Ch. Harpal Singh And Ors. vs Lala Hira Lal on 25 November, 1954

Equivalent citations: AIR1955ALL402, AIR 1955 ALLAHABAD 402

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Raghubar Dayal, J.

1. This is an appeal by the judgment-debtor against the order rejecting his objection to the decree-holder's application for execution of the decree by his arrest.

2. The decree-holder applied on 29-11-1950 for the execution of his decree for over Rs. 6,000/-by the arrest of the judgment-debtor, mentioning in the application that he had already realised Rs. 1,574/6/-. On this application notice was ordered to be issued to the judgment-debtor.

When the judgment-debtor appeared in court, he put in an application stating various reasons why he should not be arrested in execution of the decree. He was examined on his behalf and stated on oath that he had no intention not to pay the decree-holder. He was cross-examined by the decree-holder and it came out during cross-examination that he had sold certain property to the co-operative societies under two sale deeds, one for Rs. 2500/- and another for Rs. 4,000/- and that out of this amount, which the got for the sale of the property, he did not pay anything to the decree-holder whose decree was without interest.

Thereafter, the learned Civil Judge ordered his arrest holding that it appeared from his not paying a single shell to the decree-holder out of the sale-consideration realised by him that he had made wilful default in payment of the decretal money.

3. It has been urged for the appellant that this order is bad in law in view of the provisions of Section 51, C. P. C., and in view of no opportunity being given to the judgment-debtor to explain how he had utilised the sale consideration he had received. We agree with the contention for the appellant.

4. Section 51, C. P. C. provides that one mode of the execution of the decree is by arrest and detention in prison and the proviso to the section is:

> "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 pare 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."

This proviso was added in 1936 by Section 2, Code of Civil Procedure (Amendment) Act, 1936.

5. The same Act made certain alterations in Order 21, Rule 37 and 40. Under Rule 37 it made it incumbent on the court to issue a notice calling upon the judgment-debtor to appear before the court and show cause why he should not be committed to the civil prison instead of issuing a warrant for his arrest. Prior to this amendment it was discretionary with the court either to issue a warrant of arrest at once or to issue a notice.

The other amendment made in this rule was the insertion of the proviso to the effect that such a notice would not be necessary if the court was satisfied by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the court.

It would be seen that the issue of the notice can be dispensed with only when the court would be justified in ordering the arrest of the judgment-debtor in view of Sub-clause (i) to Clause (a) to the proviso of Section 51. Notice has to be issued to the judgment-debtor whenever the grounds for the arrest of the judgment-debtor would be those mentioned in Sub-clause (ii) to Clause (a) to the proviso of Section 51, or Sub-clause (b) and (c) to the proviso of Section 51.

6. The amendment in Rule 40 led to a different procedure at the hearing of the application when the judgment-debtor appeared in compliance with the notice issued to him.

Sub-rule (1) of Rule 40 is:

> "When a judgment-debtor appears before the court in obedience to a notice issued under Rule 37, or is brought before the court after being arrested in execution of a decree for the payment of money, the court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison."

7. It appears to us that the proceedings in connection with this execution application for execution by arrest of the judgment-debtor had been against the provisions of Order 21, Rule 37 and 40 read with Section 51, Civil P. C. Before the court can issue a warrant of arrest or a notice to the judgment-debtor under Rule 37, Order 21, it has to see that the judgment-debtor is liable to arrest in pursuance of the application for execution. This means that the nature of the decree should be such that it can be executed by the arrest of the judgment-debtor and that such circumstances exist that an order of arrest can be made against the judgment-debtor, in case the court was satisfied of those circumstances. Such circumstances are what are mentioned in Clauses (a) to (c) to proviso to Section 51. Unless those circumstances exist the judgment-debtor cannot be ordered to be arrested. Therefore, the existence of such a circumstance becomes one of the conditions to govern the liability of the judgment-debtor to arrest. This necessarily leads to the conclusion that the existence of such a circumstance should be alleged either in the execution application itself or in a separate application or affidavit which should accompany the usual tabular execution application. Unless such a circumstance is alleged, the court cannot think of it, and in the absence of it the court cannot take action under Order 21, Rule 37 or issue notice to the judgment-debtor why he should not be arrested. In this view of the matter the application as presented did not justify the issue of the notice to the judgment-debtor to show cause why he should not be arrested.

8. The procedure to be followed, when the judgment-debtor appears in court, should be according to what is laid down in Rule 40, Order 21, C. P. C. The judgment-debtor may or may not file any written reply. It is for the decree-holder to lead his evidence in the presence of the judgment-debtor. Such, evidence should be in support of his application for execution and should have reference to the grounds which, according to the decree-holder, would justify the arrest of the judgment-debtor in execution of the decree, and which should be one of the grounds mentioned in Clauses (a) to (c) to proviso to Section 51. It is when the decree-holder has led 'prima facie' evidence in support of his application that the judgment-debtor has to be given an opportunity of showing cause why he should not be committed to the civil prison.

In the present case the decree-holder led no evidence. The learned Civil Judge does not appear to have called upon the decree-holder to lead evidence as required by Order 21, Rule 40, C. P. C. He appears to have examined the judgment-debtor either of his own motion or at the desire of the judgment-debtor, and it was in cross-examination of the judgment-debtor that this fact was elicited that he had sold away some of his property for Rs. 6,000/- and had not paid anything to the decree-holder. The decree-holder did not pursue the matter further and did not ask the judgment-debtor as to why he did not pay the decree-holder or what he did with that money or whether that money or substantial part of it was still with him. In other words, the judgment-debtor was not given an opportunity either by the decree-holder in cross-examination or by the court after

this damaging circumstance had come on the record as to why in view of that circumstance he should not be commuted to civil prison. It is true that if the learned counsel for the judgment-debtor had been vigilant enough he could have clarified the position, but it was not necessary for him to do so in view of the requirements of law.

If there was nothing on the record which would justify an order against the judgment-debtor for the clarification of this point. It was for the decree-holder to get such facts on the record either by his own evidence or by cross-examining the judgment-debtor or his witnesses as would lead to the satisfaction of the court on one of the points mentioned in Clauses (a) to (c) to proviso to Section 51. Failure of the decree-holder to do so cannot go against the judgment-debtor.

9. Mere non-payment to the decree-holder when the judgment-debtor came into possession of means subsequent to the date of the decree will not always be sufficient for coming to the conclusion that the judgment-debtor refused or neglected to pay the decree-holder. Refusal implies that a request was made to the judgment-debtor at the time when he had the means to pay and yet the judgment-debtor did not pay and declined to make any payment. There is nothing on the record to suggest that any such request was made when the judgment-debtor had that money with him and that the judgment-debtor refused to pay the decree-holder. Negligence to pay also connotes that when the judgment-debtor could have paid he just omitted to pay due to his negligence or carelessness. If the judgment-debtor had other claims to satisfy or other more urgent necessities to meet and spend the money on such purposes, it cannot be said that he neglected to pay the decree-holder. In the absence of evidence which could have a bearing on these considerations the court below could not have felt satisfied that the judgment-debtor had refused or neglected to pay the decree-holder's amount within the meaning of Clause (b) to the proviso to Section 51, C. P. C. The learned Civil Judge does not record such a finding. He simply noted that the judgment-debtor had been in possession of money and did not pay the decree-holder and that, therefore, he committed wilful default (sic) on the part of the judgment-debtor. This is not what would justify the arrest in view of Clause (b) to proviso to Section 51, Civil P. C. In view of the above, we are of opinion that the order of the court below is not proper and should be set aside.

10. The next question is as to what order should be passed in this appeal. Considering that the decree is an old one, that this execution application was presented in 1950 and that it might mean another series of attempts to serve the judgment-debtor of the notice of any fresh application for execution, we consider it proper that we should remand the case to the court below for proceeding further with the matter subsequent to the stage of the appearance of the judgments-debtor in person.

The creditor will put in an application stating therein the reasons on the basis of which he considers it justified that the judgment-debtor should be arrested in execution of the decree. We fix 24-1-1955 to be the date or the appearance of the parties in the court below. The learned counsel for the appellant-judgment debtor and for the decree-holder have agreed to inform their clients of this date of hearing.

We, therefore, allow the appeal, set aside the order of the court below and remand the case to the court below for further proceedings, as indicated above. We further order the respondent to pay the cost of the appeal to the judgment-debtor appellants.