

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 20<sup>TH</sup> DAY OF JANUARY 2022 / 30TH POUSHA, 1943

OP(C) NO. 122 OF 2022

AGAINST THE ORDER/JUDGMENT IN E.P.NO.65/2019 IN ARB OP 281/2016 ON THE  
FILES OF THE ADDITIONAL DISTRICT AND SESSIONS COURT, KALPETTA

PETITIONER/2ND JUDGMENT DEBTOR:

DILEEPKUMAR  
AGED 56 YEARS  
S/O. SANKARAN, PAYATUKALAYIL HOUSE,  
VELIYAMBAM P.O, PULPALLY, WAYANAD 673 579  
BY ADVS.  
NAVANEETH.N.NATH  
VISHNU DILEEP  
SANEL CHERIAN

RESPONDENT/DECREE HOLDER/FIRST JUDGMENT DEBTOR:

- 1 SRIRAM TRANSPORT FINANCE CO. LTD.  
1ST FLOOR, MYMOON BUILDING, NEAR LIC OFFICE,  
SULTHAN BATHERY,  
REPRESENTED BY ITS POWER OF ATTORNEY HOLDER  
SRI MADHUSOODANAN, S/O. PADMANABHAN NAIR,  
AGED 45 YEARS, RESIDING AT SREEPADAM,  
THALAKULATHOOR, CALICUT 673 303
- 2 SATHEESH P.R  
AGED 47 YEARS  
S/O. RAGHAVAN, PANNAPPURATH HOUSE,  
KOLAMADIKUTTY POST, PULPALLY 673 579, WAYANAD

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON 20.01.2022, THE  
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**CR**

**JUDGMENT**

Dated this the 20<sup>th</sup> day of January, 2022

The second judgment debtor in E.P.No.65/2019 in Arb.OP No. 281/2016 has filed this Original Petition under Article 227 of the Constitution of India.

2. It is submitted by the learned counsel for the petitioner that though the second judgment debtor filed an objection, raising specific contention that he had no means to pay the decree debt, without conducting an enquiry under Order XXI Rule 40 of the Civil Procedure Code (hereinafter refers to as 'CPC') warrant of arrest was issued.

3. I have perused the order and the objection filed by the judgment debtor in tune with the submission made by the learned counsel for petitioner/second judgment debtor. It appears that though many untenable contentions raised in the objection, a contention disputing means of the petitioner has been raised in the objection. The learned District Judge not made enquiry to find the genuineness of this contention before issuing warrant.

4. At this juncture, I am inclined to address a relevant question viz; what is the procedure to be followed before issuance of arrest warrant in execution of a decree for payment of money. In this back drop, it is pertinent to refer Order XXI Rule 37 as well as Order XXI Rule 40 of CPC dealing with two stages of arrest of a judgment debtor. Order XXI Rule 37 is dealing with arrest and detention of a judgment debtor in civil prison when an application is filed for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of application. Rule 37 stipulates that the Court [shall], instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

5. Proviso to Order XXI Rule 37 stipulates that such notice shall not be necessary if the Court is satisfied, by affidavit or otherwise, that, with the object or effect of delaying the execution of the decree, judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.

6. Further Order XXI Rule 37 (2) provides that where appearance is not made in obedience to the notice, the Court shall, the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

7. Thus, it appears that as per proviso to Order XXI Rule 37, a warrant of arrest can be issued without issuing Rule 37(1) notice, if the Court is 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. Further when the appearance is not made by the judgment debtor in obedience to Rule 37, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

8. Order XXI Rule 40 dealing with two situations. First situation is when the judgment-debtor appears on getting notice under Order XXI Rule 37; and the second situation is when the judgment-debtor is brought before the court after being arrested in execution of a decree for the payment of money before proving his means. In this connection, it has to be observed that the judgment-debtor is not entitled to further opportunity after the

Court had entered a finding that he has sufficient means and has willfully neglected to pay the decree-debt. A conjoint reading of Rule 37 and Rule 40 of Order XXI and Section 51 show that the Code envisages only one enquiry regarding the judgment-debtor's liability for detention in prison in execution of a money decree and enquiry under Rule 40 is not necessary if the warrant is issued after finding means pursuant to the first situation provided under Rule 40(1) of Order XXI. Thus, Order XXI Rule 40 provides that when the judgment-debtor appears on notice issued under Rule 37, or is brought before Court after being arrested. 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 in civil prison.

9. Order XXI Rule 40(2) provides that pending the conclusion of the inquiry under sub-rule(1), the Court shall release the judgment-debtor on his furnishing security to the satisfaction of the Court for his appearance when required and if the judgment-debtor fails to furnish the security ordered, the Court may order the judgment-debtor to be detained in the custody of

an officer of the Court on the decree-holder depositing in Court the necessary amounts payable to the judgment-debtor and the officer of the Court in connection with such detention.

10. Thereafter, on conclusion of the enquiry under sub-rule(1), subject to the provisions of Section 51 and provision of the Code make an order for the detention of the judgment-debtor to civil prison, and shall in that event, caused him to be arrested if he is not already under arrest.

11. In this case, the petitioner herein, who is the second judgment-debtor appeared before the Court on getting notice under Order XXI Rule 37 of the CPC and filed objection stating that he had no means to pay the decree-debt. In such contingency, it is mandatory for the Court to conduct an enquiry under Order XXI Rule 40 of CPC before issuing warrant of arrest against him.

In view of the matter, the order is *per se* illegal and therefore, the said order requires interference being perverse, arbitrary and illegal. Therefore, the order impugned is set aside. The learned District Judge is directed to consider the objection filed by the second judgment debtor and conduct enquiry regarding the means as provided under Order XXI Rule 40 of CPC and pass

orders based on the said finding, afresh. The said exercise shall be done within a period of two months from the date of production or receipt of a copy of this judgment.

With the above directions, this Original Petition (Civil) stands disposed of.

Registry is directed to forward a copy of this judgment to the District Court, Kalpetta, within seven days, for information and compliance.

**Sd/-**  
**A. BADHARUDEEN**  
**JUDGE**

nkr

APPENDIX OF OP(C) 122/2022

PETITIONER EXHIBITS

- Exhibit P1                    TRUE COPY OF EXECUTION PETITION FILED BY THE RESPONDENT AS E.P NO. 65/2019 IN ARB OP 281/2016 BEFORE THE HON'BLE ADDITIONAL DISTRICT AND SESSIONS JUDGE -I AT KALPETTA WAYANAD.
- Exhibit P2                    TRUE COPY OF THE OBJECTION FILED BY THE 2ND JUDGMENT DEBTOR IN EP NO. 65/2019 DATED 04-12-2021
- Exhibit P3                    CERTIFIED COPY OF THE PROCEEDINGS DATED 10.01.2022 OF THE HON'BLE ADDITIONAL DISTRICT JUDGE, KALPETTA