
(1973) 01 MAD CK 0010
In the Madras High Court
Case No : A.A.O. No. 86 of 1968

P.G. Ranganatha Padayachi	Vs	APPELLANT
The Mayavaram Financial Corporation Ltd.		RESPONDENT

Date of Decision : 18-01-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 51

Citation : AIR 1974 Mad 1 : (1974) ILR (Mad) 224

Hon'ble Judges : N.S. Ramaswami, J;Kailasam, J

Bench : Division Bench

Judgement

N.S. Ramaswami, J.—This Civil Miscellaneous Appeal is against the order of arrest passed by the learned Subordinate Judge, Cuddalore in

execution of a money decree. There are two judgment-debtors and both were ordered to be arrested by the order dated 19-3-1968. The 2nd

judgment-debtor is challenging the said order in this Civil Miscellaneous Appeal. The point taken by the learned counsel for the appellant is that the

order of the executing Court is one without jurisdiction inasmuch as the Court has not recorded its reasons for ordering arrest after giving an

opportunity to the appellant for showing cause as to why he should not be arrested in execution. Reliance is placed on the proviso to Section 51 of

the Code of Civil Procedure. But we are of opinion that there is no merit in the point taken by the learned counsel.

2. It is no doubt true that the order of the executing Court is a one line order and it says: ""No payment made. Arrest D1 and D2 by 9-4-1968.

Batta after a week."" The executing Court has not recorded any reason for ordering arrest except saying that no payment had been made. But a

perusal of the relevant provisions of the CPC would show that the proviso to

Section 51, which makes it obligatory on the part of the executing Court to give an opportunity to the judgment-debtor to show cause and record its reasons; applies not for ordering arrest of the judgment-debtor but only for committing him to prison. In other words, only before the executing Court orders the judgment-debtor to be detained in civil prison, it has necessarily to give an opportunity to the judgment-debtor to show cause against such an order and the Court should also record its reason in writing for committing the judgment-debtor to prison.

3. The proviso to Section 51 is 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 the 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.

The same section, viz., Section 51, provides arrest and detention in prison as one of the modes of executing a decree. In the present case, the

decree-holder has sought execution of the decree by arrest and detention of the judgment-debtor has means to pay the decree amount (or a

substantial part thereof) and refuses or neglects or has refused or neglected to pay the same as contemplated under clause (b) of the proviso to

section 51. As per the terms proviso, the decree-holder has necessarily to prove:

(1) that the judgment-holder has, or has had since the date of the

decree, the means to pay the decree amount or some substantial part thereof

and (2) that the judgment-debtor refuses or neglects or has refused or neglected to pay the same. This proof should be adduced before ever the judgment-debtor could be committed to prison and only after the judgment-debtor had been given an opportunity to show cause against such detention and after the executing Court recorded its reasons in support of its order.

4. The provisions of the Code make a distinction between an order of arrest and an order of detention. There is nothing in Section 51 or in any other provisions of the Code that even before ordering arrest of the judgment-debtor, the executing Court should give him an opportunity to show cause against such an order and also record its reasons in support of its order. Such a procedure is contemplated as per the proviso to Sec. 51, only before ordering the detention of the judgment-debtor in civil prison. As a matter of fact, Order XXI, Rule 37 of the Code contemplates the executing Court passing an order of arrest even before issuing a notice to the judgment-debtor. Sub-rule (1) of the said rule says that when an application for execution of a decree for money by the arrest and detention of the judgment-debtor is made, normally the Court shall first issue a notice to the judgment-debtor calling upon him to appear before the Court and show cause why he should not be committed to civil prison. The proviso to the above said sub-rule says that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object 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. Sub-rule (2) of the said rule (Order XXI, Rule 37) says that when the judgment-debtor fails to appear in spite of notice under sub-rule (1), the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor. Whether the executing Court issues a warrant of arrest without notice or whether it issues such a warrant under sub-rule (2) of Rule 37, the Code does not contemplate the Court recording any reason in support of such an order of arrest.

5. Order XXI, Rule 40 prescribes the procedure on the judgment-debtor either appearing in Court in obedience to a notice under Rule 27 or is brought before court after being arrested in execution of the decree for payment of money. The provision says that when the judgment-debtor so

appears or is brought before court, the court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to civil prison. Upon conclusion of the enquiry, the Court, may subject to the provisions of Section 51 and to the other provisions of the Code, make an order for the detention of the judgment-debtor in civil prison and shall, in that event, cause him to be arrested if he is not already under arrest. This provision is only in consonance with the provision to Section 51 which says that the judgment-debtor shall be given an opportunity to show cause before he is committed to civil prison. It is quite obvious that there is no provision in the Code which compels the executing Court either to give an opportunity to the judgment-debtor or to record its reasons in writing before even it passes an order of arrest against the judgment-debtor.

6. In the present case, the executing Court had ordered notice under Order XXI, Rule 37(1) to both the judgment-debtors. The 2nd judgment-debtor, who is the appellant before us, had appeared before Court and he had filed a counter to the execution petition. But it appears that the judgment-debtor had offered to pay the decree amount and executing Court had given him time for payment. On the adjourned date, on payment had been made and that is why the executing Court passed the order of arrest which is now being questioned in this Civil Miscellaneous appeal. If this order is one under Order XXI, Rule 40 of the Code, it would certainly be wrong, for ordering arrest of the judgment-debtor under that rule should be only after making an enquiry as to whether the judgment-debtor under that rule should be only after making an enquiry as to whether the judgment-debtor was liable to be detained in civil prison in execution of the decree and after the executing Court records its reason in writing as contemplated under the proviso to Section 51 of the Code for ordering detention of the judgment-debtor in civil prison. But there is nothing to show that in the present case, the order of arrest passed by the executing Court was one made under Order XXI, Rule 40. This order can only be under Order XXI, Rule 37(2). The judgment-debtor had no doubt appeared in Court in obedience to the notice sent under Rule 37(1), but on the

adjourned date he defaulted. As already noticed, though he had originally offered to pay the decree amount, he had failed to pay the same and

there is nothing to show that the judgment-debtor was bodily present in the Court on the date on which the order now in appeal was passed.

Therefore, even though the judgment-debtor had originally appeared in Court in obedience to the notice issued under Rule 37(1) on the date on

which the order of arrest was passed, it must be deemed that the judgment-debtor had disobeyed the notice.

7. In *Re: Karumuri Venkataratnam*, is a similar case where the judgment-debtor had appeared in obedience to a notice issued under Order XXI,

Rule 37(1) and also filed counter. But he did not appear on the adjourned date. Therefore, the executing Court passed an order of arrest. That

was challenged on the ground that the executing Court had not given any reasons in writing before ordering arrest. That contention was repelled by

Horwill, J. Pointing out that the proviso to Section 51 applies only to an order of committing the judgment-debtor to civil prison and not to an

order of arrest. *B. K. Puttaramiah v. H. I. E. & Sons.*, AIR 1959 Mys 94, has followed the judgment of Horwill, J. referred above. *Surayarapu*

Putrayya v. Maddukuri veerraju, (1964) 2 AWR 28 is also so similar case where it was held that where a court issued a warrant under sub-rule

(1) or under sub-rule (2) of Rule 37 of Order XXI, it does not do so with the intention of committing the person, against whom the warrant is

issued, to prison and therefore the proviso to section 51 of the code does not apply. That was a case where the judgment-debtor did not appear

after notice under sub-rule (1) of Rule 37 and therefore an order of arrest was made under sub-rule (2). These decisions are all in accord with the

view expressed by us that proviso to Section 51 of the Code applies only to an order of detention and not to an order of arrest. One of us had to

deal with a similar question in *Namachivaya Mudaliar and Another Vs. P.J.A. Manickavelu and Co.*, . It has been pointed out there that under the

proviso to Section 51 of the Code of Civil Procedure, the court is bound to record in writing its satisfaction of one of the conditions prescribed in

the section only when it is committing the judgment-debtor to prison and not when it is issuing a warrant of arrest.

8. The learned counsel, however, referred to two decisions of this Court, both rendered by *Panchapakesa Ayyar, J.* They are *T. Kunhiraman Vs.*

Pootheri Illath Madhavan Nair, and Muthu Pathar v. Mani Rao, (1956) 69 M.L. 299 = AIR 1956 Mad 580. The learned Judge has observed in

those cases that the mandatory provisions of Section 51 must be complied with before arrest is ordered even if the order is passed ex parte. The

learned Judge has not made any distinction between an order of arrest and an order of detention. We have to say with respect that the law has not

been correctly stated in those decisions.

9. The learned counsel referred to two decisions of the Kerala High Court in C. V. Xavier v. Canara Bank, Ltd., 1969 KLT 927 and John

Chacko v. Thomas Varghese. ILR (1970) Ker 109. But both of them are cases of order of detention and not merely an order of arrest. So those

decisions have no application. Similarly Paramanandaswami v. Shanmugharn Pillai, AIR 1949 Mad 822 a decision of a Division Bench of this

court and Mathura Prasad Sharma Vs. Parmeshthi Das, have no application because they are cases where the executing Court had gone into the

merits of the question whether the judgment-debtor had means to pay the decree amount.

10. To sum up therefore, the order of arrest passed by the executing Court without giving a finding regarding the means of the judgment-debtor to

pay the decree amount is not one without jurisdiction as the order of the arrest is only under Order XXI Rule 37(2). Needless to say that the

executing Court should necessarily go into the question of means of the judgment-debtor to pay the decree amount after the latter is arrested and

brought to Court and before deciding whether the judgment-debtor has to be committed to prison or not in execution of the decree.

11. The Civil Miscellaneous Appeal fails and accordingly it is dismissed. But we make no order as to costs.

12. Appeal dismissed.