

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 20.04.2018

Coram: The Honourable Mr. Justice N. SESHASAYEE

**C.R.P(NPD)No.3855 of 2011
and
M.P.No.1 of 2011**

Janarthan Naidu ...Petitioner

Versus

Radha Ammal ...Respondent

This Civil Revision Petition is filed under Section 115 of Civil Procedure Code against the Fair and Decretal order in E.A.No.520 of 2010 in E.P.No.15 of 2006 in Cuddalore O.S.No.39 of 2004 dated 20.07.2011 on the file of the Principal Subordinate Judge, Villupuram.

For Petitioner : Mr.N.Suresh

For Respondent : Mr.K.Selvaraj

ORDER

The present Civil Revision Petition is filed by the judgment debtor/petitioner in E.P.No.15 of 2006 in O.S.No.39 of 2004 on the file of the Principal Sub Court, Villupuram. The respondent herein had filed O.S.No.39 of 2004 for recovery of money, following which, she

laid E.P.No.15 of 2006 for the sale of two items of properties of the judgment debtor. These two properties were earlier attached before judgment by the Trial Court viz., Sub Court, Cuddalore.

2. After filing E.P.No.15 of 2006, a Claim petition was filed as regards the first item of property in the Execution Petition, and it is stated that Vide order dated 21.12.2006, the said claim petition was allowed leaving item 2 alone for the decree holder to realise the amount under the decree he had obtained.

3. It is the case of the revision petitioner that on 29.10.2007, a memo was filed before the Execution Court by the learned counsel for the decree holder/respondent herein whereunder, the counsel had informed the Court that the decree holder would give up her right to proceed against Item 2 in E.P.No.15 of 2006 for the present, and that he would proceed against Item 2 in the eventuality of decree holder's failure to realise the entire decree debt. Since the respondent continue to proceed with the Execution Petition and the petitioner/judgment debtor had filed E.A.No.520 of 2010 for dismissing the E.P.No.15 of 2006 on the basis of the Memo dated 29.10.2007 filed by the counsel for the decree holder. This was resisted by the decree holder, and in her counter the decree holder has averred that she has not given any instruction to the counsel not to press E.P.No.15 of 2006 as against Item 2 referred to above.

4. After heard the rival side, the Execution Court accepted the version of the decree holder that she had averred in the counter affidavit and dismissed E.A.520/2017. This is now under challenge.

5. Heard Mr.N.Suresh, the learned counsel appearing for the petitioner and Mr.K.Selvaraj, the learned counsel appearing for the respondent.

6. The learned counsel for the petitioner submitted that the counsel of the petitioner who is authorized to represent the interest of the decree holder has made a statement before the Court in writing and it is not given to her to change her position, and that the statement made before the Court ought to be honoured. If at all any, the decree holder may proceed against other properties of the judgment debtor, if they are so available.

7. This was resisted by the counsel for the respondent on the ground that the signature in the Memo is stated to be a forged one. The learned counsel for the petitioner would now inform the Court that this is not part of decree holder's case and has not been raised in her counter affidavit referred to above.

8. The entire records of this case were made available and this Court perused the matter. There are two aspects involved here:

- a) Whether the counsel for the decree holder filed any Memo on 29.10.2007?
- b) If so, what is its legal implication?

9. So far as, the first question is concerned, there is nothing on record to indicate that the said Memo was forged. Indeed the decree holder has filed a counter affidavit to E.A.No.520 of 2010 through the same counsel and therefore it is difficult to accept the argument of the counsel for the respondent that the Memo is a forged one. As to the second question, it depends on the nature of the Memo that was filed before the Execution Court. In the first part of the said Memo, it is stated that the decree holder would be not pressing the Execution Petition as against the 2nd item for the present. However, the later part of the memo, towards the end, it states that Execution Petition must be allowed to be continued. Apparently, there is an internal contradiction between the first part of the Memo and second part of the Memo.

10. This must be read in conjunction with the counter affidavit of the decree holder. As earlier indicated, the decree holder has stated that she has not instructed to file a memo such as a one available on record. The inference that could be reasonably drawn is that the decree holder has not abandoned her right to execute the decree or gave up the E.P. The specific intention seen in the memo is to continue the E.P. Now, what is there to continue, if the only item now available for the Execution Court to proceed against is not pressed.

11. Even otherwise, if the decree holder wants to have an additional choice in proceeding against some other property of the judgment debtor, it is for the former to choose and not for the latter to dictate. As long as the judgment debtor is liable to satisfy the decree debt, the choice is always with the decree holder to choose any property of the judgment debtor over which the latter has a disposable interest.

12. In conclusion, this Court finds that since the decree holder has already conveyed her intention to the Execution Court to realise her debt against the 2nd item of property in E.P.No.15 of 2006 and since in the Memo also it is indicated that Execution Petition must be continued, there is little difficulty for the Execution Court to proceed with the Execution Petition.

13. In the result, this Court finds little merit in this Civil Revision Petition and the same is dismissed. The matter is remanded back and the Execution Court is directed to dispose of the E.P.No.15 of 2006 within three months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.

20.04.2018

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Index : Yes / No

To

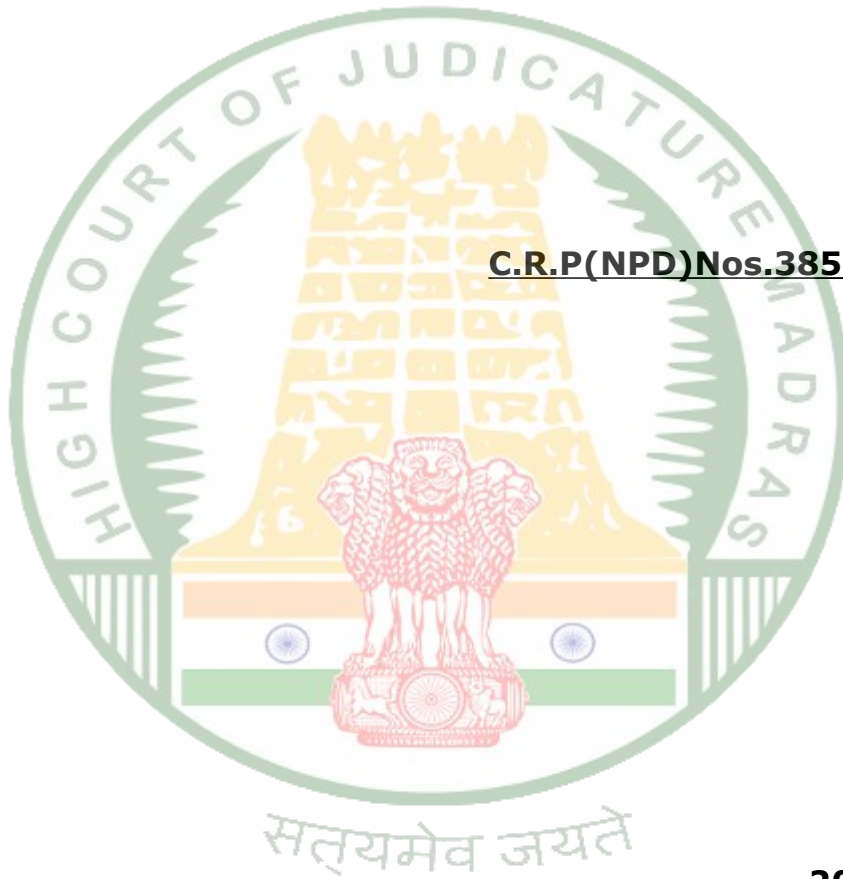
The Principal Subordinate Judge,
Villupuram.



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N. SESHASAYEE, J.,

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