

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

C.R.P.No.4694 of 2013

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India by the petitioner/Decree Holder challenging the order dated 23.08.2013 in E.P.No.45 of 2008 in O.S.No.489 of 2005 passed by the IX Additional Senior Civil Judge, (FTC), City Civil Court, Hyderabad dismissing the execution petition with costs having found that the decree holder failed to prove the means of the Judgment Debtor to discharge the debt due, so also avoidance to discharge the debt due.

2. The petitioner obtained decree in O.S.No.489 of 2005 on 13.02.2008 and filed E.P. initially for the relief of attachment of movables of the Judgment Debtors 2 and 3 later amended the execution petition vide order dated 05.02.2013 in E.A.No.19 of 2012 to commit the Judgment debtor Nos.1 to 3 to civil prison for realization of decretal amount.

3. Respondent 1 and 2 filed counter pleading that they have no means to discharge the debt due under the decree

4. During enquiry before the executing Court, both parties did not adduce any evidence either oral or documentary. Basing on the averments made in E.P. and counter, the trial Court disposed of the same on merits.

5. Aggrieved by the said order, the present revision petition is filed raising several contentions mainly on the ground that the Judgment Debtors have means to pay the decretal amount and that the executing court did not apply its mind while passing the order and committed error and prayed to set aside the order and order arrest of the Judgment Debtors for realization of the debt.

6. A bare look at the contents of the execution petition, it is clear that the petitioner sought for attachment of movables in the hands of Judgment Debtor Nos.2 and 3 for realization of Rs.7,47,165.53ps by sale of those movables. But filed an application for amendment in E.A.No.19 of 2012 and the same was allowed by order dated 05.02.2013 adding relief of realization of decretal amount by arrest of the Judgment Debtors alternatively. Thus, the execution proceedings are initiated for two reliefs i.e. attachment of movables in the hands of Judgment Debtors 2 and 3 and alternatively for arrest of the Judgment Debtors and such relief cannot be permitted except with the prior permission of the Court under Order 21 Rule 21 C.P.C, which permits the Court to permit the Decree Holder in its discretion, refuse execution at the same time against the person and property of the judgment debtor. Normally when the decree is of 12 years old, to avoid unnecessary complications in the realization of the decree debt, simultaneous execution can be permitted. Limitation for execution is 12 years. Here the decree is of the year 2008 and E.P. is filed in the year 2008. It is decree of one year old by the date of initiating the execution proceedings. In such a case, simultaneous execution cannot be permitted even otherwise no such permission was obtained by filing an application under Order 21 Rule 21 C.P.C. Similar question was came up before this Court in **K.V.Ramakrishnaiah v M.Sateesh Kumar Reddy**¹ wherein this Court held that:

“I am unable to agree with the contention of the learned Counsel for the revision petitioner that a decree holder cannot file an EP for arrest of the judgment-debtor after he filed an EP for proceeding against his immovable properties, because as per Rule 30 of Order 21 CPC, a decree for payment of money can be executed by detention in civil prison of the judgment-debtor or by attachment and sale of his property or by both. So it is very clear that the decree holder can proceed both against the person and properties of a

¹ 2006(6) ALT 70

judgment-debtor for recovery of the money due under a decree for payment of money. But as per Rule 21 of Order 21 CPC Court has discretion to refuse simultaneous execution. In view of Rule 30 of Order 21 CPC read with Rule 21 of Order 21 CPC it is for the decree holder to choose the mode of execution and it is not for the Court or the judgment-debtor to say what mode of execution the decree holder should adopt to realize the money due to him under a money decree in his favour.”

7. The petitioner/Decree Holder did not even file an affidavit in support of the execution petition, which is mandatory under the Rules disclosing the means of the Judgment Debtor and avoidance to discharge the debt by Judgment Debtors. But amended execution petition seeking alternative relief without obtaining any prior permission under Order 21 Rule 21 C.P.C. Hence, the execution petition against the Judgment Debtor for arrest is liable to be dismissed on the sole ground.

8. The contention of the learned counsel for the respondent is that they have no means and they specifically pleaded the same in the counter. When the Judgment Debtor appeared before the Court in pursuance of the notice issued under Order 21 Rule 37 C.P.C., the Court is required to conduct an enquiry under Order 21 Rule 40 C.P.C.

9. According to Sub Rule 1 of Rule 40 of Order 21 C.P.C 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.

10. Here no such enquiry was conducted as the decree holder and the judgment debtor did not adduce any evidence. A bare reading of Rule 40(1) of Order 21 C.P.C. is clear that initial onus of proof is on the decree

holder to prove that the judgment debtor possessed sufficient means to pay the dues and they are willfully evading to pay the same and when the decree holder himself did not produce any evidence, the question of shifting onus of proof does not arise. Hence, the order under challenge, does not suffer from legal infirmity warranting interference of this Court under Article 227 of the Constitution of India and that the findings of the executing Court are hereby affirmed.

11. In the result, the Civil Revision Petition is dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in the criminal petition, shall stand closed.

Date: 13.06.2017
kvrn

M. SATYANARAYANA MURTHY J

