

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.2524 OF 2016

ORDER:

This revision is filed under Section 115 of the Code of Civil Procedure, 1908 (for short, 'the Code') challenging the docket order dated 29.04.2016 in E.P. No.22 of 2016 in O.S. No.227 of 2013 whereby the petitioner/ Judgment Debtor was produced before the executing court after arrest, in connection with execution of decree by the trial court, thereupon the petitioner/ Judgment Debtor filed Memo expressing his intention to file insolvency petition before the competent court, thereupon, the executing court obtained self bond for Rs.1,98,000/- and directed to release the petitioner/ Judgment Debtor from arrest, accordingly released.

02. The main contention of the petitioner before this Court is that the trial court issued warrant of arrest without following procedure provided under Rule 40 of Order XXI of the Code.

03. During hearing, learned counsel for the petitioner requested to afford an opportunity to file counter and contest the matter before the executing court.

04. Undisputedly, the trial court issued warrant of arrest in execution of decree by following the procedure provided under Rule 37 of Order XXI of the Code. The main grievance of the petitioner is that no enquiry as to means of JDR/Petitioner has conducted by the trial court. On this ground alone, the order is to be modified.

05. According to Rule 40 of Order XXI of the Code, 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 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; Pending the conclusion of the inquiry under sub-rule(1) the Court may, in its discretion, order the Judgment-Debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required; Upon the conclusion of the inquiry under sub-rule (1) the Court may, subject to the provisions of Section 51 and to the other provisions of this Code, make an order for detention of the Judgment-Debtor in the civil prison and shall in that event cause him to be arrested, if he is not already under arrest, subject to affording opportunity to the Judgment Debtor satisfying the decree.

06. In the present case, a notice was ordered under Rule 37 of Order XXI of the Code. As the petitioner/ Judgment Debtor did not appear before the Court in obedience to the notice issued under Rule 37 of Order XXI of the Code, a warrant of arrest was issued for realization of the amount, by arrest of the petitioner/ Judgment Debtor and even after he produced before the Court after arrest, the executing court is under obligation 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 afford an opportunity to the Judgment Debtor to show cause why he should not be committed to the civil prison. But this part of procedure was not complied with, which is mandatory. However, executing court followed the procedure provided under Sub-Rule (2) of Rule 40 of Order XXI of the Code for releasing the petitioner/ Judgment Debtor after obtaining personal bond for Rs.1,98,000/-. Even at this stage, the Decree Holder is required to adduce evidence in support of his application for execution and the petitioner/ Judgment Debtor is also entitled to adduce any evidence in support of his contention as to means to discharge the decree debt.

07. The present stage of execution petition is only releasing of the petitioner in compliance of sub-Rule (2) of Rule 40 of Order XXI of the Code. Still the petitioner/ Judgment Debtor will have an opportunity

to contest the matter in view of Sub-Rule (1) of Rule 40 of Order 21 of the Code and entitled to prove his independent case by adducing evidence, since the Court is under obligation to afford opportunity to the petitioner/ Judgment Debtor.

08. The present order under challenge is only release of the petitioner in compliance of sub-Rule (2) of Rule 40 of Order XXI of the Code and the matter has not reached the stage of recording evidence of Decree holder in support of his execution petition and affording opportunity to the petitioner/ Judgment Debtor to adduce evidence in support of his claim. Therefore, the revision is premature.

09. Hence, I find no illegality in the order passed by the executing court, and on the other hand the executing court strictly adhering to the procedure contemplated under sub-Rule (2) of Rule 40 of Order XXI of the Code. Therefore, the revision is liable to be dismissed.

10. In the result, the revision is disposed of at the admission stage directing the Principal Senior Civil Judge, at Srikakulam, Srikakulam District, to follow the procedure specified in Rule 40 of Order 21 of the Code in E.P.No.2 of 2016 in O.S. No.227 of 2013. No costs.

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

M. SATYANARAYANA MURTHY, J

Date: 03.06.2016

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