

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO
+ CIVIL REVISION PETITION No.5744 of 2011

% Dated 07.11.2017

Sri Tata Kesava Rao

....Petitioner

VERSUS

\$ Sri Shaik Hasan Ahmad

... Respondent

! Counsel for Petitioners : Sri Venkata Siva Prasad.K

^ Counsel for Respondents : Sri Devalraju Anil Kumar

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> HEAD NOTE:

? CITATIONS:



**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

CIVIL REVISION PETITION No.5744 of 2011

Between :

Sri Tata Kesava Rao

....Petitioner

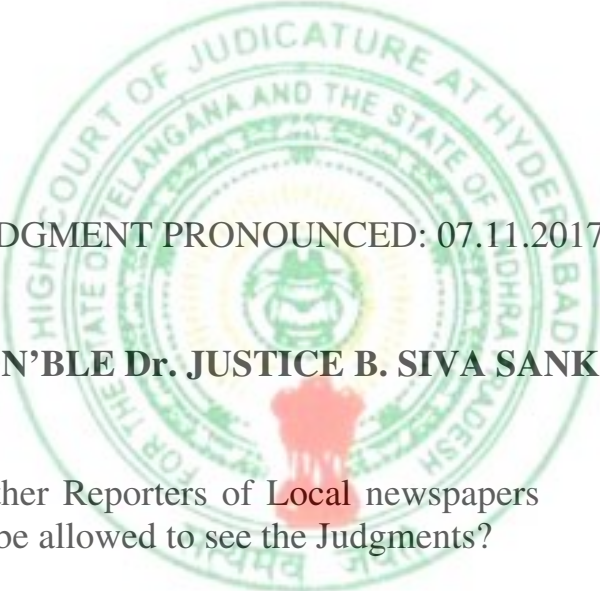
VERSUS

Sri Shaik Hasan Ahmad

... Respondent

DATE OF JUDGMENT PRONOUNCED: 07.11.2017

THE HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

- 
1. Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/No
 2. Whether the copies of judgment may be marked to Law Reporters/Journals? Yes/No
 3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? Yes/No

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO
CIVIL REVISION PETITION No.5744 of 2011

ORDER :

The revision petitioner is the decree-holder in E.P.No.146 of 2010 of the decree obtained as plaintiff in O.S.No.8 of 2008 against the respondent/judgment-debtor/defendant. Impugning the order of the Court, dated 12.09.2011, in the E.P. dismissing the prayer for arrest of the judgment-debtor by the learned I Additional Senior Civil Judge, Vijayawada, the present revision is maintained.

2. The contention mentioned in the grounds urged in the revision vis-à-vis the oral submissions during the course of hearing are that impugned order of the Executing Court is perverse and unsustainable and from ill-appreciation of the settled principles and propositions, the Executing Court should have adopt a pragmatic approach and the impugned order is erroneous and contrary to law and facts and should have been allowed the Execution Petition for arrest of the judgment-debtor and did not even go through the expression of this Court in 2011 (4) ALD 143 and thereby, sought for setting aside the dismissal order by allowing the revision and order arrest of the judgment-debtor.

3. Whereas, it is the submission of the counsel for the judgment-debtor/respondent to the revision that the impugned order of the lower Court is on contest by appreciation of the oral evidence of the decree-holder as PW.1 and another witness PW.2, besides that of respondent-judgment-debtor as RW.1 with four documents Exs.B.1 to B.4 are

running in six pages supported by reasons and for this Court while sitting in revision, there is no illegality or impropriety and thereby sought dismissal of the revision.

4. Heard as referred supra and perused the other material on record from the grounds urged supra.

5. Order XXI Rule 37 C.P.C. reads as follows:

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 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.

6. From the very proviso to the above Rule 37 sub-rule (1), though from sub-rule(1) it mandates by C.P.C. amended Act 21 of 1936 substituting 'shall' for 'may' in saying in an application for arrest of the judgment-debtor for detention in civil prison for recovery of money where judgment-debtor liable to be arrested, the Court shall

issue notice calling upon him to appear before the Court on a day to be specified to show-cause why shall not be committed to the civil prison rather than directly issuing warrant for his arrest; what the proviso says is such notice shall not be necessary if the Court is satisfied by affidavit, or otherwise, that, with the object of defeating or delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.

7. With reference to the A.P. amendment, same as Madras, with effect from 30.03.1967, the warrant for arrest of the judgment-debtor shall direct the officer to whom warrant entrusted to bring him before the Court with all convenient speed, unless the amount ordered to pay, together with interest and costs, which he is liable, be sooner paid or unless satisfaction of the Court be endorsed by the decree-holder on the warrant in the manner provided by Rule 25(2) of or XXI C.P.C.

8. Rule 25 of Order XXI C.P.C. deals with endorsement on process and A.P. amendment, same as Madras amendment, with effect from very same date supra, requires the decree holder's endorsement on the warrant of decree specified and not necessary to execute or otherwise.

9. The above procedure is different from the procedure contemplated by Order XXI Rule 11 sub-rule (1) of C.P.C., which speaks where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the

judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

10. Order XXI Rule 11 sub-clauses (2) and (3) speaks of the need of written application with the enclosing certified copy of the decree in support of the prayer as to the mode of execution.

11. It is relevant now to refer the amended provision by Act 104 of 1976, with effect from 01.02.1977, incorporating Rule 11A to Order XXI, which reads as follows:

Application for arrest to state grounds- Where an application is made for the arrest and detention in prison of the judgment-debtor, it shall state, or be accompanied by an affidavit stating, the grounds on which arrest is applied for.

12. Thus, though Order XXI Rule 37 C.P.C. proviso speaks the satisfaction by affidavit or otherwise of the Court of the necessity for immediate arrest before ordering notice otherwise mandatory before issuing arrest warrant; from this Rule 11(A) every application for arrest and detention in civil prison of the judgment-debtor (which is contemplated by Order XXI Rule 11 supra) shall state, or be accompanied by an affidavit stating, the grounds on which arrest is applied for. Thus, the grounds in the execution application are mandatory for the prayer of arrest of the judgment-debtor and how and what basis, such grounds can be either stated in the execution application or by accompanying affidavit. However, from the combined reading of Rule 37 and Rule 11A of Order XXI supra, for immediate arrest before notice concerned, affidavit generally required

and otherwise even affidavit generally required. Thus, it is always safe for the executing Court to obtain an affidavit of the decree-holder or any person on behalf of the decree-holder in support of the prayer for arrest of the judgment-debtor sought by stating the grounds therein on what basis the arrest is seeking as to how the judgment-debtor got means and willfully avoiding to satisfy the decree and on arrest it could be recovered.

13. Rule 17 of Order XXI speaks as follows:

Procedure on receiving application for execution of decree-(1) on receiving an application for the execution of a decree as provided by Rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and if they have not been complied with, [the Court shall allow] the defect to be remedied then and there or within a time to be fixed by it.

[(1A) If the defect is not so remedied, the Court shall reject the application:

Provided that where, in the opinion of the Court, there is some inaccuracy as to the amount referred to in clauses (g) and (h) of sub-rule (2) of rule 11, the Court shall, instead of rejecting the application, decide provisionally (without prejudice to the right of the parties to have the amount finally decided in the course of the proceedings) the amount and make an order for the execution of the decree for the amount so provisionally decided.]

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application.

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

14. Rule 17A is inserted by A.P. amendment as in Madras amendment, with effect from 29.03.1945.

15. From the above, on receiving the written application of a decree under execution as per Rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 (so far as arrest concerned Rule 11A that applies and so far as attachment of movable and immovable property concerned rules 12 to 14 that apply) as may be applicable to the case to see that it being complied with, if not to reject the execution application itself, unless any inaccuracy requires further decision rather than rejecting by proviso proceeding with and on entering the same in the execution petition register.

16. Rule 40 of Order XXI C.P.C. speaks that where judgment-debtor in obedience to notice or on arrest warrant appeared or produced before the Executing Court for recovery of money, the Executing Court shall proceed to hear the decree-holder and take all such evidence as may be produced in support of his application for

execution, and then shall give to the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison. Pending the conclusion of such enquiry, the Executing 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 future appearance as and when required.

17. Thus, in every execution application, the presence of the judgment-debtor, where notice ordered and where not issued directly warrant for his arrest and production, is necessary and not to dispense with by allowing any application to put appearance through Advocate, but for after his presence in view of the requirement for compliance of the above.

18. From this, coming to Rule 40 sub-rules (3) to (5) of Order XXI C.P.C. to be read with Section 51 C.P.C., on conclusion of such enquiry from judgment-debtor appeared on notice or produced on warrant with arrangement for detention under the officer of the Court for a period not exceeding 15 days or by releasing him on furnishing security for his due appearance, the Court may order for detention of the judgment-debtor in civil prison and if not already under arrest as referred supra, shall cause him be arrested. The judgment-debtor released may be re-arrested even, unless orders release of the judgment-debtor where held no arrest of him required for recovery of amount or the decree satisfied or otherwise or for no grounds to order

arrest from the enquiry. Such warrant of committal supra, as per the A.P. amendment shall be signed by Magistrate of the Executing Court/District Munsif and before committal, there must be provided of substance allowance for that period by the decree-holder as contemplated by Rule 39 or Order XXI C.P.C., which is also for payment of charges for conveyance of the judgment-debtor by bus, train or otherwise whichever is available from the place of arrest to the Court-house or civil prison or vice versa, as the case may be.

19. From this background, Rule 21 of Order XXI speaks of simultaneous execution against person and property of the judgment-debtor at a time rather than one after the other within the discretion of the Court to permit where necessary. Rule 22 speaks of the execution petition filed more than two years from the date of the decree or against the legal representatives of a party to the decree or against the assignee or receiver in insolvency, where the party to the decree has been adjudged as insolvent, the Executing Court shall issue notice to the person against whom execution applied to show-cause and where the Court feels necessary that notice can be dispensed with if already the matter once executed or otherwise, as the case may be.

20. Rule 41 which is also relevant in this context to mention though the chapter heading before commencement of rule 41, 'as attachment of property', from the very wording of the rule is clear of examination of judgment-debtor as to his property, that where a decree is for the payment of money, the decree-holder may apply to the Court for an

order to direct the judgment-debtor individual or the juristic personality represented by any officer of it responsible or any other person either by oral examination as to any and what debts owing to the judgment-debtor and whether judgment-debtor has any and what other property or means of satisfying the decree including by ordering attendance and examination of such judgment-debtor an individual or the officer of the juristic personality or other person including for production of books or documents and where a decree for payment of money remained unsatisfied for thirty days on the application of the decree-holder required the judgment-debtor supra to file an affidavit stating the particulars of the assets of him/her/it and any disobedience enables the Executing Court either to direct or to cause through another Court, for any disobedience to detention in civil prison for a term not exceeding three months and meantime to release on furnishing by affidavit such particulars, as the case may be. This Rule 41 of Order XXI C.P.C. is almost a kin on original side under Order XI C.P.C. of serving interrogatories to answer etc.,

21. From this, now coming to the means enquiry for arrest and detention, Sections 55 to 59 are relevant. Section 59 speaks of even after warrant for arrest of judgment-debtor issued, the Court may cancel the same on the ground of illness of judgment-debtor or where arrested and committed to civil prison for his release if he is not in fit state of health to be detained in the civil prison or the State Government on the ground of the existence of any infectious or

contagious disease or by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness for release of the judgment-debtor, which no way prevent his re-arrest. However, the detention in civil prison shall not exceeding the period what is provided by Section 58. Section 58 speaks in case of default of payment of money of above five thousand rupees, the detention period totally shall not exceed three months and where it is below five thousand rupees and is exceeding to two thousand rupees, the detention period shall not be exceeding six weeks and even the decree not satisfied, he shall be released from such detention after its expiry, if at all earlier the amount covered by warrant of detention paid to the officer in charge of the civil prison or decree otherwise satisfied from any order of Court for release or from non payment of subsistence allowance by the decree-holder for the detention of the judgment-debtor. It further speaks if the amount of execution under a decree for money not exceeding two thousand rupees, question of arrest and detention of the judgment-debtor in civil prison does not arise. It is further clarified that after expiry of the period supra, it does not mean discharge from the decree debt, but for not liable to be re-arrested where the total period of earlier arrest is at the limit supra. Section 57 like Rule 39 Order XXI speaks the subsistence allowance to be fixed by the State Government. Section 56 speaks the Court shall not order the arrest or detention in the civil prison of a women in execution of decree for payment of money.

22. Now, Section 55, which is material, reads as follows:

55. Arrest and detention.(1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the State Government may appoint for the detention of persons ordered by the Courts of such district to be detained :

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise;

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorised to make the arrest has duly gained access to any dwelling house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found;

Provided, thirdly, that if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorised to make the arrest shall give notice to her that she is at liberty to withdraw, and , after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest;

Provided fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount

of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The State Government may, by notification in the Official Gazette declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the State Government in this behalf.

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he may be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realised or commit him to the civil prison in execution of the decree.

23. Here, from sub-rule 4 of Section 55, it is clear that judgment-debtor appeared from notice or on warrant having satisfied about the necessity of arrest in the pre-enquiry of judgment-debtor about his means, where judgment-debtor expresses his intention to apply to be declared as insolvent and furnishes security, to the satisfaction of the

Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be released or commit him to the civil prison in execution of the decree. Thus, apart from the right of the decree-holder including from Rule 41 of Order XXI C.P.C. about the means of the judgment-debtor as to his properties and assets and liability, for that by affidavit to call for to make a request, to call for it is for the decree-holder to establish the means of the judgment-debtor.

24. In the background of law supra, now coming to the facts of the impugned order, the suit O.S.No.8 of 2008 was decreed on 26.02.2009 by the Senior Civil Judge, Avanigadda, for Rs.1,29,973/- with subsequent interest and costs. It is for recovery of the same with execution costs, the E.P. for arrest of the judgment-debtor to realize sought for saying by the decree-holder, the judgment-debtor got a house at Tadigadapa village of Krishna District and getting rent of Rs.2,000/- per month and running mechanic shop with name and style 'Star Mechanic Works' at Autonagar, Vijayawada, by earning at Rs.15,000/- per month and also doing broker business and getting Rs.5,000/- per month and also possessed other movable and immovable properties and despite means willfully neglecting and failed to pay and if arrest is ordered the amount can be realized easily. The judgment-debtor filed counter in saying he is unemployeed, not

having any avocation and unable to survive himself, being a heart patient requires minimum Rs.2,000/- per month towards treatment and not doing any work from that ill-health and not in a position to pay the decree debt though is he willing to pay, thereby sought for fixing the payment by installments at Rs.1,000/- per month and that he is the allegation of means within the knowledge of the decree-holder, hence to dismiss the E.P. otherwise.

25. As referred supra, in the course of hearing, on behalf of decree-holder, PWs.1 and 2 examined and R.W.1-judgment-debtor deposed with reference to Exs.B1 to B4.

26. PW.1-decree-holder reiterated the above facts regarding sufficient means of judgment-debtor and he is willfully avoiding payment and PW.2 deposed of he is working as mechanic in Autonagar and judgment-debtor is running Star Mechanic Works at Autonagar and getting Rs.15,000/- per month income and also doing broker business and getting Rs.5,000/- per month. The judgment-debtor reiterated in his affidavit what he contended in the counter and mainly coming to Exs.B1 to B4 concerned Ex. B4 is the application of PW.2 to ascertain the house particulars of the judgment-debtor. Ex.B1 is the medical bills of the judgment-debtor including as to he underwent bypass surgery in 2006. Ex.B2 photos are of the period for undergoing surgery. Ex.B3 is the medical prescriptions. From the above what the trial Court observed is the decree holder did not file any proof of what is the house property and did not show any record

about the judgment-debtor running Star Mechanic Works to show he is owning the same, despite the judgment-debtor denied the same. Apart from it, if at all the judgment-debtor got the means as held by this Court in **Visarapu Someswara Rao v. Mutyala Ganga Raju**¹, of if owning house and other properties, the decree-holder can proceed against the properties of the judgment-debtor rather than person of the judgment-debtor. It is with these conclusions the executing Court dismissed the petition for arrest of the judgment-debtor saying the decree-holder did not establish the means of the judgment-debtor.

27. Coming the impugment with reference to the above, once the order is supported by reasons, and what PWs.1 and 2 orally deposed is denied by RW.1-judgment-debtor of not possessing any Star Mechanic Works, not getting income, not having house, no means, no avocation and there is no scrap of paper filed by the decree-holder on whom the burden lies, for this Court while sitting in revision, there is nothing to interfere with the dismissal order.

28. Accordingly, the civil revision petition is dismissed and it is made clear while dismissing the revision that it is left open to the decree-holder if at all the particulars are of the Star Mechanic Works and the house property particulars secured including by affidavit or otherwise if at all from the judgment-debtor through Executing Court under Rule 41 of Order XXI C.P.C., a fresh petition lies.

¹ 2011(4) ALD143

Miscellaneous petitions pending, if any, shall stand closed. No costs.

Dr. B. SIVA SANKARA RAO, J

7th November 2017.
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L.R. Copy to be marked – Yes/No

