P. Narayanabhat Vs The Syndicate Bank and Others

Court: Karnataka High Court

Date of Decision: July 16, 1998

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 22, 115, 51
Constitution of India, 1950 â€" Article 21

Citation: (2000) 1 CivCC 460 : (1998) ILR (Kar) 4167

Hon'ble Judges: Hari Nath Tilhari, J

Bench: Single Bench

Advocate: Krishna Dixit, for the Appellant; Y.N. Nagaraj and N.D.R. Ramachandra, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Hari Nath Tilhari, J.
This revision arises from the judgment and order dated 26.2.1994 whereby the Court below has issued an arrest

warrant against judgment-debtor No. 2 i.e., the guarantor.

2. The facts of the case in nut-shell are that, the judgment-debtor No. 1 had borrowed Rs. 10,000/- for agricultural purposes from the respondent-

Bank. A decree was passed in favour of the Bank on 9.8.1991 for a sum of Rs. 29,834-80 paise. It may be mentioned here that the judgment-

debtor No. 2 is the guarantee. There is no doubt the decree-holder may execute the decree against either of the parties. He can execute the decree

against the gurantee. The decree-holder filed the application for execution on 19.11.1991. The decree had been passed in Original Suit No.

348/89. On 26.2.1994 the order-sheet indicates the Courts order which reads as under: -

26.2.1994

DHR by Sri N.C.

JD 1 and 2 by Sri K.S.V.

JD 4 & 6 - Absent.

JD 3, 5, 7 and 10 by Sri M.L.S.

A/N to JD1, unserved as not in station.

J.D-2"s son present.

Balance and paid Rs. 300/- to N.C. Advocate.

Hence, issue fresh Attachment Notice to JD-1 only.

Issue arrest warrant against JD-2 only by 18/6.

Feeling aggrieved from the order of arrest warrant of JD-2 i.e., the guaranty i.e. surety and surety has come up before this Court in revision u/s

115 of CPC. From the order-sheet it appears that firstly it was typed as ""fresh attachment notice to JD-2"", thereafter, the court deleted that and

changed it to ""arrest warrant"". From the certified copy it appears that ""arrest warrant"" has been put after deleting the word ""notice"". Feeling

aggrieved from this order, as 1 mentioned earlier, JD-2 i.e., the guarantor surety has come up in revision.

3. I have heard Sri Krishna Dixit, learned Counsel for the petitioner, and Sri Y.N. Nagaraj for Sri N.D.R. Ramachandra, learned Counsel for

Respondent No. 1

4. On behalf of the revision petitioner it has been contended that, the order of issuance of warrant of arrest is illegal and without jurisdiction as the

Court could not issue the arrest warrant without complying with the necessary requisites of Section 51 particularly of proviso thereto. Here the

judgment-debtor No. 2 has only challenged the order or part of the order that is related to him namely direction of issuance of warrant of arrest,

and this is not concern with notice to JD-1. So this revision is filed against the part of the order directing issuance of warrant of arrest against

judgment debtor No. 2.

5. Learned Counsel for the respondents contended that really issuance of notice might have been unduly delayed the realisation of money decreed.

The court has dispensed with the issuance of notice against judgment debtors 1 and 2 on the application moved by the decree-holder. So far as

dispensing with the notice under Order 21 Rule 22 is concerned, there is no dispute that the Court has passed the order disposing of I.A.I moved

by the decree-holder. But when the issuance of warrant of arrest has to be made, the law is very specific and its mandate to be followed is very

clear which is in negative terms as per Section 51 of CPC. Section 51 of CPC reads as under: -

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) by delivery of any property specifically decreed;

(b) by attachment and sale or by sale without attachment of any property;

(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) by appointing a receiver; or

(e) in such other manner as the nature of the relief granted may require;

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.

Explanation:- In the calculation of the means of the judgment-debtor for the purpose of Clause (b), there shall be left out of account any property

which by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

The power to issue execution order is subject to the conditions and limitations that have thus been prescribed. Proviso to Section 51 again carves

out almost an exception and puts a restriction and rider on the power of the court in the matter of execution of decree by detention may be of the

principal judgment-debtor or may be of the guarantee i.e. surety in the civil prison. Proviso to Section 51 very clearly says,

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 committee prison, the Court, for reasons to be recorded in writing, is

satisfied about the conditions mentioned in Clauses (a), (b) and (c) to the proviso.

It means that this proviso clearly provides that no warrant of arrest shall be issued without issuing notice and giving the judgment-debtor an

opportunity to show-cause why he should not be committed to prison means notice shall be given to the judgment-debtor to show cause

specifically with reference to the execution sought by arrest that why he should not be arrested or put in civil prison. The second rider is that mere

issue of notice is not sufficient but the Court has to apply its mind to the case and then it should have to satisfy as to existence of either of the

conditions mentioned in Clauses (a), (b) or (c) to proviso. Unless he is satisfied and he records the finding in writing for his satisfaction, the Court is

not entitled to issue a stereotype order of arrest. The law requires two things to be followed before issuing warrant of arrest, firstly that an

opportunity should be given to the judgment-debtor concerned to show-cause in the matter of his being committed to civil prison that why he

should not be put in civil prison. Secondly, the Court must record its satisfaction with respect to either of the conditions under Clauses (a) (b) or

(c) and until both conditions have been satisfied, no warrant of arrest should be issued. Article 21 of the Constitution provides that no person shall

be deprived of his live or personal liberty except according to procedure established by law. Life and liberty are one of the foremost important

rights of the citizen. Constitutional mandate is that he should not be deprived of his life and liberty except in accordance with provisions of law and

mode prescribed by law.

6. In this view; of the mater, the Court below could not issue warrant of arrest of a person except after following the proviso of Section 51 CPC.

Here in the present case, that requirement, admittedly, had not been followed by the Court below as it has neither issued notice as required by the

proviso nor it has recorded its satisfaction based on reasons with respect to either of the conditions under Clauses (a)(b) or (c) to the proviso.

Under such circumstances, the order impugned suffers from jurisdictional error, where power is given to do certain thing and specific mode has

been prescribed, that power can be exercised only in accordance with the mode prescribed and not otherwise. Even mandate of Article 21 is there

that no person shall be deprived of his life and liberty except in accordance with law. When the law which provides for arrest, prescribes a mode

to be followed and if it is not followed, then order of arrest and imprisonment is without jurisdiction. Depriving a person of his right without

following law definitely it can be said that if the order is allowed to stand, it may result in failure of justice on one hand and it may cause irreparable

injury to the petitioner.

Thus considered in my opinion, this revision deserves to be allowed and is hereby allowed. The order of the Court below dated 26.2.1994 so far

as the court below has issued arrest warrant against judgment-debtor No. 2 is hereby set aside. Revision is allowed with costs.