

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.02.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

C.R.P.(NPD)No.1251 of 2011
and
M.P.No.1 of 2011

T.Dharmalingam

.. Petitioner

Vs

1.K.P.Bharathi

2.S.Jayalakshmi

3.S.Karthikayan

4.S.Dhinakaran

5.S.Sankaran

.. Respondents

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the order and decretal order dated 08.03.2011, made in E.P.No.126 of 2008 in O.S.No.242 of 2004, on the file of the District Munsif Court, Gudiyatham, Vellore District.

For Petitioner : Mr.V.M.G.Ramakkannan

For Respondents : Mr.A.V.Ilango (for R1)

ORDER

The first judgment debtor/first defendant is the civil revision petitioner before this Court, challenging the order passed in E.P.No.126 of 2008 in O.S.No.242 of 2004, dated 08.03.2011, on the file of the District Munsif Court, Gudiyatham, Vellore District.

2.The case of the respondent/decree holder is that he has filed a suit against this petitioner along with the other defendants 2 to 5 in O.S.No.195 of 2002, on the file of the Sub-Court, Gudiyatham was subsequently transferred to the District Munsif Court, Gudiyatham, Vellore District and re-numbered as O.S.No.242 of 2004 and the decree was passed on 12.02.2007 directing the 1st defendant viz., the petitioner/1st judgment debtor to pay the plaintiff the suit amount of Rs.81,767/- with future interest at the rate of 24% per annum and directing the defendants 2 to 5 to pay the same from and out of the assets and estates of the deceased Subramaniam and for cost.

3.The respondent/decree holder has filed an execution petition in E.P.No.126 of 2008 in O.S.No.242 of 2004 before the District Munsif Court, Gudiyatham, Vellore District under Order 21 Rule 37 and 38

CPC for realize the amount, failing which the order to arrest of the first respondent to committed into civil prison.

4.For the said Execution Petition in E.P.No.126 of 2008, this petitioner/first judgment debtor has filed his counter stating that he does not admit any of the averments contained in the petition, this petitioner/first judgment debtor has also stated that he has not been served any copy of the Execution Petition and affidavit along with the petition and hence, he could not traverse those allegations and he reserves his right in filing the additional counter if any when the same is served.

5.This petitioner/first judgment debtor has also stated that he finding very difficult for his livelihood and hence he has no means to pay the decree amount, hence the reason stated in the execution petition for the arrest is not maintainable and hence he prayed the Execution Court to dismiss the Execution Petition.

6.Considering both side arguments, the learned District Munsif Court, Gudiyatham has allowed the Execution Petition and directed to issue warrant to this petitioner, who is the 1st judgment debtor to give

explanation on or before 08.04.2011. Challenging the said order, the first petitioner/first judgment debtor has filed the present civil revision petition before this Court.

7.I heard Mr.V.M.G.Ramakkannan, learned counsel appearing for the petitioner and Mr.A.V.Ilango, learned counsel appearing for the 1st respondent.

8.Admittedly, the respondent/decreed holder has filed the above E.P. against this petitioner/first judgment debtor under Order 21 Rules 37 and 38. Order 21 Rules 37 and 38 has stated as follows:

"37. Discretionary power to permit judgment-debtor to show cause against detention in prison.-

(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court [shall], instead of issuing a warrant for his arrest, issue a notice calling upon on him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

[Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the

decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.]

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

38. Warrant for arrest to direct judgment debtor to be brought up.- Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.”

9.This Court in a case of ***Ganesh v. Sankaran and another*** reported in ***2006 (3) CTC 546*** held that the Executing Court must interfere and ordering arrest of judgment-debtor, the Executing Court also shall hold an enquiry and give finding as to current means of judgment-debtor to discharge decree before the order of arrest and the Execution Court should follow the procedure laid down under Order 21 Rules 37 and 38.

10.Earlier, this Court in another case in ***K.M.Kannu Gounder v. Mahboob Ali Sahib and another*** reported in ***2003 (2) MLJ 329***,

this Court held as follows:

“so far as the choice whether the decree holder could adopt and file Execution Petition for attachment or for arrest is concerned in the recent times, it has been arrived at by the upper forums of law that prior to embarking upon arrest the other procedures kept open, such as attachment, etc. should be exhausted,”

11. When the decree holder has filed the petition for arrest under Order 21 Rules 37 and 38, the decree holder must have filed the petition for attachment of property first, then only he can file a petition for arrest and thereafter the Executing Court should record the reasons for ordering the arrest, but in this case without filing any petition for attachment of property, this respondent/decreed holder has directly filed petition for arrest under Order 21 Rules 37 and 38.

12. In yet another case, this Court in the case of ***Ganesa Nadar.V v. K.Chellathaiammal***, reported in ***1987 (100) LW 431***, it is held as follows:

“It is open to the decree holder to file a petition for attachment and sale of the immovable property. The

decree holder in this case has not taken recourse to those provisions. It is obvious that he is utilising the provisions of Order 21, Rule 38, C.P.C., merely as a lever to force payment without taking recourse to the proceedings for attachment and sale of the immovable property."

13.This Court also considered that the decree holder must have proceed against the property of the judgment debtor prior to embarking upon his arrest. The learned counsel appearing for the 1st respondent opposing the above, by stating that the decree holder can choose any mode of execution and he cannot be compelled to file a petition for attachment only. For supporting his case, he has produced a judgment rendered in ***Hargobind Kishan Chand v. Hakim Sing and Co.***, reported in ***AIR 1926 Lahore 110***.

14.He has also produced yet another judgment in the case of ***A.K.Subramania Chettiar v. A.Ponnuswamy Chettiar*** reported in ***AIR 1957 Mad. 777***, which is held as follows:

"Simultaneous execution both against the property and person of the judgment-debtor is allowed under Order 21, Rule 30, C.P.C. But the Court has a discretion under

Order 21, Rule 21, C.P.C. to refuse simultaneous execution and to allow the decree holder to avail himself of only one mode of execution at a time. Where a decree-holder presses for arrest of the judgment-debtor, the Court cannot, except as provided by the proviso to Section 51, C.P.C. compel the decree holder to proceed against his property or to accept payment by instalments.”

15. But, this Court in a case of ***A.Chetty v. A.Rangan*** reported in ***2002 (1) MLJ 546***, it is held that the decree holder is at liberty to seek for any mode of relief which is easier for him to recover the decree amount. The same was already considered by the Hon'ble Supreme Court in a case of ***State Bank of India v. Messers Indexport Registered and others*** reported in ***AIR 1992 SC 1740***, it is held that it is the right of decree holder to proceed with it in a way he likes.

16. The judgment produced by the learned counsel appearing for the petitioner in the case of ***Mr.Tharmapitchai and another v. A.C.A. Funds, Tirunelveli*** reported in ***1995 (2) CTC 20***, it is held as follows:

"it is seen from the above that in an execution proceedings for a Court of law to pass the order of arrest, attachment or otherwise for the relief moulded it should find out adequate reasoning to pass such an order in writing after arriving at its full satisfaction with regard to the means position of judgment-debtor.

If that is so, then the onus is undoubtedly upon the decree-holder to prove that the judgment-debtor had enough means and where with all to discharge the decree in whole or part, but even then they did not discharge. This would mean, unambiguously and undoubtedly that the decree holder who wants to levy the execution Order 21, C.P.C. must bring his case and relief against the judgment-debtor within the ambit of Section 51 of the Code of Civil Procedure and the ingredients of which are the sine-qua-non for any Executing Court to mould the relief under Order 21, Rule 35 to 40 in executing the decree for the recovery of money. If not for any reason or for the reason of want of evidence, it is undesirable for the Executing Court to order the arrest of the judgment-debtor."

17. In another case in ***M. Muthuswamy v. Supasri Chit Funds, Coimbatore and another*** reported in **2000 (2) CTC 168**, it is held as follows:

“Code of Civil Procedure, 1908, Order 21, Rule 37, 39 & 40 – Duty of Executing Court before ordering arrest of judgment-debtor – Executing Court shall hold an enquiry and give finding as to current means of judgment-debtor to discharge decree before the order of arrest under Rule 37 – Executing Court should follow procedure laid down in Rules 39 & 40 – Order passed without conducting such enquiry and without following such procedure bad in law and set aside.”

18. In yet another case in ***Srinivas G. Shet v. Manipal Finance Corporation Ltd.,*** reported in **1998 BC 21**, it is held as follows:

“The Executing Court is first required to determine the amount of subsistence allowance to be paid by the decree holder for arrest and production judgment-debtor before it in execution of a money decree and that it is a condition precedent for the decree holder to deposit the

said amount into the Court before the arrest warrant is issued against the judgment-debtor."

19. When the Executing Court has passed orders, the Executing Court shall hold an enquiry and give a finding as to the correct means of the judgment-debtor to discharge the decree before ordering arrest under Rule 37 of the C.P.C. This order clearly held in the case of ***Ganesh v. Sankaran and another*** reported in **2006 (3) CTC 546**, this Court clearly held that the Executing Court should follow the procedure laid down in Rule 39 and 40 of the C.P.C. But, in the present case in hand, the Executing Court has not followed the principles laid down by this Court in ***M. Muthuswamy v. Supasri Chit Funds, Coimbatore and another*** reported in **2000 (2) CTC 168** and ***Tharmapitchai and another v. A.C.A. Funds, Tirunelveli***, reported in **1995 (2) CTC 20** and the Hon'ble Supreme Court in ***Jolly George Varghese v. Bank of Cochin*** reported in **AIR 1980 SCC 470**. Hence, the order of the Executing Court is liable to be set aside.

20. Order 21 Rule 39 and 40 of C.P.C. stated as follows:

"39. Subsistence allowance.-(1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the

Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under Section 57, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment debtor in the civil prison shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

HIGH COURT AMENDMENT (MADRAS): (1) Substitute the following for sub-rule (1):

“(i) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into the Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court and for payment of the charges for conveyance of the judgment-debtor by bus, train or otherwise whichever is available from the place of arrest to the Court House”. (Amendment of 1962).

(2) In sub-rule (1) of rule 39, after the words “for the payment of the charges of conveyance of the judgment-debtor”, insert the words “and of the amin or process-server who executes the warrant of arrest”. (Amendment dated 16.9.1970).

(3) Substitute the following as sub-rules (4) and (5):

“(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the Civil prison and from the Civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer-in-charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and the costs of the conveyance

(if any), of the judgment-debtor shall be deemed to be costs in the suit.

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed."

40. Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.- (1)

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 the 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.

(2) 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.

(3) 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 the 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:

Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the court may, before making the order of detention, leave the judgment-debtor in the custody of an officer of the court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) When the Court does not make an order of detention under sub-rule (3), it shall disallow the application and, if the judgment-debtor is under arrest, direct his release].

HIGH COURT AMENDMENT (MADRAS): (i) Add the following sub-rule:

(6) During the temporary absence of the judge who issued the warrant under rule 37 or 38, the warrant of committal may be signed by any other judge of the same court or by any judicial officer superior in rank who has jurisdiction over the same locality or where the arrest is made on warrant issued by the District Judge, the warrant of committal may be signed by any Subordinate Judge or District Munsiff empowered in writing by the District Judge in this behalf, and the Judge signing the warrant of committal in the above cases shall also have the same powers as the judge who issued the warrant in respect of passing such orders as may be appropriate under sub-rules

(1), (3) and (5) of this rule. (Amendment dated 17-3-1954).

(ii) Add the following sub-rule:

“(7) No judgment-debtor shall be committed to the civil prison or brought before the Court from the custody to which he has been committed pending the consideration of any of the matters mentioned in sub-rule (1) unless and until the decree-holder pays into Court such sum as the Judge may think sufficient to meet the travelling and subsistence expenses of the judgment-debtor and the escort. Sub-rule (5) of rule 39 shall apply to such payments.”

21. When the Executing Court passing orders of arrest, they should follow the procedure laid down in Rule 39 and 40 of C.P.C. since it is the duty of the Executing Court, before ordering the arrest of judgment-debtor, the Executing Court shall hold an enquiry and give a finding as to the correct means of the judgment-debtor to discharge the decree before ordering arrest under Rule 37 of C.P.C. This was clearly held by this Court in the case of ***M. Muthuswamy v. Supasri Chit Funds, Coimbatore and another*** reported in **2000 (2) CTC 168**, the Executing Court should follow the procedure laid down in Rule 39 and 40 of C.P.C. and the order passed without following such procedure in law and is liable to be set aside.

22.The very same thing was observed by the Hon'ble Supreme Court in the reported case in ***Jolly George Varghese v. Bank of Cochin*** reported in ***AIR 1980 SCC 470***, that the Executing Court passed order under Order 21 Rule 37 of C.P.C. arrest of the judgment debtor and detention in civil prison, it is violative of Article 11 of International Covenant on Civil and Political Rights and Article 21 of Constitution of India. Before passing orders under Order 21 Rule 37 and 38, the Executing Court should record satisfaction regarding means of judgment-debtor and then pass orders giving adequate reasons.

23.This Court also clearly held that if the Executing Court has passed the order of arrest, attachment or otherwise for the relief moulded it should find out adequate reasoning to pass such an order in writing after arriving at its full satisfaction with regard to the means position of judgment debtor. If that is so, then the onus is undoubtedly upon the decree-holder to prove that the judgment-debtor had enough means and where with all to discharge the decree in whole or part, but even then they did not discharge. This would mean, unambiguously and undoubtedly that the decree holder who

wants to levy the execution Order 21, Cr.P.C. must bring his case and relief against the judgment-debtor within the ambit of Section 51 of the Code of Civil Procedure and the ingredients of which are the sine-qua-non for any Executing Court to mould the relief under Order 21, Rule 35 to 40 in executing the decree for the recovery of money. If not for any reason or for the reason of want of evidence, it is undesirable for the Executing Court to order the arrest of the judgment-debtor.

24. In my view that the Executing Court in the case in hand ignoring the procedures laid down under Order 21 Rule 39 and 40, which is a mandatory and thereafter order of arrest under Order 21 Rule 37 of C.P.C. to be passed, since, the decree holder has to file an Execution Petition for attachment first and thereafter he can seek for arrest. Therefore, the very order of the Executing Court in this case, for order of arrest of the petitioner under Order 21 Rule 37 and 38 of C.P.C. is against the law. Therefore, this Court is necessitated for the interference of the order passed by the Executing Court in E.P.No.126 of 2008 dated 08.03.2011, since the Executing Court without following the mandatory provisions of Order 21 Rule 39 and 40 of C.P.C. directly issued the order of arrest under Order 21 Rule 37 of C.P.C. and hence

the same is liable to be set aside and accordingly the order in E.P.No.126 of 2008 in O.S.No.242 of 2004 dated 08.03.2011 is hereby set aside.

25.In the result:

(a) the civil revision petition is allowed by setting aside the order passed in E.P.No.126 of 2008 in O.S.No.242 of 2004, dated 08.03.2011 on the file of the District Munsif Court, Gudiyatham;

(b) the matter in E.P.No.126 of 2008 remand back for fresh consideration and the Executing Court is hereby directed to pass appropriate orders under Order 21 Rule 37 and 38 of C.P.C., after following the mandatory provisions;

(c) the Executing Court is hereby directed to complete the said exercise within a period of three months from the date of receipt of a copy

of this order. No costs. Consequently,
connected miscellaneous petition is closed.

06.02.2017

Note: Issue order copy on 07.03.2017.
vs

Index: Yes
Internet: Yes

To

The District Munsif Court,
Gudiyatham, Vellore District.

M.V.MURALIDARAN,J.

VS

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