

(2016) 10 KL CK 0049

In the High Court Of Kerala

Case No : OP(C).No. 2329 of 2016 (O)(Against The Order in EP 3/2016 in O.S No. 480/2012 of Sub Court, Karunagappally Dated 26/8/2016)

Sulaiman Kunju

APPELLANT

Vs

Dinesh Lal

RESPONDENT

Date of Decision : 17-10-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 37, Section 51(c), Section 59

Citation : (2016) 4 KLT 79

Hon'ble Judges : Mr. Sathish Ninan, J.

Bench : Single Bench

Advocate : Sri. A. Shafeek (Kayamkulam), Advocate, for the Petitioner; Sri. S. Shaji, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Sathish Ninan, J. - The original petition is filed challenging Ext.P2 order dated 26.08.2016 in E.P No. 3 of 2016 in O.S No. 480 of 2012 on the files of the Subordinate Judge's Court, Karunagappally. The judgment debtor is the petitioner in the original petition. The decree in O.S No. 480 of 2012 is one for realisation of 1,53,000/- with interest at the rate of 8% on the principal amount from the date of judgment till realisation. The execution petition was filed for realisation of the decree debt by arrest and detention of the judgment debtor as provided for under Section 51(c) of the Code of Civil Procedure (for short "C.P.C").

2. Notice was issued to the judgment debtor on the execution petition under Order 21, Rule 37 C.P.C. The judgment debtor entered appearance and filed objections. Evidence was taken in the execution petition. On the side of the decree holder PWs 1 and 2 were examined and on the side of the judgment debtor DWs 1 and 2 were examined and Exts.B1 to B8 were marked. The execution court after considering the evidence, entered a finding that the judgment debtor has sufficient means to wipe off the decree debt and that the

non-payment is wilful.

3. The judgment debtor had raised a further contention that he is suffering from serious illness and hence he is not liable to be arrested and detained in execution of the decree. To substantiate the said plea, the petitioner had relied on Exhibit B2 which is the case summary and discharge card of the year 2014. The court below after considering the evidence concluded that there is no evidence to reach a conclusion that the judgment debtor is suffering from such serious illness as to absolve him from the liability to be arrested as provided for under Section 59 C.P.C. It was further held that Section 59 comes into play only after the arrest of the judgment debtor. Accordingly, overruling the contentions raised by the judgment debtor, the execution court found that the judgment debtor is liable to be arrested and detained in civil prison in execution of the decree.

4. The copies of the depositions were made available to me by the learned counsel for the petitioner. On going through the evidence, it is seen that the decree holder has specifically pointed out the source of income of the judgment debtor. He has deposed that the judgment debtor is getting 5,000/- as his pension and 30,000/- from his hotel business. It is also stated that the judgment debtor has received an amount of 7 lakhs as retirement benefits. The judgment debtor has produced extract of his bank account to show that only an amount of 1,713/- is being received as monthly pension. On going through the evidence of PW1, it is seen that his specific assertion in the chief affidavit is that the judgment debtor has an income of 30,000/- from his hotel business. There was an attempt to challenge the same in cross examination. However, when the judgment debtor is examined as DW1, he did not have a case that the said hotel business as alleged by the decree holder does not belong to him. There is not even a whisper even in the chief affidavit filed by him to the said effect. Further, it is admitted that at the time of retirement he had received certain amounts, but according to him the said amounts were used by him for settling his liability with a Bank. However, but for the ipse dixit of the judgment debtor, no documentary evidence is produced to prove the same. The court below after considering the evidence adduced in the case has reached a conclusion on facts that the judgment debtor possesses necessary means to pay the amount covered by the decree and that the non-payment is wilful. I do not find any reason to interfere with the said factual finding.

5. Another contention raised by the learned counsel for the petitioner/judgment debtor is that the judgment debtor is suffering from serious illness and hence he is not liable to be arrested and detained in execution of the money decree. Shelter is sought to be taken under Section 59 C.P.C, which provides for release of the judgment debtor from arrest on the ground of his serious illness. The court below has observed that Section 59 C.P.C deals with the situation after arrest and the court may release the arrested person if he is not in a fit state of health to be detained in civil prison. Therefore, essentially according to execution court, the question of release of the judgment debtor arises only after the judgment

debtor is arrested in execution of the decree.

6. It would be profitable to extract Section 59 C.P.C.

"Release on ground of illness.-(1) At any time after a warrant for the arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom -

(a) by the State Government on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court, to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by Section 58.

7. On a plain reading of Section 59 C.P.C, it would appear that it contemplates mainly three situations. First, after the issuance of warrant for the arrest of the judgment debtor the court may cancel the warrant for arrest on the ground of serious illness of the judgment debtor. Second, while the judgment debtor has been arrested, the court may release him on being satisfied that he is not in a fit state of health to be detained in the civil prison. Third, if the judgment debtor is committed to the civil prison he may be released by the court on being satisfied that he is suffering from any serious illness. Sub Section (4) of Section 59 C.P.C provides that a judgment debtor, who is released on the basis of his serious illness as above may be rearrested in execution of the decree. Therefore, a reading of the Section would give an impression that a plea that the judgment debtor is suffering from serious illness and hence is not liable to be arrested, could be raised only after the issuance of a warrant for arrest or only after he has been arrested or detained, and not before that. If a judgment debtor is entitled to raise a plea that he is not liable to be arrested since he is suffering from serious illness and thus he is exempted from arrest and detention in terms of Section 59 C.P.C, there is no reason why the judgment debtor should be shunted to a stage after warrant for arrest is issued against him, to approach the execution court and then to raise such a plea. of course it is open for the judgment debtor to raise such a plea after the issuance of warrant for arrest or after he has been arrested or while in detention. It would be negation of natural justice and would be inequitable if it is held that a judgment debtor who receives a notice on the execution petition wherein the relief sought for is arrest and detention of the judgment debtor in civil prison, is not permitted to raise in defence the right of insulation from arrest and detention under Section 59 C.P.C.

It does not stand to reason to hold that the judgment debtor has to wait for the issuance of a warrant for his arrest, to enable him to raise the plea that he is not liable to be arrested and detained on the ground of his serious illness. A reasonable and just interpretation has to be given as regards the benefit afforded under Section 59 C.P.C.

8. In *Xavier v. Canara Bank* reported in 1969 KLT 927, V.R. Krishna Iyer, J had observed that, "the humanitarian impulse of Section 59 C.P.C must not be lost sight of when applying it to the concrete fact of a particular case. After all, courts must remember that there is a brutal element in driving a decrepit or one in the grip of a deadly disease or excruciating pain into a prison cell, unless the object be the somewhat depraved one of inflicting on a debtor the worst suffering for the sin of not having paid off his relentless creditor. Section 59 C.P.C seasons justice with mercy and justice is a coefficient of law". Section 59 C.P.C has been embodied with an avowed object.

9. On receipt of a notice in the execution petition for arrest and detention under Order 21, Rule 37 C.P.C, the judgment debtor may along with his contention that he does not possess the sufficient means to wipe off the decree debt and that he is not deliberately evading the payment, also raise the plea that on the ground of his serious illness he is not liable to be arrested and detained in civil prison. In the event such a plea, which is essentially in terms of Section 59 of C.P.C, is urged by the judgment debtor, the execution court has to consider the said plea also. It cannot refrain from enquiring into the said plea holding that such a plea is available for the judgment debtor, in terms of Section 59 C.P.C, only after the passing of an order of arrest and detention. Since the primary point for determination in a proceeding under Order 21, Rule 37 C.P.C would be about the means of the judgment debtor and his refusal to pay the decree debt, necessarily, the execution court has to take evidence and consider the same. It is only appropriate and just that the plea of non-liability to be arrested and detained in execution of the decree, if raised, shall also be considered by the execution court simultaneously, and a separate finding be entered into as regards the said objection. It is necessary for the execution court to enter separate findings regarding the issue of the means of the judgment debtor and nonpayment, and also regarding the claim for exemption from detention on the ground of serious illness. This interpretation would only carry forward the intention of the legislature insofar as it granted protection from arrest and detention to a judgment debtor who is suffering from serious illness.

10. In the instant case, as noted earlier, the execution court though has observed that Section 59 C.P.C would come into play only after arrest, execution court has still proceeded to consider the claim of the judgment debtor on his contention regarding exemption from arrest on the ground of his illness. The judgment debtor has raised a contention that he is suffering from heart disease and is under treatment from Sree Chitra Hospital. He has produced Exhibit B2 the treatment and discharge summary from the hospital, to prove the same. After

consideration of the evidence, the execution court concluded that there is no sufficient material on record for the court to conclude that the judgment debtor is not in a fit state of health so as to be exempted from detention. As of now there is no material available on record to come to a different conclusion. However, taking note of the object underlying Section 59 C.P.C, I feel that the decree holder and the judgment debtor could be afforded a further opportunity to adduce fresh evidence regarding the plea of the judgment debtor regarding exemption from arrest and detention. The finding of the execution court on the said plea is hereby set aside and the execution court is directed to reconsider the plea of the judgment debtor regarding exemption from arrest and detention on the ground of his illness. The parties will be at liberty to adduce fresh evidence in the said regard. The execution court shall pass fresh orders on the said plea. The entire process as above shall be completed within a period of 2 months from the date of receipt of a copy of the order. The finding of the execution court regarding the means of the judgment debtor and the refusal to pay, is confirmed. Further steps in the execution petition shall be in terms of the finding to be entered into in terms of the directions made above.

11. In the result the Original Petition is allowed in part. Exhibit.P2 order is set aside to the extent as mentioned above.

The parties will appear before the execution court on 11-11-2016.