

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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CIVIL REVISION PETITION No.5605 of 2010
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ORDER:

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This civil revision petition under Section 115 of the Code of Civil Procedure, 1908 ('the Code' for short) by the petitioner/decreed holder ('DHR' for brevity) is directed against the order dated 01.10.2010 of the learned District Judge, Chittoor made in EP.No.26 of 2007 in OS.No.31 of 1999 filed under Order XXI Rules 37 and 38 of the Code requesting to commit the judgment debtor/respondent ('JDR' for brevity) to civil prison for realisation of the decree debt.

2. The relevant facts for consideration, in brief, are as follows: - 'The DHR having obtained a decree against the JDR for recovery of money in a sum of Rs.3,40,000/- with future interest at 12% per annum from 09.05.1997 till the date of realisation and costs had filed the execution petition under Order XXI Rules 37 and 38 of the Code for realisation of the said decree debt and sought arrest and detention of the JDR in the civil prison. In support of the request in the execution petition, the DHR had also filed a proof affidavit. The JDR had filed a counter and resisted the execution petition. During the course of enquiry, the DHR and a supporting witness were examined as PWs.1 and 2 and exhibits P1 to P3 (A1 to A3) were marked on the side of the DHR. The JDR was examined as RW1 and exhibits B1 to B5 were marked on his side. On merits, the learned District Judge had dismissed the EP. Therefore, the DHR is before this court.'

3. I have heard the submissions of the learned counsel for the revision petitioner/decreed holder. Though the respondent/judgment debtor is served with a notice, none appeared on his behalf. I have perused the material record.

4. Now the point for determination is:

‘Whether the DHr had made out valid and sufficient grounds for ordering the execution of the decree by arrest and detention of the JDr in the civil prison as per the procedure established by law? And, if so, whether the impugned order is liable to be set aside?’

5. POINT:

5. (a) The introductory facts are already stated supra, in detail. Order XXI of the Code contemplates the execution of a decree by ordering arrest of the judgment debtor and Section 51 of the Code lays down that the Court may, on the application of the decree holder, order execution of the decree *inter alia* by ordering arrest and detention of the judgment debtor in prison where arrest and detention is permissible. The *proviso* to the said section states that where the decree is for 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 and unless the court, for reasons to be recorded in writing, is satisfied among other things, that the judgment debtor is or has had since the date of decree the means to pay the amount of the decree or some substantial part thereof and had refused or neglected to pay the same. In an execution petition filed for arrest and detention of the judgment debtor in a civil prison, the initial onus of proof will be on the decree holder to establish that the JDr has got sufficient means to pay the amount of the decree or some substantial part thereof but has wilfully refused or neglected to pay the same with the object or effect of obstructing or delaying the execution of the decree.

5. (b) Coming to the case on hand, in the affidavit filed in support of the execution petition, the decree holder had pleaded to the following effect: - “The JDr is a Doctor. He is doing private practice. He owns a nursing home under the name and style of ‘Srilatha Nursing Home’ opposite to Venkateswara Talkies, Vellore road, Chittoor. He is getting a monthly income of Rs.50,000/-. He had leased out a portion of the building (Lahta Nursing home building) on rent and is getting rents in a sum of Rs.50,000/- per month. The JDr is owning fertile land of an extent of Ac.3.00 cents at

Keenatampalle in Yadamari mandal. He is cultivating the lands by raising sugarcane, paddy and groundnut crops and vegetables and is getting an income of Rs.75,000/- per annum. The said land is a very valuable land. He is also having Mango and coconut grove in an extent of Ac.7.00 cents near Gangadhara Nellore. The trees in the said grove are well grown up and the JDr is enjoying the usufruct of the said trees and is getting an annual income of Rs.2,00,000/- from the said garden. He is also having nursery plantation and mango and coconut trees in his landed property aforementioned and getting an income of Rs.50,000/- from the nursery and the trees in the land. The wife of the JDr is also a professional Doctor and is working in Ruby hospital, Tirupathi and is drawing a monthly salary of more than Rs.30,000/-. The son of JDr is a Software Engineer working at Australia and he is getting a salary of Rs.2,00,000/- per month. The JDr is having sufficient means but is wantonly evading to pay the decree debt. If an arrest warrant is issued against him, he would pay the decree debt."

5. (c) The case of the JDr in his counter is this: - 'The material allegations in the affidavit of the DHr are false. The JDr is aged 59 years and is suffering from Diabetes and Hyper Tension. The JDr had suffered an infection and underwent surgery for infected abscess which was drained. He is not in a position to attend to any work and he is immobile and is taking treatment as inpatient in CMC hospital, Vellore. In the month of November 2006 he had secured employment on contract basis for one year in ECH poly clinic on a monthly salary of Rs.15,000/- and the said period had expired in the month of October 2007. From the month of November 2007 onwards he is not having any job or income. From out of his salary he used to spend Rs.6,000/- on his livelihood and sustenance and medical expenses and used to pay Rs.2,000/- per month to Shriram City Union Finance, Chittoor as he had availed a loan for purchasing a motorcycle. He did not attend to the job regularly. All these facts were known to the DHr as the same were mentioned in the counter filed in EP.37 of 2006. The present EP is filed after seeking permission for simultaneous execution though an earlier EP filed for sale of immovable properties is pending. In the said EP, this JDr had

pleaded no objection for sale of 1/6th share in item no.2 of the said EP schedule property for realisation of the decree amount. Without exhausting the remedies in the said EP the present EP filed for arrest of the JDr is not maintainable. There are no merits in the application.'

5. (d) During the course of enquiry, the DHr who was examined as **PW1** had reiterated his pleaded case. He had got exhibited on his side exhibits P1 to P3 which are only prescriptions given to PW2 by the JDr. The DHr did not exhibit any documentary evidence to show that the JDr owns properties and is getting from the said properties sufficient income to discharge the decree debt in full or a substantial part thereof. In his cross examination, the DHr had admitted to the effect that having earlier filed EP.37 of 2006 he had sought permission for simultaneous execution and then filed the present EP against the JDr for his arrest. But, he had denied the suggestions that the JDr is not receiving any income from the properties shown in EP.37 of 2006 and that the JDr is not concerned with the property bearing D.No.19-563, 19-564 and 19-565 and that the JDr is not having properties other than the property shown in EP.37 of 2006. He had admitted that he had not shown the properties in EP.37 of 2006 in the present EP and that he had not filed any document to show that the JDr is having immovable properties and that the JDr is working as a Doctor in any hospital. When it was suggested to him that the term of service of the JDr as private Doctor had expired in October 2007 and that the JDr is not presently running a private clinic by name Sri Ganesh Poly Clinic and is not getting any income, he had denied the said suggestions as 'not true'. He had also denied the suggestions put to him in regard to the ill health and the treatment, which the JDr is receiving from CMC hospital, Vellore. In the affidavit of **PW2** filed in lieu of chief examination, he had specifically testified that the JDr owns a two storied building opposite to Anand Theatre in Vellore road of Chittoor and that the said building is worth more than Rs.20,00,000/- and that the JDr has leased out on rent a portion of the said building to the Armed forces to run a poly clinic for Ex-service men and that the other portion of the building was leased out to other persons and that the JDr is getting rents in a sum of

Rs.25,000/- per month and that in a portion of the said building the JDr is residing and that the JDr is a famous Doctor in the above said poly clinic and is getting a salary of Rs.15,000/- and that he is also running a private clinic near old bus stand under the name and style of Sri Ganesh poly clinic and that he had received treatment for the last 15 years from the JDr for ailments like fever, head ache and other diseases and that the JDr has issued prescriptions viz., P1 to P3 to him for the said ailments and that the JDr owns landed properties and building at Keenatampalle in an extent of Ac.4.00 cents and that he is raising crops such as sugar cane, paddy and groundnut and getting annual income of Rs.1,00,000/-. As already noted, except the prescriptions given by the JDr to the PW2 no other documents are exhibited. PW2 in his cross examination admitted that he was not present when his affidavit in lieu of chief examination was prepared and typewritten. He had denied the suggestions that the JDr does not own any properties as spoken to by him and that he is giving false evidence on the instructions of the DHr. He had admitted that exhibits P1 to P3 do not contain his name and had denied the suggestion that they are fabricated. He pleaded ignorance of the survey number of the lands of the JDr at Keenatampalle and about the JDr not getting any salary.

5. (e) Per contra, the JDr having reiterated his defence in his affidavit filed in lieu of examination in chief had exhibited exhibits B1 to B5. In his cross examination the following points were elicited: 'He holds a decree in Bachelor of Medicine. Srilatha Nursing home building was constructed by a firm by name Srilatha Nursing home of which he and his wife are partners. The ECHS poly clinic was located in the said building. He was appointed as a Doctor in the said clinic on payment of salary of Rs.15,000/- per month. The said building is a three storied building. He has no idea about the present value of the said building. His wife is working as a Professor or Assistant Professor in Government Medical College, Tirupathi. In the year 1989 a clinic by name Ganesh Poly Clinic was opened by him. When it was suggested to him that he is getting an income of Rs.50,000/- towards rent from the said three storied building, he having denied the said

suggestion had added that it is vacant as on today. He had further admitted that he is doing granites business under the name of Asha granites and that he is a working partner of the said firm; but had stated that the said Asha granites was wound up due to loss. He had denied the suggestion that the said granites business is in running condition and he is getting income from the same. He had admitted that he had purchased sites at Tirupathi in the name of Asha Granites, but, had added that those plots were sold away and had denied the suggestion that the plots were not sold away, and had stated that the lands of Asha granites are worth Rs.1 Crore as on today. He had admitted that he owns Ac.3.00 cents of land at Keenatampalle and that the said lands are under cultivation and that they are raising groundnut crops in the said land. He had denied the suggestion that he owns more than Ac.5.00 cents of lands at Keentamapelle and is getting more than Rs.1,00,000/- from the said lands; but, had further admitted that he owns a building at Keenatampalle and had pleaded ignorance of the whereabouts of his son saying that he has no contact with his son. He denied the suggestion that he is maintaining good health and that he has exhibited brought up documents to evade payment of the decree debt.'

5. (f) A careful analysis of the entire evidence including the evidence extracted would lay bare that the JDr is a person owning substantial properties. Regarding the means and capacity of the JDr it is necessary to restate the following important admissions from the evidence of JDr.

'Srilatha Nursing home building was constructed by a firm by name Srilatha Nursing home. I and my wife are the members (partners) of the said firm. An ECHS poly clinic was located in the said building. The said building is a three storied building. I have no idea about the present value of the said building. I am also doing granites business in the name of Asha granites. I am the working partner of the said firm (Witness adds that the said Asha granites is wound up due to loss). It is true that we purchased sites at Tirupathi in the name of Asha granites (witness adds that the said plots were sold away). I am owning Ac.3.00 cents of land at Keenatampalli village. The said lands are under cultivation. We are raising groundnut crops in the said land. I am owning Ac.3.00 cents of land near GD Nellore which is a mango garden.'

The admissions are the best form of proof on which the DHr can rely to show

that the JDr is a person having substantial properties and that he is having means and capacity to pay at least a substantial portion of the decree debt. The fact that the JDr, after having stated in his counter that he is not liable for arrest, had made the above admissions about the ownership of valuable immovable properties is by itself sufficient to hold that he is wilfully not paying the decree debt with the object of delaying and defeating the just debt of the DHr. In the decision in **Aluru Venkatarao v. Kodali Venkata Sri Krishna**^[1] this Court having referred to a decision in **Jolly George Varghees's case (AIR 1980 SC 470)** had observed that if the decree holder is able to produce some material or evidence regarding the source or means of the judgment debtor that may normally be sufficient to pay the decretal amount and also the status, occupation and the assets of the judgment debtor, then whether such means or source etcetera are not sufficient to pay the decretal amount being a fact especially within the knowledge of the judgment debtor, the burden of proving the same would be on the judgment debtor in view of Section 106 of the Evidence Act. On an overall consideration of the evidence on record, a safe conclusion can be arrived at that the DHr had sufficiently established the case by required standard of evidence for ordering the execution of the decree by arrest and detention of the JDr in a civil prison.

5. (g) Further, it is necessary to mention that the learned District Judge did not appreciate the facts and the evidence on record in the right perspective and had held against the DHr on the unsustainable grounds that the building was attached in an earlier EP and that the DHr had failed to establish that the JDr has got liquid cash to pay the decree debt and that the DHr having obtained attachment of valuable property in EP.37 of 2006, which is pending, had prevented the JDr from securing any money for repayment of the decree debt and that the DHr had filed the EP seeking permission for simultaneous execution and that therefore, the EP filed requesting for arrest and detention of the JDr is not genuine and that there is any amount of suspicion about the bonafides of the DHr and that therefore, the JDr is not liable for arrest. In this regard, what is to be noted is that though the building was stated to have been attached in EP.37 of 2006 the fact remains that JDr

is having, even according to his own admissions, Ac.3.00 cents of land at Keenatampalle village and Ac.3.00 cents of Mango garden near GD Nellore. Further the JDr having admitted that they have purchased sites at Tirupathi in the name of Asha granites, which is a partnership firm of which the JDr is a working partner, had stated that the plots were sold but no document was filed to show that the plots were sold or to show that the said granites business went into losses and was wound up. Therefore, in the well considered view of this court, the learned District Judge did not consider the matter involved in the execution petition in the right perspective and had erroneously dismissed the execution petition filed for the arrest of the JDr. There is one more aspect to be considered. When the DHr filed EA.63 of 2007 seeking permission for simultaneous execution and when the said petition was allowed, the JDr had then preferred an appeal before this court against the decree of the trial court and when the said appeal was at the unnumbered stage, he had obtained interim stay and had deposited an amount of Rs.3,80,836/- i.e., a part of the decree debt and the DHr has withdrawn the said amount without furnishing any security as per the orders of this court. Subsequently, the interim stay was vacated. Thus out of the amount due under the decree the DHr had already withdrawn Rs.3,80,836/- as per the orders of the court below in EA.52 of 2009. The fact that the JDr had deposited a substantial amount in one spell while obtaining interim stay also would lay bare that he has got the means and also the capacity to raise money and pay the remaining decree debt or a substantial part thereof. Viewed thus, this court finds that the DHr is entitled to the relief claimed and that the impugned order is, therefore, unsustainable both under facts and in law and is liable to be set aside.

6. In the result, the Civil Revision Petition is allowed and the impugned order dated 01.10.2010 dismissing the EP.No.26 of 2007 in OS.No.31 of 1999 is hereby set aside holding that it is a fit case to order arrest and detention of the JDr in a civil prison. However, considering the facts and circumstances of the case, the JDr is granted eight weeks time from today to deposit the entire balance amount due under the decree along with

costs of execution to the credit of the EP before the court below. And, on failure of the JDr to comply with the said direction, the court of execution shall issue a warrant of arrest against the JDr in accordance with the procedure established by law and further proceed with the execution proceedings. The execution petition stands allowed accordingly.

There shall be no order as to costs. Miscellaneous petitions pending, if any, in this CRP shall stand closed.

JUSTICE M. SEETHARAMA MURTI

6th November, 2014

Note: LR copy to be marked.

(B/o)

Vjl

[\[1\]](#) 1994 (3) ALT 538