
(1992) 03 KL CK 0039

High Court Of Kerala

Case No: C.R.P. No.s 1896/91

A.K. Prakash and
Another

APPELLANT

Vs

The Canara Bank

RESPONDENT

Date of Decision: March 6, 1992

Acts Referred:

Civil Procedure Code Amendment Act, 1976 & Order 23 Rule 3#Civil Procedure Code, 1908 (CPC) & Order 21 Rule 37, Order 21 Rule 37(1), Order 21 Rule 37(2), Order 21 Rule 40, Order 3 Rule 1

Citation: (1992) 03 KL CK 0039

Hon'ble Judges: K.K. Usha, J

Bench: Single Bench

Advocate: S. Venkitasubramonia Ayyar and V. Giri, for the Appellant; P.V. Narayanan Nambiar and M.P. Asok Kumar, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K.K. Usha, J.

The judgment-debtors in E.P. 72/88 in the Court of Subordinate Judge, Thalassery are the revision Petitioners.

Respondent/the decree holder in O.S. 67/82 filed the execution petition for realisation of an amount of Rs. 95,915.28 from the revision Petitioners

by means of their arrest and detention. The 1st revision Petitioner appeared through counsel pursuant to receipt of notice under Order 21, Rule 37

and filed counter-affidavit contending that he has no means to pay the decree debt or part thereof that there is no willful neglect on his part to pay

the decree amount. The 2nd Petitioner/2nd judgment-debtor remained ex parte.

2. The decree holder produced Exts. A-1 to A-5 to prove that the 1st judgment-debtor has means to pay the decree debt. No oral evidence was

adduced by both sides. Ext. A-1 is a photostat copy of an application filed by the 1st Petitioner to permit him to sue as an indigent person. Ext. A-

2 is the report of the Tahsildar, Thalassery, dated 19th September 1988 stating that the 1st Petitioner has got 2 acres and 37 cents of land and 5

acres of cashew garden. Ext. A-3 is a counter-affidavit filed in Ext. A-1 petition and Ext A-4 is a sale deed dated 22nd June 1979 executed in

favour of the 1st revision Petitioner in respect of one acre of property. Ext. A-5 is the prior title deed. It was contended on behalf of the 1st

judgment-debtor before the executing court that the properties referred in these documents have already been sold in execution of decrees

obtained by the Syndicate Bank and Indian Bank against the 1st judgment-debtor for debts due to them. But the court below rejected the above

contention on the ground that in the counter affidavit filed by the 1st judgment-debtor, no such plea that the properties were already sold in

execution of other decrees had been taken and that the 1st judgment-debtor was not even examined as a witness. Accepting the materials available

from the documents produced by the decree holder, the court below found that the 1st judgment-debtor has means to discharge the decree debt

and there is willful negligence and refusal on his part to pay the decree debt. On these findings the warrant for arrest of the 1st judgment-debtor

was issued. Warrant was issued for arrest of the 2nd revision Petitioner/2nd judgment-debtor also.

3. The attack on the impugned order by the 1st revision Petitioner is mainly on the ground that the court below has wrongly relied on Exts. A-1 to

A-4 documents which are not proved in the case in accordance with law. So long as these documents are not proved any material available from

those documents cannot be treated as evidence in this case. Admittedly no witness is examined on behalf of the decree holder. It is not seen how

the documents were marked. The Respondent has no case that those documents were marked as agreed by both parties. It was therefore to be

found that there is justification in the complaint raised by the 1st revision Petitioner. Apart from the above, it is further contended that the court

below has wrongly assumed that the properties covered by the documents are still available with the judgment-debtor for discharging the decree

debt. According to him, these properties were already sold in execution of decree obtained by the Syndicate Bank and the Indian Bank. The

reason given by the executing court for rejecting the above contention taken by the judgment-debtor namely that he has not taken such a

contention in the counter-affidavit does not seem to be justified. Admittedly no reference to these documents was made in the application for

execution filed by the decree holder. Under these circumstances there was no occasion for the judgment-debtor to give explanation regarding the

non-availability of the properties with him. In view of the above, I am inclined to hold that the finding entered by the court below that the 1st

judgment-debtor has means to pay the decree debt but there is deliberate negligence and refusal on his part to pay the decree debt is unjustified.

4. The learned Counsel appearing on behalf of the Respondents then contended that even if the finding that the 1st Petitioner has means is to be set

aside, he is still liable to be arrested in view of the fact that pursuant to a notice issued under Order 21, Rule 37(1) of the Code of Civil Procedure,

he had not appeared in person before the court. Admittedly, the 1st Petitioner appeared only through counsel and filed his objections. According

to the Respondent it is mandatory that he should appear in person and not through counsel when a notice under Rule 37(1) of Order 21 is

received. In support of the above contention, the learned Counsel relied on a decision of the Bombay High Court in *Mctdhusudan v. Trimbak* AIR

1961 Bombay 23. The learned Judge of the Bombay High Court held that even though under Order III, Rule I, a party who is required to appear

before the court, may either appear in person or through a recognised agent or a pleader, the rule itself lays down that where it is expressly

provided otherwise by any law, a party will have to appear in person. The learned Judge further held that the provisions of Sub-rule (1) of Rule 37

are clear to the effect that the Code contemplates the personal presence of the judgment-debtor because under that sub-rule the court has also a

power to issue a warrant for the arrest of the person against whom the execution is sought and that in lieu of issue of such warrant the court has

power to direct issue of a notice. Therefore, even in an answer to such a notice under Rule 37(1) the judgment-debtor must appear in court in

person and his appearance through a counsel is not enough. The learned Counsel further referred to a decision of the Punjab and Haryana High

Court in Bhagat Singh Vs. Gurmukh Singh, , in which a learned Judge of the High Court of Punjab and Haryana has followed the Bombay

decision. The facts of the above case would show that there was a specific direction by the court to the judgment-debtor to appear in person. But

he failed to do so. In the present case, no such direction has been given by the executing court to the 1st judgment-debtor to be present in the

court.

5. The learned Counsel appearing on behalf of the 1st judgment-debtor contended that it is not open to the Respondent to put forward the above

contention. As a reading of the impugned order would show that arrest warrant was issued not because the judgment-debtor failed to appear in

person pursuant to a notice under Order 21, Rule 37(1). By referring to various provisions of the Code of Civil Procedure, the learned Counsel

further contends that there is no merit in the contention taken by the Respondent that on receipt of a notice under Sub-rule (1) of Rule 37 it shall be

mandatory on the part of the judgment-debtor to appear in person and not through counsel. He submitted that so long as there is no specific

provision made under Sub-rule (1) for appearance of the judgment-debtor in person, the right given to a party under Order III, Rule 1 to appear

through counsel cannot be denied to the judgment debtor. He relied on decision of the Supreme Court in *Byram Pestonji Gariwala v. Union Bank*

of India and Ors. 1992 (1) S.C.C. 3, in, support of his above contention. While interpreting the words ""in writing and signed by the parties

inserted in Order 23, Rule 3 by the CPC Amendment Act of 1976, the Supreme Court held that those provisions must be construed in

consonance with the language of Order 3, Rule 1. Without an express provision directly taking away the authority of the counsel to enter into a

compromise on behalf of the party. The Supreme Court held that it is not possible to hold that legislature had wanted to fundamentally alter the

position of the counsel as traditionally understood in the system of law and practice followed in India. The learned Counsel further pointed out that

a learned Judge of this Court has taken the view in C.R.P. 2246/91 that personal presence of the judgment-debtor is not mandatory on receipt of

a notice under Sub-rule (1) of Rule 37. A copy of the judgment was made available by the learned Counsel after this C.R.P. was heard and

reserved for judgment. It is seen that in the above decision this Court has refused to follow the decision of the Bombay High Court referred earlier.

6. I am in respectful agreement with the view taken by the learned Single Judge in C.R.P. No. 2246/91. A reference to various provisions of the

CPC and the Forms prescribed thereunder can take one only to such a conclusion. Order 3, Rule 1 provides that any appearance, application or

act in or to any Court, required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly

provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by a pleader (appearing,

applying or acting, as the case may be), on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person. The above would show that unless it is expressly

provided otherwise by law, a party can be represented in a proceeding through a counsel. Of course, it is open to the court to issue an order

directing the party to be present in person (such a direction was seen given in the case reported in Bhagat Singh Vs. Gurmukh Singh, . Then the

next question to be examined is whether Sub-rule (1) of Rule 37 of Order 21 specifically provides that a party who receives notice under Sub-rule

(1) of Rule 37 shall appear before the court in person. A plain reading of the rule would not help to give the rule such an interpretation. But the

learned Counsel appearing on behalf of the Respondent compared the form of the notice to be issued under Order 21, Rule 37 as given in

Schedule No. 12 with Form No. 1 in Appendix B relating to notice to be issued in Order 5, Rules 1, 5 and submitted that the words ""by a

pleader"" are missing in the form of notice to be issued under Rule 37(1) of Order 21.

7. The learned Counsel appearing on behalf of the 1st Petitioner, on the other hand, pointed out the wording of Form No. 3 in Appendix B, a

notice to be issued under Order 5, Rule 3 and pointed out that in the above notice it is specifically mentioned that the party shall be present in

person. So long as such specific provision is missing in Form No. 12, which is the Form of Notice to be issued under Sub-rule (1) of Rule 37,

there is no merit in the contention taken by the Respondent that when notice is issued under Rule 37(1) presence of party in person is mandatory.

The above contention raised on behalf of the 1st revision Petitioner is liable to be accepted.

8. The learned Judge of the Bombay High Court, in Madhusudtin v. Tritnbak AIR 1961 Bom 22 has held that in lieu of issue of warrant under

Sub-rule (1) of Rule 37, the court has power to direct issue of notice and in answer to such notice the judgment-debtor must appear in court in

person and his appearance through a counsel is not enough. With great respect to the learned Judge, I am constrained to disagree with the above

view. Sub-rule (1) of Rule 37 cannot be given a meaning that it is mandatory for the party to be present in court in person pursuant to a notice

issued under Sub-rule (1) of Rule 37. In view of the above, contention raised by the Respondent that the 1st Petitioner was liable to be arrested

for the reason that he appeared only through counsel and not in person pursuant to receipt of a notice under Order 21, Rule 37(1) of CPC is only to be rejected.

9. As far as the 2nd Petitioner is concerned, he has not appeared either in person or through counsel pursuant to receipt of notice under Sub-rule

(1) of Rule 37 of Order 21. Sub-rule (2) of Rule 37 provides that where appearance is not made in obedience to the notice, the Court shall, if the

decree-holder so requires, issue a warrant for arrest of the judgment-debtor. The impugned order does not show that warrant was issued in

exercise of the power given under Sub-rule (2) of Rule 37. There is no finding that on the basis of the evidence, the court was prima facie

convinced that the conditions in the proviso to Section 51 of the CPC are satisfied in order to issue a warrant against the 2nd revision Petitioner.

As a matter of fact, there is no discussion regarding the case of the 2nd revision Petitioner available in the impugned order.

10. In the result, the impugned order is set aside and the court below is directed to conduct fresh enquiry in the case of the 1st revision Petitioner

as contemplated by Rule 40 of Order 21 of Code of Civil Procedure. The court below will also consider whether an arrest warrant is liable to be

issued against the 2nd revision Petitioner in the light of the provisions contained u/s 51 and Order 21, Rule 37 of the CPC and pass appropriate

orders.

In the result, the Civil Revision Petition is allowed to the above extent.