

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

THURSDAY, THE 19TH DAY OF NOVEMBER 2015/28TH KARTHIKA, 1937

OP(C).No. 1330 of 2015 (O)

EP 106/2013 OF IIIRD ADDITIONAL DISTRICT COURT, KOZHIKODE

PETITIONER(S)/JUDGMENT DEBTOR:

**NIZAR, AGED 36 YEARS,
S/O. ABDUL RAHMAN, 125A, TAMMA NILAM PARAMBA,
KALLAI, KOZHIKODE DISTRICT.**

**BY ADVS.SRI.VINOD SINGH CHERIYAN
SRI.R.SUDHISH**

RESPONDENT(S)/DECREE HOLDER:

**M/S.INDUS BANK LIMITED,
REP. BY POWER OF ATTORNEY HOLDER, SANJAY P,
LEGAL EXECUTIVE INUDS BANK, Y.M.C.A. CROSS ROAD,
KOZHIKODE 673001.**

**BY ADVS. SRI.G.HARIHARAN
SRI.PRAVEEN.H.**

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 19-11-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:**

PJ

APPENDIX

PETITIONER(S)' EXHIBITS

- EXHIBIT P1: COPY OF THE EXECUTION EP NO.106 OF 2013 IN NCVS/052 L/09 FILED BEFORE THE DISTRICT COURT, IIIRD ADDITIONAL (WAKF), KOZHIKODE DATED 11.3.2013
- EXHIBIT P2: COPY OF THE COUNTER STATEMENT FILED BY THE PETITIONER/JUDGMENT DEBTOR IN EP NO.106 OF 2013 IN NCVS /052 L/09 FILED BEFORE THE DISTRICT COURT, IIIRD ADDITIONAL (WAKF), KOZHIKODE DATED 24.11.2014
- EXHIBIT P3: COPY OF THE AFFIDAVIT IN SUPPORT OF THE PETITION, EA NO.107 IF 2014 IN EP NO. 106 OF 2013 IN NCVS/052 L/09 FILED BEFORE THE DISTRICT COURT, IIIRD ADDITIONAL (WAKF), KOZHIKODE DATED 24.11.2014
- EXHIBIT P4: COPY OF THE COUNTER STATEMENT FILED BY THE RESPONDENT / DECREE HOLDER IN EA NO. 107 OF 2014 IN EP NO. 106 OF 2013 IN NCVS/052 L/09 FILED BEFORE THE DISTRICT COURT, IIIRD ADDITIONAL (WAKF), KOZHIKODE DATED 15.1.2015
- EXHIBIT P5: COPY OF THE AFFIDAVIT IN SUPPORT OF THE PETITION EA NO.108 OF 2014 IN EP NO.106 OF 2013 IN NCVS/052 L/09 FILED BEFORE THE DISTRICT COURT, IIIRD ADDITIONAL (WAKF), KOZHIKODE DATED 15.1.2015
- EXHIBIT P6: COPY OF THE COUNTER STATEMENT FILED BY THE RESPONDENT / DECREE HOLDER IN EA NO. 108 OF 2014 IN EP NO. 106 OF 2013 IN NCVS/052 L/09 FILED BEFORE THE DISTRICT COURT, IIIRD ADDITIONAL (WAKF), KOZHIKODE DATED 15.1.2015
- EXHIBIT P7: COPY OF THE AFFIDAVIT IN SUPPORT OF THE PETITION EA NO. 109 OF 2014 IN EP NO. 106 OF 2013 IN NCVS/052 L/09 FILED BEFORE THE DISTRICT COURT, IIIRD ADDITIONAL (WAKF), KOZHIKODE DATED 24.11.2014
- EXHIBIT P8: COPY OF THE ORDER IN EA NO.107 OF 2014 IN EP NO.106 OF 2013 IN NCVS/052 L/09 FILED BEFORE THE DISTRICT COURT, IIIRD ADDITIONAL (WAKF), KOZHIKODE DATED 28.3.2015
- EXHIBIT P9: COPY OF THE ORDER IN EA NO.108 OF 2014 IN EP NO. 106 OF 2013 IN IN NCVS/052 L/09 OF THE IIIRD ADDITIONAL DISTRICT COURT/(WAKF) TRIBUNAL, KOZHIKODE DATED 28.3.2015
- EXHIBIT P10: COPY OF THE ORDER IN EA NO.109 OF 2014 IN EP NO.106 OF 2013 IN NCVS /0562 L/09 OF THE IIIRD ADDITIONAL DISTRICT COURT/WAKF TRIBUNAL, KOZHIKODE DATED 28.3.2015

..2..

OP(C).No. 1330 of 2015 (O)

EXHIBIT P11: COPY OF THE ARBITRATION AWARD OF ARBITRATOR, CHENNAI IN
NCVS /052 L/09 DATED 19.4.2010

RESPONDENT(S)' EXHIBITS

NIL

/ TRUE COPY /

P.S. TO JUDGE

PJ

K.ABRAHAM MATHEW J.

O.P.(C) No.1330 of 2015

Dated this the 19th day of November, 2015

JUDGMENT

The respondent bank which has obtained an award for money initiated proceedings under Order 21 C.P.C against the petitioner-debtor to realise the amount. The learned District Judge issued him a notice under Order 21 Rule 37 C.P.C. He did not appear. The court set him ex parte and ordered that he be arrested and produced before it. The petitioner filed Ext P5 application to set aside the ex parte order, Ext P3 application to condone the delay in filing it and Ext P2 objection to the notice issued under Rule 37 contending that he has no means to pay the decree debt. The learned District Judge held that Section 5 of the Limitation Act is not applicable to execution proceedings and accordingly by Exts P8 and P9 orders he dismissed both applications. This is challenged.

2. Heard.

3. If a judgment debtor fails to appear in person or through counsel in response to the notice issued under Order 21 Rule 37 C.P.C, he cannot be set ex parte. No such procedure is contemplated by C.P.C.

The court can set a party ex parte only if it can proceed further in his absence. Rule 37(2) prescribes that when a judgment debtor fails to respond to the notice issued under Rule 37(1) the court shall issue an arrest warrant against him, which is only to secure his presence for the enquiry contemplated in Rule 40(1) and not for non-payment of the decree debt. But he is at liberty to surrender before the court before he is arrested. When he is arrested and produced, or surrenders before the court, Rule 40 comes in to play. As the court has not proceeded to the stage of enquiry regarding his means to pay the debt, he has not lost his right to show cause why he should not be detained in jail for non-payment of the debt. Even if he does not show cause, he cannot be immediately ordered to be detained in jail unless the decree holder proves that he has the means to pay the debt. No means is pleaded or not, the court has to conduct an enquiry, in which the decree holder should adduce evidence to establish his allegation of the judgment debtor having the means to pay the debt. Sub Rule 2 of Rule 40 gives discretion to the court to release the latter on his furnishing security for his appearance or to detain him in the custody of an officer of the court during the pendency of the enquiry. The detention under this sub rule is

not for non payment of the debt, but only to ensure his presence during the enquiry. The enquiry contemplated in Rule 40(1) is mandatory. A bald statement in the decree holder's pleadings and evidence that the debtor has properties or income to pay the debt is not sufficient. If, on enquiry, the court reaches the conclusion that the debtor is liable to be detained for non payment of the decree debt, he shall be caused to be arrested so that he may be detained. His arrest is necessary only if he is not already under arrest. This is the procedure prescribed in Rule 40 C.P.C.

4. When the petitioner surrendered before the court and filed objection pleading no means, the District Judge should have conducted the enquiry contemplated in Rule 40. It is true that Section 5 Limitation Act is not applicable to execution proceedings. But that is irrelevant because the court could not have set him ex parte and proceeded with the execution in his absence. Exts P3 and P5 applications were unnecessary. The impugned orders are liable to be set aside. The District Judge should entertain Ext P2 objection filed by the petitioner and conduct an enquiry with regard to his means to pay the debt.

In the result, this O.P is allowed. Exts P8 and P9 orders are set aside. The learned District Judge is directed to take up Ext P2 objection and conduct an enquiry with regard to the means of the petitioner to pay the decree debt.

**K.ABRAHAM MATHEW
JUDGE**

pm