

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELENGANA AND THE STATE OF ANDHARA PRADESH**

CIVIL REVISION PETITION No.2903 of 2011

Between:

M/s. Margadarsi Chit Fund Limited

.....Petitioner

and

Kanupuru Hari Kumar Reddy and 6 others

.....Respondents

-

Date of Judgment pronounced on : 05-08-2016

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

1. Whether Reporters of Local newspapers : Yes/No
May be allowed to see the judgments?
2. Whether the copies of judgment may be marked : Yes/No
to Law Reporters/Journals:
3. Whether The Lordship wishes to see the fair copy : Yes/No
Of the Judgment?

*** HON'BLE DR. JUSTICE B. SIVA SANKARA RAO**

+ CIVIL REVISION PETITION No.2903 of 2011

% 05-08-2016

Between:

M/s. Margadarsi Chit Fund Limited

.....Petitioner

And

\$ Kanupuru Harikumar Reddy and 6 others

.....Respondents

< GIST:

> HEAD NOTE:

! Counsel for the petitioner : Sri P. Durga Prasad

^ Counsel for the respondents : Sri V. Sudhakar Reddy

? Cases referred

1. (2015) 7 SCC 337
2. AIR 1969 SC 297 (1)
3. (1869) 6 Bom HCR 241
4. AIR 1992 SC 1740(1)
5. AIR 1968 SC 1413

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.2903 of 2011

ORDER:

Impugning the dismissal order in E.P.No.4 of 2009 filed by the decree holder of O.S.No.334 of 2016 on the file of Senior Civil Judge, Kavali, Nellore District, while maintaining against the judgment debtor (J.Dr.) Nos.1 to 7 in proceeding against the

6th J.Dr. for relief of arrest and recovery of entire decretal amount, despite means failed to pay wilfully and if arrest is being ordered it can be realised, from the contest by the 6th respondent as judgment debtor against whom enforcement sought, that already the decree holder sought attachment of the property of the

1st J.Dr., who was subscriber of the chit and it was a house property covered by attachment before judgment order in I.A.No.594 of 2006 where security was furnished in disposing of the application vide order of the trial Court dated 07.08.2006 and with further contention of 6th J.Dr. has no means apart from decree holders remedy is to proceed against the 1st J.Dr. on the property furnished or security given in seeking to sought for dismissal, the trial Court dismissed the execution petition on both counts mainly by referring to expression of a Single Judge of this Court in **M. Venkataramanaiah Vs. M/s. Margadarsi Chit Fund Limited and Others** reported in C.R.P.No.5357 of 2007; despite the same was overruled by this Court in C.R.P.No.2980 of 2008 dated 15.06.2010 in **Chalapathi Chit Fund Private Limited,**

Guntur Vs. Mr. Adusumilli Malleswara Rao and Others and this might be the same not brought to the notice of the lower Court by proper assistance from both sides counsel. It is impugning, the present revision is maintained.

It is the contention of the learned counsel for the decree holder/revision petitioner that the order of the lower Court is unsustainable and once there is a decree, it is the option of decree holder to proceed against any of the J.Drs., who are of being joint tortfeasors and it is after satisfaction of decree of the reliefs submitted by any of the J.Drs. and their remedy is by stepping into shoes of decree holder and seek for apportionment or the like and not for the decree holder nor any J.Dr. can dictate or direct much less through Court to proceed only against a particular J.Dr. or particular mode of execution among the modes of execution available under Order 21 CPC and the expression of the Single Judge of this Court is no longer good law from the expressions of the Apex Court including the latest covered by **Central Bank of India Vs. C.L. Vimla and Others**^[1].

Whereas it is the submission of the learned counsel for the 6th J.Dr. that it is not only on the ground of there is a remedy to proceed against the property of the 1st J.Dr. from the attachment before judgment sought and on acceptance of security that petition disposed of to recover, but also for this J.Dr. has no means and thereby for this Court while sitting in the revision, there is nothing to interfere.

Heard and perused the material on record.

In fact as per Contract Act Sections 124 to 126 in particular, no doubt in case of indemnity it is the undertaking to see that the amount be paid without proceeding or demanding even initially the principal debtor and in case of guarantee, it is the very undertaking from the provision to pay by the guarantor in the event of failure to pay by the principal debtor. However, once there is a demand, if not even by any

written notice at least filing of suit or serving of notice of demand for the guarantor also to pay from failure of principal debtor. When once there is a decree against all judgment debtors passed jointly, it enables the decree holder to choose against whom he can proceed for the safe and early and effective recovery of his fruits of the decree. In fact the expression of the Apex Court in **The Bank of Bihar Limited Vs. Damodar Prasad and Another**^[2] on the scope of Sections 128 and 140 of the Contract Act in this regard is very clear that liability of surety need not be deferred until remedies against principal debtor are exhausted. Once decree obtained by creditor against debtor and surety in direction to the creditor to first exhaust remedies against principal debtor is unjustified and even under Order 20 Rule 11 and Section 151 CPC from decree once joint can be enforced against anybody as also held in this regard by the Bombay High Court in **Lachhman Joharimal Vs. Bapu Khandu**^[3] apart from the expression in Wright Vs. Simpson ((1802) 6 Ves Jun 714) and same is reiterated by referring to the above expression among other subsequent expressions by the Apex Court in **State Bank of India Vs. M/s. Index Port Registered and Others**^[4] and also referring to Order 21 Rule 30 and Order 34 Rules 4 & 5 CPC of mortgage preliminary and final decrees passed and of late the Apex Court again reiterated the principle in Central Bank of India supra.

Having regard to above, once the law is very clear, the observation of the lower Court that the decree holder has to proceed against the 1st J.Dr. from attachment before judgment security furnished in disposal of the petition to proceed against that security or the property of him before proceeding against other J.Drs., who are guarantors to the debt is unsustainable.

Now coming to the means of J.Dr. proved by the decree holder and same can be rebutted by the J.Dr. concerned, the decree holder

exhibits Ex.P1-Encumbrance certificate showing J.Dr. is having property of Ac.1-59 cents in S.No.182/1 of Musunuru Village worth about 60 lakhs apart from oral evidence regarding the alleged maintenance of school and running of restaurant in Kavali and getting 5 to 6 lakhs per annum. No doubt so far as oral evidence regarding restaurant and school and maintenance or running the same there is no further corroboration, despite the J.Dr. having come to the witness box, apart from cross examination of PW.1, disputes the same and that he has no means. However, coming to the property reflected in the Encumbrance certificate which is a public document, it is not the case of the J.Dr. that the property never in existence to further prove by the decree holder, but for the version that it was sold away. Once that is the case, the burden shifts on the J.Dr. to establish by producing the sale deed to exhibit which exclusively known to him for not even furnished date of sale deed or registered number of sale deed to enable the decree holder to obtain certificate copy and to exhibit, and that too under Section 106 of Evidence Act and from the law in this regard laid down by the three Judge Bench of the Apex Court in **Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif & Ors**^[5] of party in possession or control of best evidence cannot withhold. The lower Court did not advert to the burden and onus in this regard before saying the means of J.Dr. could not be proved by the decree holder despite the Encumbrance Certificate shown of the property existence not in dispute; that too in support of the defence of the J.Dr. of alienation to others, not proved the so called alienation. Thus, it requires remand of the matter to the lower Court by affording opportunity to the J.Dr. to establish by filing any sale deed and with right of any further evidence to adduce by both sides. The executing Court is directed to dispose of the execution petition afresh since remanded within a period of two (2) months from the date of receipt of a copy of this order and also both parties are directed to appear before the Court on 28.08.2016 without need of issuing fresh notice. The

counsel for D.Hr./revision petitioner can meanwhile send by registered post notice to J.Dr. for his appearance before lower Court on 28.08.2016.

Accordingly and in the result, the revision petition is disposed of subject to above observations.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 05.08.2016

Note: L.R. copy to be marked

(B/o)

ska

[\[1\]](#) (2015) 7 SCC 337

[\[2\]](#) AIR 1969 SC 297 (1)

[\[3\]](#) (1869) 6 Bom HCR 241

[\[4\]](#) AIR 1992 SC 1740(1)

[\[5\]](#) AIR 1968 SC 1413