(2010) 07 KL CK 0016

In the High Court Of Kerala

Case No : Matrimonial Appeal No. 985 of 2009

Sunitha, K.K. APPELLANT

Vs

Ramesh, A.S. RESPONDENT

Date of Decision : 23-07-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 51, 58
Contract Act, 1872 — Section 16(2)
Evidence Act, 1872 — Section 111
Limitation Act, 1963 — Section 10

Citation : AIR 2010 Ker 184 : (2011) 2 RCR(Civil) 177

Hon'ble Judges : R. Basant, J;M.C. Hari Rani, J

Bench : Division Bench

Advocate : C.S. Dias, Varghese C. Kuriakose, K.N. Abhilash, R. Leela, Praveen K. Joy, Sunil Nair Palakkat, Arjun S. Raj, Jisa P. Jose and Priya R. Kumar, for the Appellant; C.A. Chacko and M.B. Vimalraj, for the Respondent

Judgement

R. Basant, J.—Is the plea of no means available to a husband against proposed arrest and detention u/s 51 of the CPC in execution of a decree for money passed by the Family Court in favour of his wife for return of parental share and gold ornaments entrusted to him? Can Proviso (c) to Section 51 CPC be said to be attracted? These, in short, are the questions raised in this appeal.

2. To the vitally relevant facts first. The Appellant and the Respondent were married on 19-5-1996. They lived together for some period of time. Separate residence commenced from 14-9-2002. The husband allegedly did not return to his wife cash, ornaments, articles etc. of value Rs. 3,25,500. The wife claimed return of the said amount of Rs. 3,25,500 along with the interest and costs.

3. The husband was set ex parte once. The said ex parte order was set aside. Though the husband was permitted to participate in the proceedings, he again did not co-operate and take part in the proceedings. Accordingly, the Family Court proceeded to pass the decree directing him to pay the said amount of Rs.

3,25,500 along with interest and costs.

4. The Respondent/wife took out execution before the Family Court. The husband was once directed to be arrested. He was arrested. While he was in custody, he approached this Court and on condition that he deposits an amount of Rs. 25,000 and executes a bond with two solvent sureties for the balance amount, he was released from custody. Thereafter, before the execution court, the Respondent--husband pressed the plea that he is without any means and that, in these circumstances, the money decree cannot be executed against him by arrest and detention. That plea was considered by the court below and by the impugned order, the court below came to the conclusion that the Respondent/ judgment-debtor has no means and consequently, he is not liable to be arrested and detained in execution of the money decree. It is that order, that is impugned in this appeal by the decree-holder/wife.

5. We may straight away refer to the contention that the sureties who had executed the bond as per the earlier order passed by this Court are also liable to be proceeded against. In the execution petition or in this appeal they are not parties. Our attempt to trace the bond, if any, executed by them has not succeeded. We are, in these circumstances, satisfied that it is not necessary for us to come to any authentic finding in this Mat. Appeal about the liability of the sureties to be proceeded against. If execution is taken out against them on the strength of the bond allegedly executed by them, the Family Court will have to consider the claim for execution against them in the light of all contentions which may be raised before the Family Court. We are not, in these circumstances, embarking on a consideration of that aspect of the matter in this appeal.

6. The learned Counsel for the Appellant/decree-holder in this appeal before us raises only one contention. Sri Varghese C. Kuriakose, counsel for the Appellant, raises the short contention that in view of Proviso (c) to Section 51 of the Code of Civil Procedure, the decree-holder/husband is not entitled to raise a plea that the decree is not liable to be executed against him by arrest and detention for the reason that he is without means.

7. That is the short question arising for consideration.

8. It will be apposite straight away to refer to Section 51 of the Code of Civil Procedure. We extract the same below:

Section 51--Powers of court to enforce execution.--Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree--

(a) * * * *

(b) * * * * (c) by arrest and detention in prison [for such period not exceeding the period specified in Section 58, where arrest and detention is permissible under that section] (d) * * * *

(e) * * * * 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.

(emphasis supplied and portions not directly relevant are omitted)

9. The learned Counsel for the Appellant submits that arrest and detention in civil prison is a mode of execution recognised u/s 51(c) of the CPC The counsel contends and we accept that to avoid the consequence of arrest and detention in civil prison by operation of the Proviso to Section 51 Code of Civil Procedure, the court must be satisfied that the judgment-debtor does not come within the sweep of Clauses (a),(b), and (c) of the provisos to Section 51 Code of Civil Procedure.

10. We need not be detained in this discussion with provisos (a) and (b). It is accepted that if proviso (c) applies, notwithstanding provisos (a) and (b), the money decree can be executed by arrest and detention.

11. We straight away refer to the decision in Jolly George Varghese and Another Vs. The Bank of Cochin, . Relying on Article 11 of the International Covenant on Civil and Political Rights which declared that "no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation", it was held that mere poverty cannot expose a person to the consequence of arrest and detention in execution of a civil decree. We find it unnecessary to advert to that decision as Proviso(c) to Section 51 CPC refers to breach of an obligation to account by a person who has a fiduciary capacity. Article 11 of the International Covenant or the decision in Jolly George''s case (supra) cannot, in these circumstances, have any reference to the controversy on hand.

12. Proviso (c) to Section 51 recognises the principle, which has been accepted in Section 4(3) of the Debtors Act, 1869 of England. Section 4(3) is extracted by us below:

4. Abolition of imprisonment for debt, with exceptions.--With the exceptions hereinafter mentioned, no person shall be arrested or imprisoned for making default in payment of a sum of money.

There shall be excepted from the operation of the above enactment.

1. * * * *

2. * * * * 3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control.

4. * * * *

5. * * * *

6. * * * * (irrelevant portions omitted)

13. The short question to be decided is whether the Respondent herein/the judgment-debtor has suffered the decree because he was bound in a fiduciary capacity to account for such sum. For proviso (c) to Section 51 CPC applies, the decree must be for a sum for which the judgment-debtor was bound in a fiduciary capacity to account. The crucial question, hence, is whether the impugned decree has been suffered by the Respondent for breach of his obligation to account for the amounts in a fiduciary capacity.

14. As to what is fiduciary capacity, we find no specific definition in the CPC or under the General Clauses Act. The Family Courts Act also does not define the same. The Indian Contract Act in Section 16(2)(a) though it refers to fiduciary capacity also does not bear any definition of fiduciary capacity. We are, in these circumstances, forced to fall back on the dictionaries, law lexicons and precedents, to ascertain the precise scope of the expression "bound in a fiduciary capacity to account".

15. We note that a Division Bench of this Court earlier had occasion to consider the ambit of the expression "bound in a fiduciary capacity to account" in the decision in Francis v. Central Bank of India 1990 (2) KLT 983. The question arose in totally different circumstances. The question to be considered in that case was only whether surety in a commercial loan transaction with the Bank can be held to be bound in a fiduciary capacity to account. But the discussions in that case by the Division Bench has reference to the sweep of the expression ''bound in a fiduciary capacity to account''.

16. It is unnecessary to extract specific passages. But it is now clear 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 the judgment-debtor was bound in a fiduciary capacity to account".

17. We make it clear that to attract Clause (c), the requirement is not merely

that the decree-holder and the judgment-debtor must share a fiduciary relationship. The judgment-debtor must be bound in such fiduciary capacity "to account". There may be several instances of a decree passed in litigation between persons in fiduciary capacity where the element of liability to account may not be there. We may, therefore, hasten to observe that to attract proviso(c), the requirement is not only that there must be fiduciary capacity/ relationship between the decree-holder and the judgment-debtor, the judgment-debtor must have been made liable because he was bound in such fiduciary capacity to account. We find that this aspect of the matter--that the judgment-debtor must be bound in fiduciary capacity to account, had received the attention of the Division Bench in Francis''s case (supra).

18. That takes us to the crucial question whether in this case, the Appellant and the Respondent have a fiduciary relationship. It will then have to be considered whether the judgment-debtor was bound in such capacity to account and it is on the ground of his failure to account that the decree was passed against him.

19. We now come to the question whether husband-wife relationship is one which can be described to be a fiduciary relationship. We have already noted that there is no satisfactory and precise definition of the expression fiduciary relationship/capacity in any of the relevant statutes. Even in Francis''s case (supra), the court was obliged to consider the dictionaries and Law Lexicon. Black''s Law Dictionary explains "fiduciary capacity" in the following words:

One is said to act in a ''fiduciary capacity'' or to receive money or contract a debt in a ''fiduciary capacity'', when the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of Anr. person, as to when he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. The term is not restricted to technical or express trusts, but includes also such offices or relations as those of an attorney at law a guardian, executor, or broker, a director of a corporation and a public officer.

20. In Stroud''s Judicial Dictionary, the expression "fiduciary capacity" is described as follows:

Fiduciary Capacity.--An administrator who has received money under letters of administration and who is ordered to pay it over in a suit for the recall of the grant, holds it "in a fiduciary capacity" within Debtors Act, 1869...; so, of the debt due from an executor who is indebted to his testator''s estate which he is able to pay but will not...; so of moneys in the hands of a receiver..., or agent...or Manager..., or moneys due on an account from the London agent of a country solicitor..., or proceeds of sale in the hands of an auctioneer..., or moneys which in the compromise of an action have been ordered to be held on certain trusts...of partnership moneys received by a partner.... [Note.--The period to be looked to is that of the act done....]

Warton''s Law Lexicon refers to the expression "fiduciary" and explains the same in the following words:

One who holds anything in trust. See TRUST

In Bouvier''s Law Dictionary, "fiduciary relationship" is defined in the following words:

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.... In the following cases debt has been held not a fiduciary one; a factor who retains the money of his principal...an agent under an agreement to account and pay over monthly;...one with whom a general deposit of money is made.

(emphasis supplied)

21. We thus find that to understand the expression fiduciary capacity, we have to look at the nature of the relationship inherently and the nature of the relationship in the instant facts. At least in Bouvier''s Law Dictionary, the husband and wife relationship is specifically referred to as a fiduciary relationship. All relationships which are built on mutual trust, dependence and confidence of a special variety can certainly be described to be fiduciary relationship for the purpose of Section 51(c), according to us. Following the dictionaries, a trustee, executor, administrator, director of a Corporation or Society, Medical or Religious Adviser, husband and wife, ward and guardian, agent and principal etc. can safely be held to be fiduciary relationship for the purpose of Section 51(c) Code of Civil Procedure. We asked for precedents specifically on the point as to whether husband and wife relationship can be described to be a fiduciary relationship. Specific precedents on the point are not brought to our notice.

22. We have heard both counsel. In our anxiety to ensure that unbiased assistance is also available, we requested Advocate C.S. Dias also to assist the court as amicus curiae. The counsel have traced a precedent in Dwaraka Prasad v. Nasir Ahmad 1925 Oudh 16. That decision did not specifically consider the expression ''fiduciary capacity''. For the purpose of Section 111 of the Evidence Act, it was considered and held that the relationship of husband and wife is one of active confidence. By necessary implication - as fiduciary relationship is one in which there must be active confidence, the decision in Dwaraka Prasad''s case (supra) can also be held to support the view that husband and wife relationship is one which can be described to be fiduciary. Considering the nature of the marital tie inherently, and on principle, we are satisfied that it will be absolutely safe to conclude that husband and wife can be safely held to share a fiduciary relationship unless the contra is shown. There may be instances where in an

acrimonious matrimony that relationship may lose its fiduciary nature. Be that as it may, at least in the absence of a counter plea it can safely be held that husband-wife relationship is a classic example of a fiduciary relationship.

23. We now have to consider the question whether the husband in the instant case has suffered the decree for the breach of his liability "to account" in such a fiduciary capacity. According to the claimant-wife, cash (representing her share in paternal property), gold ornaments and articles were brought by her to the matrimonial home at the time of marriage. They were entrusted to the husband. After the relationship soured the husband who was bound in such fiduciary capacity to account for the articles entrusted to him, failed to account for the articles and consequently the wife approached the court and claimed a decree. The decree was granted. The question hence is whether a husband having such articles of the wife in his possession is bound in a fiduciary capacity to account to his wife. The learned Counsel for the Respondent argues that there is no element of obligation in a fiduciary capacity to account in the instant case.

24. On this aspect, we have precedents in abundance. When a wife walks into the matrimonial home with cash, ornaments and articles belonging to her and leaves them with the husband, is the husband liable to account in trust? This question has come up for consideration before courts on many occasions. Our attention has been drawn to the following decisions.

25. In Pratibha Rani Vs. Suraj Kumar and Another, the question had come up before the Supreme Court, whether appropriation by the husband of stridhana property which the wife had brought to the matrimonial home would amount to criminal misappropriation to attract the provisions of the Penal Code. It was clearly held in that decision that such articles entrusted must be held to be the articles entrusted to the husband by the wife in a fiduciary capacity and that the husband is liable to account for such properties in trust whenever the wife makes the demand. In Maniyamma v. Abdul Rasaak 1989 (1) KLT 636, this Court had followed the said dictum and had further clarified that the dictum is not limited in its operation to Hindu husbands and wives notwithstanding the fact that the decision in Prathibha Rani''s case (supra) dealt with a Hindu wife and a Hindu husband and stridhana properties which such wife had brought to the parental home.

26. A learned Single Judge of this Court had occasion to consider the question whether the husband can be held to be bound in trust to restore the articles in Swapna v. Thankavelu 1990 (2) KLT 604. The following observations in paragraph 5 beyond any controversy settles that the husband is in the circumstances certainly in the position of a trustee and is bound to account to the wife all her properties at any time when she demands. We extract the relevant passage i.e., paragraph 5 below:

5. Counsel for the Appellant contended that in the facts and circumstances of this case there cannot be any limitation at all in filing the suit is filed by the wife for

return of the ornaments and utensils entrusted by her to the husband. According to the counsel the husband is in the position of a trustee insofar as the ''sreedhana properties'' are concerned and that he is bound to return them as and when demanded by the wife. After hearing counsel for both sides I am satisfied that there is much force in the contention raised by the counsel for the Appellant. It is normal for the husband and wife to reside together after the marriage and the wife normally is not expected to keep her ornaments and other valuable articles under a separate locker and key. Normally any wife may entrust her valuable things to the husband for safe custody and by that it does not mean that the husband is the owner thereof and that he has having a hostile title thereto so as to defeat the wife by claiming that it is barred by limitation. The husband in the circumstances is certainly in the position of a trustee who is bound to account to the wife all her properties at any time when she demands. The above position has been accepted by the Lordships of the Supreme Court also in Pratibha Rani Vs. Suraj Kumar and Another, which was followed by this Court in Maniyamma v. Abdul Rasaak 1989 (1) KLT 636. Though both the cases arises out of a prosecution for criminal breach of trust the principles therein stated are applicable even in respect of a suit pending before the Civil Court. Their Lordships have held that in such circumstances the husband is in the position of a trustee and he is bound to return the ornaments and utensils as and when the wife demands for the same. If the husband is the trustee and the wife is entitled to follow the property in the possession of the trustee, certainly Section 10 of the Indian Limitation Act will apply and in such cases there shall not be any period of limitation. In the facts of the case I have no hesitation to hold that the husband is in the position of a trustee so far as the ornaments and utensils entrusted to him by the wife are concerned and u/s 10 of the Indian Limitation Act there shall not be any limitation for such a suit by the wife against husband. In these circumstances the view taken by the Appellate Court that the suit is barred by limitation is erroneous and I reverse the same.

(emphasis supplied)

27. We may immediately take note that the question came up before the learned Single Judge to decide the play of Section 10 of the Limitation Act and not in the context of proviso (c) to Section 51 of the Code of Civil Procedure. But the decision shown unmistakably that in such a situation, the husband as a trustee is liable to account to the wife for such properties. That is the substratum of the expression "bound to account in a fiduciary capacity" appearing in Section 51(c) of the Code of Civil Procedure. We are in complete agreement with the conclusion of the learned Single Judge in paragraph 5 extracted above.

28. We note that an earlier Division Bench of this Court in Chacko v. Annamma 1993 (1) KLT 675 had also taken a similar view though Their Lordships in that case was concerned with properties of a Christian wife and the liability of a Christian husband to account for the same. It remains that the question was considered u/s 10 of the Limitation Act where also the crucial element to be

established is whether the elements of trust exist in the relationship between the parties. That was also a transaction of entrustment of properties of the wife with the husband.

29. The above discussions lead us to the conclusion that husband and wife relationship can be held to be a fiduciary relationship. It also follows that in respect of cash, ornaments and articles brought by the wife to her matrimonial home and entrusted to the husband, he is bound in a fiduciary capacity to account to the wife whenever she makes a demand. Elements of trust are involved in such relationship and in the entrustment of cash/ornaments/articles. We do not, in these circumstances, have any hesitation to agree that proviso (c) to Section 51 of the CPC squarely applies and the pleas which may be available under Clauses (a) and (b) of Section 51 of the CPC shall not be available to a judgment-debtor, if the case falls within Clause (c).

30. It follows from the above discussions that the impugned order by which the relief of execution by arrest and detention of the Respondent was denied to the Appellant is unjustified and does warrant interference.

31. One more incidental question remains. Does the entire decree relate to amounts payable for breach of obligation on the part of the judgment-debtor bound in a fiduciary capacity to account? We have already noted that what is crucial is not merely the existence of fiduciary relationship between the judgment-debtor and the decree-holder. What is relevant is whether the decree is for a sum which the judgment-debtor is bound in a fiduciary capacity to account to the decree-holder. We therefore must consider the entire claim and ascertain whether any part of the claim is there to which proviso (c) to Section 51 of the CPC will not apply.

The claim is under the following heads:

(1) Currency brought as share in parental property .. Rs. 1,50,000

(2) Value of 22 sovereigns of gold ornaments (22 x Rs. 4,000) .. Rs. 88,000

(3) Value of the articles other than gold ornaments entrusted. .. Rs. 17,500 (4) Amounts received subsequently for various purposes .. Rs. 70,000 ------------- Total .. Rs. 3,25,500 -------------

32. We have no hesitation to agree that claims under heads (1), (2) and (3) referred above which were brought by the young wife when she came from the parental home to the matrimonial home squarely fall within the sweep of proviso (c) to Section 51 of the Code of Civil Procedure. But so far as the 4th item of claim is concerned, that represents even admittedly only amounts obtained by the husband from the wife/her parents from time to time during the currency of the marriage for various purposes. We are of the opinion that in the absence of better materials, it is not possible to come to a conclusion that the husband was bound in fiduciary capacity to account for the said amount of Rs. 70,000. Insofar as the said amount, the proportionate costs and interest due on the said amount,

proviso (c) to Section 51 of the CPC cannot have any application.

33. We are, in these circumstances, satisfied that this appeal deserves to be allowed in part. We held that in the proceedings for execution of the decree amount of Rs. 2,55,500 (i.e., Rs. 3,25,500 minus Rs. 70,000 as shown earlier) along with interest and proportionate costs, the Respondent is not entitled to take up the plea of no means.

34. This appeal is allowed to the above extent. The court below shall proceed with the execution petition and pass appropriate orders. Parties/counsel shall appear before the Family Court on 30-8-2010 to continue the proceedings.

35. The Registry shall forthwith forward the records to the Family Court.

36. We place on record our appreciation for the worthy assistance rendered to this Court by the Advocates for the contestants and by Advocate Sri C.S. Dias who assisted us as amicus curiae.