

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

CIVIL REVISION PETITION No.5816 of 2010

ORDER:

This civil revision petition, under Section 115 of the Code of Civil Procedure, 1908 ('the Code' for short), by the petitioner/decree holder is directed against the order dated 23.07.2010 of the learned I Additional Senior Civil Judge at Visakhapatnam made in EP.No.43 of 2009 in OS.no.1335 of 2006 filed under Order XXI Rule 11 read with Rule 37 of the Code for realisation of the decree debt by ordering arrest and detention of the respondent/ judgment debtor in civil prison.

2. Heard the submissions of the learned counsel for the revision petitioner/ DHr. There is no representation for the respondent/ JDr. Perused the material record.

3. The parties shall hereinafter be referred to as the DHr and the JDr.

4. The basic facts in a nutshell are as follows: -

'The DHr obtained a decree for Rs.4,28,225/- recoverable from the JDr with subsequent interest at 6%per annum on Rs.2,50,000/- from the date of the suit, 16.10.2016, till date of realisation and for costs in a sum of Rs.14,853/-. Since the JDr failed to repay the said decree debt, the EP was filed for recovery of the said amount with interest and costs, *inter alia*, alleging that the JDr is having movable and immovable properties in and around Visakhapatnam and that the JDr is intentionally avoiding to pay the decree debt. The JDr resisted the EP, *inter alia*, contending that he is working as a Senior Assistant in Facor Company of Garividi of Vizianagaram and drawing a monthly salary of Rs.8,198/- as is evident from his salary certificate and that he has no properties and hence he is not in a position to pay the decree debt

and that the DHr can take appropriate steps for attachment of his salary and that he is not in a position to pay the entire decree debt and that he has no means to pay the decree debt and that the EP for his arrest is not maintainable and that he would make his best efforts to pay the decree debt either in instalments or by approaching his relations and friends to come to his rescue. During the course of enquiry, the DHr and the JDr were examined as PW1 and RW1. No documentary evidence was adduced on either side. On merits, the Court of execution dismissed the EP *inter alia* holding that the DHr could not establish any *mala fide* intention on the part of the JDr and also failed to make out a case for ordering arrest of the JDr. Therefore, the aggrieved DHr is before this court.'

5. 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 judgment debtor in the civil prison as per the procedure established by law? And, if so, whether the impugned order is liable to be set aside?'

6. POINT:

6. (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.

6. (b) Coming to the case on hand, in the affidavit filed in support of the execution petition, the DHr only alleged to the effect that the JDr is having movable and immovable properties in and around Visakhapatnam and reiterated the said averment in her evidence. She did not even state as to what are the properties (movable and immovable) which the JDr is having and did not produce any certified copies of documents like municipal record or revenue record from the competent authorities to show that the JDr is having house property or vacant site or landed property. On the other hand, the JDr asserted that he is not having any properties and that his only source is his salaried income, which is less than Rs.10,000/- per month.

6 (c) It is no doubt true that in an execution petition filed requesting to commit the JDr to a civil prison, the initial onus of proof will be on the DHr to establish that the JDr has got sufficient means to pay the amount due under the decree or some substantial part thereof and that he had wilfully refused or neglected to pay the same with the object or effect of obstructing or delaying the execution of the decree. The evidence that was adduced on record, in the well considered view of this Court, lays bare that the initial onus of proof, which is on the DHr, is not discharged. In the decision in Aluru Venkatarao v. Kodali Venkata Sri Krishna¹ this Court having referred to a decision in Jolly George Varghees's case (AIR 1980 SC 470) had observed that if the decree

¹ 1994 (3) ALT 538

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. The evidence on record on a careful perusal reflects that the DHr failed to establish that the JDr is having properties and sufficient means to pay the entire decree debt or a substantial portion thereof. In the facts and circumstances of the case, when the DHr is unable to produce any evidence and establish, as required under law, that the JDr is having sources or assets or means which are normally sufficient to pay the decree debt and that the JDr had wilfully refused or neglected to pay the decree debt despite having such sources or means to pay the entire decree debt or substantial part thereof, it follows that the factual and legal requirements for ordering arrest and detention of the JDr are not satisfied. In that view of the matter, this Court finds that the Court below is justified in dismissing the EP.

7. Viewed thus, this Court finds that there is no merit in the revision and that the revision petition is liable to be dismissed. The point is answered accordingly.

8. In the result, the Civil Revision Petition is dismissed. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this CRP shall stand closed.

M. SEETHARAMA MURTI, J

14th October, 2016
Vjl