

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 17.02.2017

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (NPD) No.4192 of 2012

V.R.Nagarathinam

.. Petitioner

vs

R.Mani

.. Respondent

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the order dated 12.6.2012 made in O.E.P.No.19 of 2010 in O.S.No.58 of 2000 on the file of the Principal District Munsif-cum-Judicial Magistrate Court No.I, Cheyyar.

For Petitioner : Mr.P.Mani

For Respondent : Mr.T.Kathiravan

ORDER

This revision is directed against the order of the learned Principal District Munsif-cum-Judicial Magistrate, Cheyyar, in E.P.No.19

of 2010 in O.S.No.58 of 2000 dated 12.6.2012, dismissing the Execution Petition filed by the petitioner seeking to attach and sell the immovable properties mentioned for realisation of the decree amount.

2. The petitioner, who is the plaintiff in the suit had obtained decree against the respondent on 21.8.2001. Since the respondent failed to discharge the decree amount, the petitioner had filed the present Execution Petition to attach and sell the immovable properties mentioned in the E.P.

3. Resisting the Execution Petition, the respondent filed counter stating that earlier the respondent was arrested and detained in Civil Prison in E.P.No.137 of 2004. The petitioner had also filed E.P.No.207 of 2005 in respect of the properties not belonging to him and the same was dismissed. It is stated that properties mentioned in the present Execution Petition are not belonging to the respondent and in fact, the same were already sold by the respondent and his family members for the debt to one Kalathi Mudaliar. Now the Kalathi Mudaliar was in possession and enjoyment of the said properties. Hence, prayed for dismissal of the Execution Petition.

4. Before the Executing Court, on the side of the petitioner, 3 witnesses were examined and Exs.P1 to P3 were marked. The respondent examined himself as R.W.1 and Exs.R1 and R2 were marked.

5. Upon consideration of the oral and documentary evidence, the Executing Court dismissed E.P.No.19 of 2010. Aggrieved by the same, the petitioner has preferred this revision.

6. Challenging the order of dismissal of E.P.No.19 of 2010, the learned counsel for the petitioner submitted that the Executing Court erred in dismissing the Execution Petition on the ground that the respondent had already sold the properties sought to be attached and the said approach adopted by the Executing Court is erroneous as the respondent was the owner of the properties and he did not produce any document to prove that he had already sold the properties. He would submit that the Executing Court ought to have considered the admission of the respondent in his evidence and ought to have attached and sold the properties.

7. Per contra, the learned counsel for the respondent

submitted that the properties mentioned in the Execution Petition are not properties of the respondent and the same were sold by the petitioner to one Kalathi Mudaliar and now the said Kalathi Mudaliar was in possession and enjoyment of the same. Further, the learned counsel submitted that earlier the respondent was arrested and detained in Civil prison and pursuant to the order passed in I.P.No.15 of 2005, declaring the respondent as insolvent, the earlier Execution Petition was dismissed. According to the learned counsel, the Executing Court after analysing the oral and documentary evidence, rightly dismissed the Execution Petition and there is no need to interfere with the same.

8. I have considered the submissions made by the learned counsel appearing on either side and also perused the materials available on record.

9. The point that arises for consideration is whether the Executing Court was right in dismissing E.P.No.19 of 2010.

10. It is admitted by the respondent that there was a money decree dated 21.8.2001 in O.S.No.58 of 2000 against him. Earlier, the

petitioner had filed E.P.No.137 of 2004 for realisation of the decree amount, where the respondent was arrested and detained in civil prison. Thereafter, the petitioner filed E.P.No.207 of 2005 to attach and sell the immovable properties mentioned therein for realisation of the decree amount.

11. It appears that the respondent had filed I.P.No.15 of 2005 to declare him as insolvent by showing the decree amount passed in E.P.No.137 of 2004 in O.S.No.58 of 2000 as schedule of liabilities. In I.P.No.15 of 2005, the respondent had shown his assets as under:

Shirts – 2	..	Rs.200.00
Dhoties – 2	..	Rs.100.00
Towels – 2	..	Rs. 50.00

Total	..	Rs.350.00

सत्यमेव जयते

12. The respondent was examined as R.W.1 in the Execution Petition and he had deposed that he had sold the properties on 22.1.2001 to one Sundaram and the petitioner had filed the Execution Petition falsely as if the properties stood in his name.

13. It is pertinent to note that in his cross examination, the respondent stated that he and his son was jointly doing weaving work at No.1/67, Old Mettu Street, New Anna Street by purchasing materials from Mamandoor and Nasarathpettai and was earning Rs.5,000/- together. He further deposed that on 30.7.1997, he had mortgaged properties belonging to him to one Kalathi Mudaliar and subsequently, the same were sold to Kalathi Mudaliar.

14. Admittedly, the respondent has not shown his avocation and monthly earnings in I.P.No.15 of 2005. By suppressing the material fact, he had obtained an ex parte order in his favour. When the respondent was doing weaving work on his own, he cannot contend that he is an insolvent. In his cross-examination, the respondent stated that there were two weaving machines. One belongs to him and the another belongs to his son. In I.P.No.15 of 2005, contrary to the owning of one weaving machine, the respondent had stated his assets only attires as his assets, which would clearly show the intention of the respondent to defeat the claim of the petitioner.

15. Since the respondent himself admitted that he is owning one weaving machine and was doing weaving work, he cannot take advantage of the ex parte decree passed in I.P.No.15 of 2005 declaring him as insolvent. It is patently clear that by suppressing the material fact that he was owning weaving machine and was earning Rs.2,500/- per month, the respondent had obtained order in I.P.No.15 of 2005. The concept of declaring a person as insolvent is he should not own any property except the wearing cloths. In the present case, the respondent himself admitted that he is owning one weaving machine. More over, the respondent has not shown correct particulars in I.P.No.15 of 2005 qua debts due by him to one Bai at Arani. Therefore, this Court is of the view that the respondent cannot rely upon the order passed in I.P.No.15 of 2005.

16. Coming to the immovable properties shown in the present Execution Petition, it is the say of the respondent that he had already sold the properties to one Kalathi Mudaliar. Again he himself stated that he had sold the properties to one Sundaram. The specific evidence of the respondent is that he had mortgaged the properties in favour of Kalathi Mudaliar on 30.7.1997 for the debt obtained by him. Since he was not able to discharge the mortgage debt, the respondent

sold the properties to Kalathi Mudaliar. In his evidence, the respondent further stated that on 22.1.2001, he had sold the properties to one Sundaram. How it could be possible for the respondent to sell properties to two persons. More over, the respondent failed to produce document to show that he had sold properties to Kalathi Mudaliar. The alleged sale in favour of Sundaram is dated 22.1.2001 when the suit was initiated by the petitioner was pending.

17. It appears that the petitioner had produced before this Court the Encumbrance Certificate for the period from 01.01.1990 to 29.01.2017. On a perusal of the same, it is seen that there was only one entry to the effect that the respondent and M.Rajkumar and M.Muthukumar jointly purchased house site in Survey Nos.100/1A, 100/1 situated in Korukkathur from one Sundaram on 27.2.2012 under a registered sale deed bearing Document No.460 of 2012.

18. The Executing Court erred in dismissing E.P.No.19 of 2010 as if the petitioner has not produced sufficient documentary evidence to prove that the properties sought to be attached are belonged to the respondent when the fact remains that the petitioner

has proved that the respondent had suppressed materials facts. Further, the Executing Court ought not to have dismissed E.P.No.19 of 2010 on the basis of the order passed in I.P.No.15 of 2005.

19. This Court finds that the respondent was having sufficient means to pay the decree amount and only in order to defeat the claim of the petitioner, the respondent had taken such a defence, which cannot be entertained. The respondent is bound by the decree and it is the duty of the petitioner to realise the decree amount. Therefore, this Court is of the view that the Executing Court ought to have considered the admission of the respondent in his evidence and ought to have attached and sold the properties to realise the decree amount.

20. For the foregoing discussion, this Court is of the view that the Executing Court erred in dismissing E.P.No.19 of 2010 and the same is liable to be set aside.

21. In the result, the Civil Revision Petition is allowed thereby the order dated 12.06.2012 passed in E.P.No.19 of 2010 in O.S.No.58 of 2000 on the file of the learned Principal District Munsif-cum-Judicial Magistrate Court No.1, Cheyyar is set aside. The Executing Court is

directed to restore E.P.No.19 of 2010 and proceed further in accordance with law. No costs.

17.02.2017

vs

Note: Issue order copy on 22.01.2019

Index : Yes

To

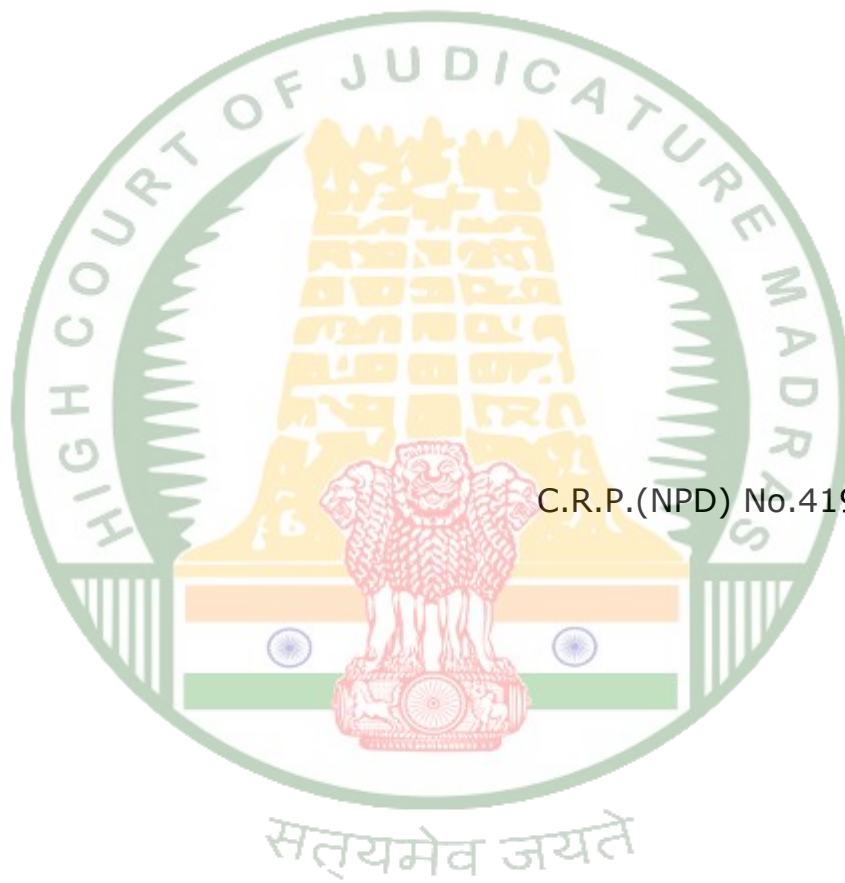
The Principal District Munsif-cum
Judicial Magistrate No.I,
Cheyyar.



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M.V.MURALIDARAN, J.

VS



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