

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOMAS P.JOSEPH

THURSDAY, THE 28TH DAY OF FEBRUARY 2013/9TH PHALGUNA 1934

CRP.No. 88 of 2013 (E)

[AGAINST THE ORDER DTD. 06/02/2013 IN E.P.NO.61/2010 IN C.S.NO.30/2005
(IN THE COURT OF CIVIL JUDGE, SENIOR DIVISION, NASHIK) OF THE
PRINCIPAL SUB COURT,ERNAKULAM]

REVISION PETITIONER/JUDGMENT DEBTOR:

SUBRAMANIAN POTTY @ C.R.S.POTTY, AGED 55 YEARS,
S/O RAMACHANDRAN POTTY HOUSE NO X/518,
GOKULAM, OPP. VHS, SEA PORT- AIRPORT ROAD, IRUMBANAM,
THRUPUNITHURA, ERNAKULAM DISTRICT.

BY ADVS.SRI.BABU KARUKAPADATH,
SMT.M.A.VAHEEDA BABU,
SRI.JAGAN GEORGE,
SRI.K.A.NOUSHAD,
SRI.P.G.PRAMOD,
SRI.KANDAMPULLY RAHUL.

RESPONDENT/RESPONDENT/DECREE HOLDER:

AUTOCOP INDIA PVT. LTD.,
HAVING ITS REGISTERED OFFICE AT -
MUHAMMEDBHAI ESUFALI COMPOUND,
OLD AGRA ROAD, OPP. KALIKFA MANDIR, NASHIK,
MUMBAI- 400 058.

BY ADV. SRI.SAJI VARGHESE KAKKATTUMATTATHIL(CAVEATOR).

THIS CIVIL REVISION PETITION HAVING COME UP FOR ADMISSION
ON 28-02-2013, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

Prv.

THOMAS P. JOSEPH, J.
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Civil Revision Petition No.88 of 2013
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Dated this the 28th day of February, 2013

O R D E R

It is said that the difficulty of an Indian litigant starts in execution. Without much labour respondent was able to obtain a decree for recovery of money from petitioner, in C.S. No. 30 of 2005 of the Civil Judge's court, Senior Division, Nashik. Since petitioner is either residing or running business within the local limits of Sub Court, Ernakulam, decree certificate was transferred to this court for execution. Respondent filed E.P. No. 61 of 2010. Respondent resorted to various modes for realisation of the amount and ultimately, sought personal execution against petitioner claiming that in spite of having sufficient means petitioner has not discharged liability under the decree and hence petitioner may be detained in the civil prison. Petitioner contended that he has not sufficient means. Executing court came to the conclusion that petitioner has sufficient means but has neglected/refused to discharge liability and ordered warrant of arrest to the petitioner for his detention in civil prison. That order is under challenge.

2. Learned counsel for petitioner has contended that

Exts.B1 to B10 series and Exts. X1 to X5 show that petitioner is not having sufficient means either to discharge the whole or a substantial portion of the decree amount which now has swelled to Rs.95 lakhs. According to the learned counsel, there is nothing on record to satisfy requirements of Sec. 51, proviso (b) of the Code of Civil Procedure (for short "the Code") and in the circumstances, executing court was not right in issuing warrant of arrest to the petitioner. Reliance is placed on the decision in **Jolly George Varghese V. Bank of Cochin** (1980 KLT 375), **D. Viswanathan and another V. The Karnataka Bank Ltd.** (AIR 1988 KER 274) and **Jayadev Singh A.K. V. A.A. Majeeth (2010 (2) KHC 730** (paragraph 4)).

3. A further contention learned counsel has advanced is that though petitioner had contended that the person who was signed the execution petition and gave evidence as PW.1 were not competent to do so, executing court has not answered the said contention.

4. Learned counsel for respondent has argued that respondent was represented in the suit by its authorised signatory officer, Sri. Niraj Sharad Jakagdar who was filed the

execution petition. It is argued that PW.1 who has given evidence is an officer of the respondent competent and capable of giving evidence on its behalf. Referring to the finding of the executing court regarding means, learned counsel contends that evidence is sufficient to show that petitioner has sufficient means. Learned counsel has also referred me to the various proceeding respondent had taken for realisation of amount in execution of the decree and in particular, affidavit of authorised officer of the respondent in support of E.A. No. 131 of 2011.

5. Under the proviso (b) of Sec.51 of the Code it has to be shown that judgment debtor has, or since the date of the decree had means to pay the amount of decree or some substantial part thereof and refuses and neglects or has refused or neglected to pay amount due under the decree.

6. Representative of the respondent has given evidence as Pw.1 and stated about means of petitioner. He referred to the landed properties and other movables belonging to the petitioner. Respondent gave contra evidence as PW.1 and proved Ext.B1 to B9 and Exts. X1 to X5.

7. Though, PW.1 stated about other movables and other

immovable properties belonging to the petitioner, he was not able to substantiate the claim and that claim of the respondent is found against by the executing court also.

8. It is however seen from the affidavit of the authorised representative of respondent in support of E.A No. 131 of 2011 that there was a request to attach two vehicles allegedly belonging to the petitioner and an attempt was made by the Amin appointed by the executing court for the said purpose. In the affidavit the authorised representative of respondent states that on 11.01.2011 petitioner had refused to sign S.A. and T.A. served by the Amin appointed by the executing court and absconded on the way while proceeding with Amin to the executing court on 11.01.2011. The deponent also states that report of the Amin is entirely true. He further states that the petitioner instead of accompanying the Amin to the court absconded in a car bearing No.KL 35B - 1315.

9. So far Exts.B1 to B9 and X1 to X5 is concerned, it is claimed that though petitioner is engaged in a whole sale and retail business (as admitted by PW.1) the business was running at a loss except during 2005 – 2006 and 2006 – 2007. According

to the petitioner, he was able to make a marginal profit of around Rs.7,000/- during 2005 – 2006 and around Rs. 1 Lakh in 2006 – 2007 (yearly). The executing court has opined that it is difficult to believe the version of petitioner that from 2005 onwards, he is running at a loss, at the same time, he is continuing the business. A further observation executing court has made is that evidence on record shows that petitioner is engaged in business having turn over of lakhs of rupees and in the circumstances, contention that he has no sufficient means to discharge liability or even substantial portion of it cannot be accepted.

10. In **Jolly George Varghese V. Bank of Cochin** (1980 KLT 375, the Supreme Court has referred the circumstances in which a judgment debtor could be arrested under Sec.51 of the Code. In paragraph 11, it is observed that the words which hurt are “ or has had since the date of the decree, the means to pay the amount of the decree” which implied superficially read that if at any time after passing of a decree the judgment debtor had come to some resources but not discharged the decree, he could be detained in prison even though at that later point of time he

was found to be penniless. Reference is also made to Article 11 of the Covenant and Article 21 of the Constitution of India. It is held that there must be some element of bad faith or beyond mere indifference, to say some deliberate or reculant disposition in the past or alternatively current means to pay the decree or a substantial part of it and that provision emphasis the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of obligation under the decree. In **D Viswanathan and another V. The Karnataka Bank Ltd.** (supra) it is held that the mere fact that judgment debtor is shown to have some business does not mean that the business is profitable. The decree holder has to prove circumstances which enable him to get a warrant of arrest. In **Jayadev Singh A.K. V. M.A. Majeed** (2010(2) KHC 730 (paragrpah 4)) was a case of warrant of arrest issued to the Managing Director of a company. This court held that in the absence of appropriate evidence there could be no presumption or inference that a Managing Director of a company has sufficient means to discharge the decree debt.

11. This court in **Kuppuswamy V. P. G.**

Menon (1992(2) KLT 203) referring to various other decisions has held that it is not necessary that judgment debtor has liquid cash “in presenti” and in spite of that, has refused or neglected to pay the decree amount or substantial portion of the decree amount to attract Sec.51 of the Code. It is held that it is open to the executing court on the materials placed before it to draw inference as regards statutory finding required by the section. If there is prima facie materials on record about means of judgment debtor, it is for the judgment debtor to rebut it. There, referring to the evidence that judgment debtor has right over a house or other property it was held that in such a situation it is possible to infer that judgment debtor is able to raise sufficient funds by encumbering or selling the property.

12. It is not essential for the decree holder to give strict proof that there was dishonest transfer, concealment etc. as stated in the proviso to Sec.51 of the Code. These are the matters which are within the power of the executing court to infer from proved circumstances. The expression “means” does not mean liquid cash in presenti but only means 'realisable assets'. It is not correct to say that the word “means” occurring

in Clause (b) of the proviso to Sec.51 of the Code should be taken as equivalent to liquid cash. “means” employed in clause (b) of the proviso to Sec.51 of the Code only means realisable assets and where judgment debtor has got sufficient assets from which necessary funds can be realised, it is open to the court to presume the statutory finding required by the proviso to Sec.51 of the Code.

13. Evidence shows and it is also not disputed that petitioner was engaged as sole agent of the respondent for distribution and sale of their products in the State of Kerala. Even in the proof affidavit, DW.1 has stated in paragraph 2 that at least during 2005 - 2006 and 2006 - 2007, he made 'marginal profits' though according to him, that was not sufficient to meet his day-to-day expenses. In paragraph 4, petitioner states that sales turnover during the subsequent years (after 2007-2008) was less than Rs.40 Lakhs. But no audit reports were required to be submitted to the Sales Tax Department. I must also notice various documents produced by the petitioner showing that he was engaged in business having turnover of lakhs of rupees. For eg., in Ext.B1 which is the audit report under Sec.42 of the

Kerals Value Added Tax Act (for the year 2005 – 2006) it is stated that the amount collected by way of VAT from registered dealers is Rs. 74,72,010.13 and that inter state purchase amounted to Rs.3,54,790/-. The net purchase was for Rs.78,26,800.13 and the gross profit is stated as Rs.1,28,085.48. Ext.B2 is a similar audit report for the year ending on 31.03.2007. There also, similar accounts are given. The gross profit is stated as Rs.10,58,513.01. Thus, evidence on record is sufficient to show that petitioner was and is engaged in business having turnover of lakhs of rupees.

14. At the same time, I must also notice when at a time the Amin attempted to attach movables of petitioner in his shop, what was available there were only few pieces of furniture !

15. It is relevant to note from the evidence of petitioner as DW.1 that according to him until 2007 he had 10 branches in various parts of the State and in the year, 2007 in the head office alone there were 18 employees. Total number of employees in his establishment (including various branches) even according to the petitioner was 50. DW.1 of course stated that he stopped branches in the year, 2007. I must notice that

the decree was passed in this case on 11.01.2006. In other words at the time the decree was passed, petitioner was having apart from his head office, 10 branch offices also and even as per his version, there were about 50 employees working under him. Version of petitioner that he then had no means is difficult to be accepted. It was in connection with his business that he acquired liability and the court passed a decree for recovery of the amount. May be, in the various documents he has produced he is shown to be not having any profit. But I must also notice that in spite of not having any profit at all (allegedly), petitioner is continuing with his business having turnover of lakhs of rupees.

16. Learned counsel for petitioner would argue that notwithstanding the loss petitioner is suffering, it is his obligation to strive hard under Article 51(A) of the Constitution. counsel, petitioner is striving hard to come out of his financial Evidence on record is sufficient to show that petitioner is possessed of realisable assets. Then it is for petitioner to discharge his liability of the respondent. If that is not done, it is open to the court to infer statutory findings required as per

proviso to Sec.51 of the Code as done by the executing court. I find no reason to interfere with the order under challenge.

Civil revision fails and it is accordingly dismissed.

Sd/-
THOMAS P.JOSEPH,
JUDGE

smv

//True copy//

P.A. To Judge