite of the fact that execution has been filed on 27-4-1987 and direction to arrest has been issued on 27-4-1989, Nazir is not executing the same on the plea of nonavailability of

Munda cheque. She prayed to send the judgment-debtor direct to prison. On 10-11-1989, executing Court directed to move the District Judge. On 19-3-1990, Nazir reported that Munda cheque has been received. On that basis, executing Court directed issue of warrant of arrest against the judgment-debtor. These dates have been indicated just to highlight how a destitute wife has been deprived of her maintenance on account of procedural delay in executing court in spite of provisions for "periodical inspections to control and regulate functioning of courts.

4. On 23-7-1990 judgment-debtor appeared and filed an application to set aside ex parte order to hear under Order 21, Rule 106, C.P.C. and Rule 40 read with Sections 51 and 151, C.P.C. On such petition, execution of warrant of arrest was kept in abeyance till 7-8-1990. On 10-8-1990, executing Court decided not to execute warrant of arrest to give opportunity to judgment-debtor to satisfy why the decree would not be executed by detention of judgment-debtor in civil prison.

5. On 25-8-1990, decree-holder filed an application for drastic action against judgment-debtor. In the said petition supported by affidavit of decree-holder, it was asserted-

(i) There are series of litigations numbering more than 12 in different forums between parties.

(ii) A proceeding for vesting of ceiling surplus lands under the Orissa Land Reforms Act is pending against mother of judgment-debtor before Revenue Officer, Bargarh;

(iii) Judgment-debtor is the only son of her mother;

(iv) Judgment-debtor has married for the second time illegally and his mother has transferred lands in name of the second wife;

(v) Judgment-debtor is owner of properties worth lakh of rupees. Yet, he has stated that he is working with his mother. He resides with his mother in a big pucca house;

(vi) Although judgment-debtor has lost all the litigations with decree-holder being a capitalist, he has joined hands with some tooters to entangle decree-holder in several litigations to attack her ferociously.

6. No objection was filed by judgment-debtor to this petition on affidavit and question of issue of warrant of arrest for execution of the decree was heard on basis of which impugned order was passed.

7. Executing Court held that judgment-debtor did not dispute that various litigations have been fought between the parties and he lost in each case. It was found that judgment-debtor has deserted decree-holder and accepted a second wife, a ceiling surplus proceeding is pending against his mother and he is only son of his mother. He is living with his mother and second wife. These facts were not disputed in the executing Court. It was submitted in the executing court that

decree-holder has not disclosed the movable and immovable properties in her affidavit. Executing Court held that the affidavit cannot be ignored on that account to find that judgment-debtor is a landless poor man and is unable to pay the decretal dues. From the facts and circumstances and conduct of judgment-debtor, executing Court came to conclusion that judgment-debtor was wilfully avoiding to pay the decretal duties and is dishonestly disowning his obligation to pay the decretal amount.

8. Liberty of a person is fundamental right under our Constitution. Courts are guardians of such liberty. Therefore, preconditions required to affect liberty of a person are to be satisfied before the same is touched. While Section 51, C.P.C. authorises in clause (c) execution of a decree by arrest and detention in prison where arrest and detention is permissible u/s 58, Proviso to Section 51 puts further restriction for such arrest and detention in execution of decree for payment of money. It reads as follows ;--

"Provided that, where the decree is for the 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 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;

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) 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 and refuses 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.

Explanation : In the calculation of the means of the judgment-debtor for the purpose of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree."

8A. Plain language of the proviso leaves no room for doubt that for directing arrest and detention, Court is to be satisfied that any of the three conditions as laid down in (a) to (c) of the Proviso is fulfilled. Although satisfaction of the Court in a judicial satisfaction based on materials, Parliament has approved a further mandate that Court is to record reasons for its satisfaction.

9. When Court is required to possess materials to record reasons for its satisfactions, parties are to produce the same. Normally, a party who seeks the

order of arrest and detention is to produce the same without which Court would not be in a position to record the reasons. In ILR (1960) Cut 33 (Paramananda Parida v. Maheswar Panda) it has been laid down by the Division Bench that it is not for the judgment-debtor to prove the negative. It is for the decree-holder to prove the positive and for the Court to find in favour of the contention of the decree-holder and to record its reasons for ordering arrest.

10-11. Restriction in Proviso is attracted to all categories of decrees for payment of money. Accordingly, the same is attracted to decree for maintenance which is one category of decree for payment of money. Until legislature makes a separate provision for decrees for maintenance of wives and children restriction laid down in proviso to Section 51, C.P.C. would be applicable to execution of such decrees also.

12. In this case, except prayer to execute the decree by arrest and detention of judgment-debtor, there was no other material with the Court for directing arrest. No satisfaction was recorded when the order was passed after service of notice on judgment-debtor was held to be sufficient. Accordingly, the order is not sustainable in law being in contravention of Section 51, Proviso C.P.C.

13. However, thereafter judgment-debtor has entered appearance and prayed to recall the order directing arrest and detention. Decree-holder has also filed an application where in circumstances have been indicated in support of her prayer for realisation of decretal amount by arrest and detention of judgment-debtor. In case circumstances as revealed in the execution proceeding would be sufficient to satisfy the executing Court order directing arrest and detention would not be interfered with.

14. It is no doubt true that wife decree-holder is to satisfy the Court that one of the conditions restricting arrest and detention of her husband judgment-debtor is fulfilled. It is not the case of the decree-holder that judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court. It is equally not asserted that after institution of the suit, judgment-debtor dishonestly transferred, concealed or removed any part of his property or committed any other act of bad faith in relation to his property. Case of decree-holder is that her husband having means to pay the amount of the decree or some substantial part thereof and neglected to pay the same.

15. For considering the means to pay the amount of maintenance to wife, I cannot forget that it is only Rs. 100/- per month. When Court fixed the quantum in the judgment, it considered the means of the husband at that time. In a suit for maintenance issues are (i) Liability to pay and (ii) amount payable, Husband had opportunity to bring to the notice of the Court the facts and circumstances from which the quantum is to be fixed. Court does not pass a decree which cannot be executed. Accordingly, in absence of any other material on the facts and circumstances brought to notice of the Court, when an amount of maintenance at Rs. 100/- per month was fixed, an inference is to be drawn that

at the time of judgment husband had means to pay the amount decreed.

16. Decree-holder is to prove that judgment-debtor has or had since the date of decree, the means to pay the amount of decreed. In respect of other money claims question of capacity to pay is not an issue. In a claim for maintenance such a question is material. Therefore, a distinction has always to be made between suit for payment of money as maintenance and other types of money claims. When at the time of judgment, the defendant judgment-debtor had means to pay as is supposed to have been found by the trial Court, it can be presumed that such means to pay continued. Presumption is also a mode of satisfaction of the Court to draw an inference. Whether Court would draw such presumption depends upon discretion of the Court on the facts and circumstances. In case of a wife who has become destitute such a presumption can be drawn. It is to be kept in mind that by the time of judgment, wife is no more a companion of the husband. She has been deprived of the shelter. In such circumstances, to expect a wife to prove that husband has means to pay since the date of decree would be requiring something which would be onerous on her part. She has to approach executing Court because the husband did not respect the decree. Deprived of maintenance, her life has become miserable. If liberty of a person is a fundamental right, life is a higher fundamental right. To expect a wife to collect materials in respect of means of husband who has the moral and statutory obligation to maintain, would amount to refusing her the subsistence effecting her life. Accordingly, presumption ought to be drawn that husband has continued to have the same means which he had at the time of judgment.

17. Aforesaid presumption gains support since judgment-debtor who appeared in the suit did not bring materials about his means to pay the grant installments neither under Order 20, Rule (1)(a) or (2), C.P.C. Added to it a man who has no means to pay maintenance would not normally marry again since he would again have the obligation to maintain the second wife and the children to take birth on the marital relationship. An executing Court would not be unjustified to be satisfied that husband having means neglects to pay the decree-holder wife.

18. Normally, I would have affirmed the order. However, I am inclined to give opportunity to judgment-debtor to explain to the Court to rebut the presumptions against him. This would, however, be subject to condition that judgment-debtor shall deposit Rs. 1500/-within two months either by installments or at a time and shall continue to deposit Rs. 100/-every month till the question of his arrest and detention is considered afresh. On failure to comply with the order, executing Court can draw the presumption and record reasons for its satisfaction for arrest and detention of the judgment-debtor.

19. In result, subject to aforesaid conditions civil revision is allowed and executing Court is directed to consider the question afresh after giving opportunity to both parties to bring further materials on record. No costs.