

**THE HONOURABLE SRI JUSTICE U.DURGA PRASAD
RAO**

Civil Revision Petition No.4747 of 2015

ORDER:

This Civil Revision Petition is filed by the petitioner/JDR aggrieved by the order dated 10.09.2015 in E.P.No.25 of 2013 in O.S.No.151 of 2003 passed by Principal Senior Civil Judge, Srikakulam issuing arrest warrant against him under Order XXI Rule 38 CPC.

2a) In O.S.No.151 of 2003 the respondent/DHR obtained a money decree against the petitioner on the file of Principal Senior Civil Judge, Vizianagaram on 26.03.2009 and the appeal—A.S.No.75 of 2009 on the file of Family Court-cum-Additional District Court, Vizianagaram filed by petitioner was dismissed on 01.12.2010 and thereafter, the decree-holder got transferred the decree from the Senior Civil Judge's Court, Vizianagaram to the Principal Senior Civil Judge's Court, Srikakulam and filed E.P.No.25 of 2013 for recovery of Rs.3,68,920/- plus costs of Rs.11,207/- by way of arrest and sending the JDR to civil prison.

b) The DHR pleaded that JDR has got landed property in Singidi village of Kotturu Mandal, Srikakulam District and doing business in pesticides and fertilizers under the name and style M/s.G.S.N.Traders at Singidi village and further he got house property at Singidi worth Rs.15 lakhs and in spite of having sufficient means and repeated demands of DHR,

he did not choose to pay the EP amount and intentionally evading the payment.

c) The JDR filed counter denying the averments in the decree-holder's affidavit and contended that he has no movable or immovable properties to pay the EP amount. He further contended that the calculation of interest was wrongly shown in the EP. He thus contended that EP for his arrest is not maintainable.

d) The impugned order shows during the enquiry PWs.1 and 2 were examined on behalf of DHR and RWs.1 and 2 were examined on behalf of JDR and no documents were marked.

e) The Executing Court basing on the oral evidence of either party has observed that JDR is doing business in pesticides and fertilizers in his own building and he has not wound up the same as claimed by him and he has also owned one house in his native village, but he suppressed his assets and income and he did not come forward with truthful version and he wilfully neglected to pay the decretal amount and accordingly negated the contention of JDR and issued arrest warrant under Order XXI Rule 38 CPC.

Hence the CRP.

3) Heard arguments of Sri V.Sudhakar Reddy, learned counsel for petitioner/JDR and Sri K.B.Ramanna Dora, learned counsel for respondent/DHR.

4) Assailing the order, learned counsel for petitioner/JDR argued that the JDR has absolutely no means to pay the decretal amount inasmuch his G.S.N.Traders is almost in the brink of winding up and he has no other assets and considering it the Executing Court ought to have dismissed the EP but it wrongly placed burden on him to prove that he has no means and held as if he failed to discharge his burden and accordingly ordered the impugned arrest warrant which is liable to be quashed.

5) Per contra, learned counsel for respondent/DHR argued that admittedly the JDR is working as Supervisor in cashew factory in Billumada village, Bhamini Mandal and he is having house property. Besides he is the managing partner of M/s.G.S.N.Traders and DHR has discharged his preliminary burden by proving aforesaid financial source of the JDR and as the JDR claimed that M/s.G.S.N.Traders was almost in the position of winding up, the burden would be on him to place on record that the said concern was in such a wretched state and he has no other means to discharge the debt. He failed to do so and therefore, the Executing Court rightly held in spite of having sufficient means, the JDR wilfully neglected to pay the decretal amount and ordered his arrest. He relied upon the decision reported in ***Konda Subbaiah v. Yedoti Kamalakshaiah***^[1] to buttress his submission that suffice if DHR places some

material before the Executing Court indicating that JDR possessed property and means and thereupon the burden would shift to the JDR to establish that he had no means and hence not in a position to discharge the decretal amount. He submitted that in the instant case the JDR failed to discharge his burden and the Executing Court rightly ordered for his arrest.

6) In the light of above rival arguments, the point for determination is:

“Whether there are merits in the CRP to allow?”

7) **POINT:** As can be seen, the EP amount is Rs.3,68,920/- plus costs of Rs.11,207/-. The mode of execution sought for by the DHR is to arrest the JDR and send him to civil prison.

8) Proviso to Section 51 CPC provides certain parameters for ordering arrest of JDR in execution of a money decree. Section 51 reads thus:

“Section 51 - Powers of Court to enforce execution

Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree--

- a) by delivery of any property specifically decreed ;*
- b) by attachment and sale or by the sale without attachment of any property;*
- c) by arrest and detention in prison for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section;*
- d) by appointing a receiver; or*

e) in such other manner as the nature of the relief granted may require:

Provided that, where the decree is for the 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, the Court, for reasons recorded in writing, is satisfied--

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,--

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation:- In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree."

9) The DHR perches on sub-clause (b) to proviso as he claims that in spite of having sufficient means to pay the decretal amount, the JDR refused to pay the decretal amount and hence he is liable to be incarcerated in civil prison. Burden of proof of means of JDR is concerned, in the cited decision (1 supra), a learned single Judge of this Court observed thus:

"Para 7: The approach adopted by the Executing Court is totally untenable in law. Once a decree is passed in favour

of the plaintiff in a suit, the corresponding obligation is placed upon the defendant, to discharge the decree. When there is no response from the defendant, for discharging the decree, the plaintiff had an option to choose the method of execution. Arrest of the judgment-debtor is one such option. It can be resorted to, only when it is alleged by the decree-holder, that the judgment-debtor failed to comply with the decree, though the latter possessed of adequate means. Law does not require him to conclusively prove this. As a matter of fact, it is just impossible for anyone to prove the properties and resources possessed by another. The duty of a decree-holder in matters of this nature ends, where he places some material before the Executing Court, which indicates that the judgment-debtor is possessed of the property and means. Thereupon, the burden shifts to the judgment-debtor, to establish, as to how he is handicapped from discharging the decree.

Hence, it has to be seen whether the DHR has discharged his initial burden in showing the means of the JDR.

10) In the affidavit filed in support of Execution Petition, the DHR stated that the JDR got landed property worth Rs.20 lakhs in Singidi village in Kottur Mandal, Srikakulam District and doing business in pesticides and fertilizers under the name and style M/s.G.S.N.Traders at Singidi village and also got house property worth Rs.15 lakhs at Singidi village and despite his repeated demands the JDR has not paid the EP amount and he is intentionally evading the payment. In the cross-examination he clearly stated that he knows about the JDR's firm and there are two partners in the said firm and JDR is the managing partner. He denied the suggestion that JDR's is a proprietary concern. He examined PW2 who is working as Area Sales trainee in J.K.Agri Genetics,

Hyderabad, who deposed that both DHR and JDR are doing business in pesticides and JDR is doing business under the name and style M/s.G.S.N.Traders and both of them used to purchase pesticides from their organization. He further stated that JDR is having his own business and also dealer in GSN Traders at Singidi and he is capable person to discharge the EP amount. He denied the suggestion that JDR never purchased the goods from J.K.Agri Genetics. He visited the JDR's firm about 7 years back. He denied the suggestion that JDR's firm was almost in closing stage and there are no assets to JDR and he was deposing falsehood at the instigation of PW1.

11) It is true that no documentary evidence was produced in support of claim of PWs.1 and 2 that the JDR owning GSN Traders and he used to purchased pesticides from PW2's concern and that JDR is having job and house property. However, that is not the end of the matter, as in his own evidence the JDR (RW1) admitted the same. In the chief examination no doubt, JDR (RW1) deposed as if he has no means. However, in the cross-examination he admitted that he is working as Supervisor in cashew factory in Billumada village, Bhamini Mandal and he is the sole proprietor of GSN Traders and he owned joint family house in his native village. Of course, he stated that he stopped GSN Traders which he was running in a rented shop.

12) So, from the above admissions, it is clear that the

petitioner/JDR is working as Supervisor in cashew factory in Billumada village and that he is having a joint family house property. So far as the business GSN Traders is concerned, he admitted that he was running it as a sole proprietor but claimed that he closed it. In view of such admission and having regard to the above cited decision, the burden is on him to establish that he closed his business. However, he did not produce any record to show that he intimated to the concerned authorities that he closed the business.

13) Therefore, from all the above, it is clear that the petitioner/JDR is having sufficient means to discharge the decretal amount, but he wilfully neglected and refused to discharge the same. Hence, the Court below rightly ordered arrest of JDR and I find no illegality or irregularity in it.

14) In the result, the CRP is dismissed. No costs.

As a sequel, miscellaneous petitions, pending if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 22.01.2016

Murthy

^[1] 2008 (6) ALD 290