(1987) 11 KL CK 0027

In the High Court Of Kerala

Case No : C.R.P. No. 322 of 1983-H

T.K. Hamsa APPELLANT

Vs

Pandikasalayil Abdul Kareem RESPONDENT

Date of Decision : 05-11-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 37
Debt Relief Act, 1977 — Section 2(3), 2(4)

Citation : AIR 1989 Ker 47

Hon'ble Judges : P.K. Shamsuddin, J

Bench : Single Bench

Advocate : P.K. Bala Subramonian, S.V. Balakrishna Iyer and K. Jayakumar, for the Appellant; P.V. Madhavan Nambiar, for the Respondent

Final Decision : Allowed

Judgement

P.K. Shamsuddin, J.—This revision petition has been directed against the order of the court of Munsiff, Taliparamba in E.P. No. 47 of 1982 in O.S. 288 of 1972. That application was filed under Order XXI, Rule 37, C.P.C. for arrest and detention of the respondent to realise the decree debt. The petitioner herein obtained a decree in O.S. 288/72 for Rs. 1,800/- against the respondent herein. When the above execution petition was filed it was objected to by the respondent herein. He contended that he is a debtor entitled to the benefit of the Kerala Debt Relief Act. The petitioner disputed that the respondent is a debtor within the meaning of Section 2(4) of the Kerala Debt Relief Act and contended that he was having income of more than Rs. 3,000/- per year. The petitioner herein was examined as P.W. 1 and Exts.A.1 to A5 were marked and a report of the Commissioner Ext.C1 regarding the income of the respondent herein was obtained. The lower court took the view that the burden is on the petitioner to prove that the respondent was having an income of more than Rs. 3,000/- per year. It also held that some of the items of properties belonging to the respondent were sold away as per Exts.A4 and A5. The lower court also noticed that as per the report of the Commissioner Ext.Cl the total income of the respondent is Rs. 4,684.50 per year, but took the view that since the respondent retired from service subsequently the salary income of the respondent shown as Rs. 1,613 has to be deducted and so calculated it could not be said that the respondent was having an income of more than Rs. 3,000/-. The learned Munsif-accordingly dismissed the application.

2. In this revision petition the petitioner has challenged the correctness of the order of the lower court. In Elavalli Kurisupalli Prarthanan Sangham v. Velu Appunni 1984 K LT 702 : AIR 1985 NOC 192) and in Narayani Amma and Others Vs. Kochu Pillai, two Division Benches of this court (to one of which I am a party) have taken the view that the judgment-debtor who claims a statutory discharge of the debt cannot succeed unless he proves that he is a ''debtor'' within the meaning of the Act. If the initial burden is discharged, then the burden shall be on the creditor who contests the claim to prove that the debtor is not entitled to the protection. In the circumstances, the view taken by the lower court that the burden is on the petitioner herein to prove that the respondent is a debtor is not correct. So the lower court was not justified in basing its conclusion on the fact that the petitioner herein has not discharged his burden to show that the respondent herein is not a debtor within the meaning of Kerala Debt Relief Act. The petitioner herein has attempted to prove that the respondent herein was having income of more than Rs. 3,000/-by production of Exts. A1 to A3. As per Ext.A1 the respondent has got 47 cents of paramba and 35 cents of single crop wet land. The respondent herein has got a contention that those lands were acquired subsequently and therefore it cannot be taken into consideration in deciding the question whether the respondent herein was a debtor within the meaning of Section 2(4) of the Kerala Debt Relief Act. Section 2(3) defines ''debt'' thus :

"any liability in cash or kind, whether secured or unsecured, due from or incurred by a debtor on or before the date of commencement of this Act, whether payable under a contract, or under a decree or order of any court, or otherwise, and subsisting on that date".

Certain categories of debts have been excluded from the purview of the definition. That the question whether the petitioner is a debtor has to be determined on the basis of the income as on the date of commencement of the Act is clear from the above definition. The income available to the respondent on the date of commencement of the Act is the criterion to determine whether he is a debtor entitled to protection of the Act. The lower court is clearly in error in holding that since the respondent retired from service subsequent to the commencement of the Act, the salary of the respondent should not be taken into account and that the Commissioner ought to have deducted that income in reckoning the total income of the respondent. The counsel for the respondent contended that he had serious objections to the assessment of income of the respondent by the Commissioner and the objections filed by his client to the report of the Commissioner have not been considered by the lower court. Since the lower court has not decided the question of status of the respondent as a debtor on the correct basis the only course open to me is to set aside the order passed by the lower court and remand the matter for fresh disposal after considering the respective contentions of the parties. Accordingly I set aside the order of the lower court and remand the matter to it for fresh consideration and disposal in accordance with law. The question whether the respondent is liable to be arrested if he is found to be not a debtor entitled to protection of the Act, does not arise in this revision petition and I am not expressing any opinion on that aspect.

C.R.P. is allowed as stated above. Parties will bear their respective costs.

