

(2011) 06 KL CK 0060
In the High Court Of Kerala
Case No : O.P. (C) No. 185 of 2010

T.J. Abraham and Another

APPELLANT

Vs

M/s. Maharastra Apex Corporation Limited and Another

RESPONDENT

Date of Decision : 03-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 51

Citation : (2011) 3 CivCC 380 : (2011) 4 CivCC 636 : (2011) 3 KLJ 46 : (2011) 4 RCR(Civil) 248

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : Jawahar Jose and Cissy Jawahar, for the Appellant; S.R. Dayananda Prabhu, for the Respondent

Final Decision : Allowed

Judgement

K.T. Sankaran, J.—The petitioners and the second respondent are the judgment debtors in E.P. No. 32 of 2003 on the file of the Court of the District Judge, Kasaragod. The first respondent secured an arbitral award in A.P. No. 357 of 2000. It was put in execution by the decree holder (first respondent) for realization of the amount by arrest and detention of the judgment debtors in civil prison. It is submitted that the judgment debtors were originally set exparte before the executing court and an order for arrest was passed against them. That order was challenged by them in C.R.P. No. 277 of 2004 before the High Court. An order of stay was passed on condition that the judgment debtors should deposit 40,000/- before the executing court. They deposited the amount. The Revision was later disposed of recalling the warrant and affording an opportunity to the petitioners to adduce evidence.

2. The judgment debtors contended that they have no means to pay the decree debt or a substantial portion thereof and, therefore, they cannot be detained in civil prison.

3. In the affidavit filed before the executing court, the decree holder stated that the first petitioner (first judgment debtor) owns an extent of more than one acre of land under Ext.A1 registered document and therefore, he has means to pay the decree debt. The decree holder also contended that the judgment debtors have cash and immovable properties.

4. The judgment debtors contended that Ext.A1 property was sold on 12.9.1996 to one Pokker as per Ext.B1 assignment deed. They have no other property. It was also stated that the first judgment debtor is an agricultural labourer and he is residing in his wife's house.

5. The court below rejected the contentions put forward by the judgment debtors on the following grounds: (a) Ext.B1 sale deed was executed by the first judgment debtor on 12.9.1996, one month after the execution of the hire purchase agreement between the judgment debtors and the decree holder. The decree amount is due on account of the hire purchase agreement. It is clear that Ext.B1 was executed assigning the property to the third party "to evade from the proceedings which would be initiated in pursuance of the hire purchase agreement and to defeat the rights of the petitioner/decreed holder". (b) The judgment debtors deposited 40,000/- in compliance with the interim order of stay passed by the High Court in C.R.P. No. 277 of 2004. (c) The first judgment debtor is a driver by profession and therefore, he is a man of means.

6. As regards the first ground on which the executing court found against the judgment debtors, it is to be noted that there is no case for the decree holder that Ext B 1 is a fraudulent transfer. No such contention was put forward either in the Execution Petition or in the affidavit filed by the decree holder. It is true that Ext.B1 assignment deed was executed within a short period after the execution of the hire purchase agreement. That by itself would not be a sufficient ground to hold that Ext.B1 is a fraudulent transfer. The court below did not make any enquiry as to whether Ext.B1 is a fraudulent transfer. No evidence was adduced by the decree holder on that aspect. The judgment debtors were also not afforded an opportunity to defend the case on that aspect. The learned counsel for the petitioners/judgment debtors contended that the decree holder is not entitled to contend that Ext.B1 is a fraudulent transfer as that plea is barred by limitation. It is not necessary to decide that question in this Original Petition, since the court below did not consider the question whether Ext.B1 amounts to a fraudulent transfer. The court below held, only on the ground that Ext.B1 was executed one month after the execution of the hire purchase agreement, that "Ext.B1 cannot be treated as a valid document". This finding of the court below is erroneous.

7. The executing court found that the plea of no means is not sustainable, since the judgment debtors deposited 40,000/- in compliance with the interim order passed by the High Court in the Revision filed by them earlier. The fact that the judgment debtors deposited the said amount does not mean that they have the means to pay the decree debt or a substantial portion thereof. That they

deposited the amount only means that they complied with the interim order. The deposit could be made either using the resources of the judgment debtors; or they could arrange funds from elsewhere. There is no evidence to indicate that the judgment debtors had their own funds at the time of deposit of 40,000/-.

8. In *Karunakaran Pillai v. Joseph* 1976 KLT 433, a question arose whether the offer made by the judgment debtor to pay the decree debt in installments would amount to forfeiture of the plea of no means. It was held thus:

10. That a debtor offers to pay the decree debt in installments need not necessarily mean in every case that he has at the time of the offer the means to pay the decree debt in full or a substantial part thereof. It is quite possible that he makes the offer to maintain his respectability before the public and under the hope and expectation that money would be forthcoming in future for payment of the installments. Whether he has means to pay has to be decided irrespective of the offer to pay installments.

9. In *Jolly George Varghese and Another Vs. The Bank of Cochin*, , speaking for the Bench, Justice V.R. Krishna Iyer held:

There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree.

10. I am of the view that the court below was not justified in arriving at the conclusion that the judgment debtors have the means to pay the decree debt only on the ground that they deposited 40,000/- as mentioned above. Under clause (b) of the proviso to Section 51 of the Code of Civil Procedure, in order to pass an order for arrest and detention of the judgment debtor in civil prison, the executing court has to arrive at a finding 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. Only on arriving at a finding as provided in clause (b) of the proviso to Section 51 of the Code of Civil Procedure, the executing court would be justified in passing an order for arrest and detention of the judgment debtors in civil prison. Such an order cannot be passed on surmises and conjunctures. There must be clear evidence to prove the ingredients of clause (b) of the proviso to Section 51. The object of detaining a judgment debtor in civil prison for nonpayment of the amount decreed is not to punish him. Detention in civil prison is aimed at enabling the decree holder to realize the decree for payment of money. Mere inability to pay the money does not render the judgment debtor liable to be arrested and detained in civil prison. In the case on hand, there is no finding to the effect that the judgment debtors had, since the date of the decree, the means to pay the decree debt or a substantial portion thereof or at the time when they deposited 40,000/-. The mere deposit would not lead to such a

conclusion. No finding was arrived at that the deposit was made using the funds of the judgment debtors. There is also no evidence to show that the judgment debtors have the current means to pay the decree debt. The decree holder stated in evidence that the judgment debtors have resources and immovable properties. However, the decree holder could not produce any evidence to substantiate the same.

11. The finding of the court below that the first judgment debtor himself admitted that he is a driver by profession is absolutely incorrect. I have gone through the evidence of DW1. There is no such admission. He only stated that he knows driving. That does not mean that he is a driver. He stated in evidence that he is an agricultural labourer. It cannot be presumed that a person who knows driving is a driver by profession. A person may have several skills. Those skills may enable such person to become a professional or to get a job. Mere possession of the skills would not lead to the conclusion that the person concerned earns money from any profession, trade or job which could be pursued using those skills. In order to arrive at the conclusion that such a person has the means to pay the decree debt, it must be proved that he earns money using the skill which he possesses. In the present case, PW1 did not state that the first judgment debtor is a driver by profession. Only in the cross examination of the judgment debtor, an answer was elicited that he "knows to drive vehicle". The finding of the court below that the first judgment debtor, being a driver by profession, has the means to pay the decree debt, is clearly erroneous.

12. The learned counsel for the decree holder submitted that the judgment debtors have subsequently acquired assets and that they have liquid resources to pay the decree debt. The counsel also submitted that the decree holder did not get an adequate and meaningful opportunity to produce the necessary data to prove that the judgment debtors have the means to pay the decree debt. The counsel further submitted that an opportunity may be granted to the decree holder to adduce evidence to prove the ingredients of clause (b) of the proviso to Section 51 of the Code of Civil Procedure. For the aforesaid reasons, the order impugned is set aside. The executing court shall consider the matter afresh after affording an opportunity to both parties to produce documents and to adduce evidence. Both parties shall be afforded an opportunity to submit further pleadings. The executing court shall consider all the contentions put forward by the parties.

The Original Petition is allowed as indicated above. No order as to costs.