

THE HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

CIVIL REVISION PETITION No. 896 of 2018

ORDER:

1) Assailing the order, dated 27.10.2017, passed in E.P.No.127 of 2012 in O.S.No.460 of 2005 on the file of the Senior Civil Judge, Amalapuram, wherein an application filed under Order XXI Rule 37 of C.P.C., seeking civil arrest of the judgment debtor was allowed, the present Civil Revision Petition is filed under Section 115 of the Code of Civil Procedure.

2) The facts in issue are as under:

The decree holder, who is the respondent herein, filed O.S.No.460 of 2005 for recovery of Rs.1,71,400/- with interest. The said suit was dismissed on 17.08.2007, against which the respondent herein preferred A.S.No.173 of 2007 before the VII Additional District Judge, Kakinada, which was allowed on 18.11.2011. The said judgment and decree in appeal has become final. Thereafter, the decree holder filed the present execution petition under Order XXI Rule 37 of C.P.C., seeking issuance of arrest warrant and sent him to jail for civil imprisonment, as contemplated under Section 55 of C.P.C.

3) A counter came to be filed by the judgment debtor opposing the same. It is said that the decree holder knowing fully well that the judgment debtor has no capacity to pay the decretal amount, filed the present E.P. only with a view of harass him. It is further urged that the decree holder failed to prove, by adducing

evidence, that the judgment debtor had means to pay the amount and in spite of the same, he is intentionally not paying the same. It is also urged that the evidence in chief of decree holder by itself may not be sufficient to order arrest of the judgment debtor.

4) After considering the rival submissions made, the Court below allowed the E.P., issued arrest warrant against the judgment debtor under Order XXI Rule 37 (2) of C.P.C., for securing his presence for conducting enquiry under Rule 40 of Order XXI of C.P.C. Assailing the same, the present Civil Revision Petition is filed under Section 115 of C.P.C.

5) In spite of service of notice, there is no representation on behalf of the decree holder. Hence, the Court heard the learned counsel for the petitioner/judgment debtor and perused the record.

6) The main ground urged by the learned counsel for the petitioner is that the Court below erred in issuing the arrest warrant, when the decree holder failed to prove that the judgment debtor has means to pay the decretal amount and that he is intentionally not paying the decretal amount in spite of having means to pay the decretal amount.

7) As seen from the record, the appeal filed by the plaintiff/decree holder was allowed directing the defendant/judgment debtor to pay a sum of Rs.1,71,400/- with interest @ 6% p.a.,

from the date of suit till the date of realization, apart from costs of the suit and appeal. It is also not in dispute that the said judgment in appeal has become final.

8) The question is whether the Court below was justified in issuing the arrest warrant under Order XXI Rule 37 (2) of C.P.C.?

9) The material on record would show that the decree holder entered the box and examined himself as PW.1. No effort was made by the judgment debtor either to examine himself as a witness or mark documents in support of the pleas taken before the Court. The evidence of PW.1 (decree holder) would show that after passing the decree in appeal, he demanded the judgment debtor to pay the decretal amount with interest and costs. The judgment debtor is doing business in coconut and paddy and getting an income of Rs.30,000/- per month. It is further stated that the judgment debtor is also having properties and getting an income of Rs.20,000/- per month. Hence, it is pleaded that though the judgment debtor is hale and healthy and having sufficient means to pay the decretal amount and is intentionally not paying the same. Hence seeks issuance of arrest warrant. PW.1 was cross-examined at length and the suggestions given by the judgment debtor with regard to income earned by him and also the properties owned by him were all denied by the decree holder. However, it is admitted that no documents have been filed by the decree holder to show that the judgment debtor was having movable and immovable properties.

10) At the same time, it is to be noted that the judgment debtor also did not enter the witness box to deny the contents in the evidence of PW.1. Basing on the above, learned counsel for the petitioner tried to contend that the decree holder failed to prove that the judgment debtor is having sufficient means to pay the amount and that he is intentionally not paying the same. He places reliance on the judgment of this Court in *E.N.Satyanarayana v. Chowdamma*<sup>1</sup>. It was a case where the respondent therein filed O.S.No.9 of 2004 for recovery of Rs.45,000/-, which was decreed on 02.03.2006. Pursuant to the said decree, the decree holder filed E.P.No.129 of 2006 for arrest of the judgment debtor. In support of her plea, the decree holder examined herself as PW.1 and got examined two more witnesses as PWs.2 and 3. She also got marked Ex.P1 to substantiate her plea. The judgment debtor himself was examined as RW.1. After appreciation of the entire evidence, the Court ordered arrest of the judgment debtor, which was challenged in the revision. The main argument advanced by the learned counsel for the petitioner therein was that pending suit there was an order of attachment before the judgment in respect of Ac.10.00 of land belonging to the judgment debtor. It was further argued that instead of proceeding against the said property, the decree holder has chosen to seek execution of the decree, by arrest of the judgment debtor. In view of the judgment of this Court in Gudiwada

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<sup>1</sup> (2009) 4 ALD 666

Munemma v. Jawardhal<sup>2</sup> and the judgment of the Apex Court in *Jolly George Varghese and another v. The Bank of Chochin*<sup>3</sup>, this Court held that “no reasons are forthcoming as to why the decree holder has not chosen to proceed against the said property and that the Court below failed to make any enquiry in that regard”. The Court also held that “without recording any finding that the said property which was attached pending the suit is not available for sale so as to recover the decretal amount, the impugned order directing arrest is un-warranted and unjustified. The facts in the instance case are totally different. It is not a case whether there was any attachment of property pending the suit.

11) In *Gudiwada Munemma case (2 supra)* this Court held as under:

“14. There is no procedural irregularity in the case on hand. The respondent/ judgment-debtor has been put on notice as required under Order 21, Rule 37 CPC. Indeed, the petitioner/decree-holder has placed on record his affidavit in examination in chief and marked certified copy of No. I-B Register as Ex. A-1. The respondent/ judgment-debtor did not choose to cross-examine the petitioner/decree-holder and there by the means of the judgment-debtor spoken by decree-holder to satisfy the decretal amount shall stand proved. The executing Court after going through the material brought on record, made the following observation:

9. With regard to the means of the J. Dr., the D. Hr., filed his affidavit along with the E.P. proforma

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<sup>2</sup> (2006) 6 ALT 587

<sup>3</sup> AIR 1980 SC 470

stating that the J. Dr., is doing seasonal business and also having lands and getting monthly income of Rs. 5,000/- from his seasonal business and also Rs. 7,000/- from his lands, apart from that he is also working as Thalari and getting a monthly salary of Rs.2,000/-. He also stated the same in his affidavit of evidence in-chief filed during the course of enquiry. But, the J. Dr., did not choose to cross-examine the P.W. 1 in spite of giving number of adjournments for his cross-examination to P.W. 1. Therefore, in view of the said reasons even though the J. Dr., filed his counter stating that he has no income to pay the E.P. amount, but in view of his failure to challenge the allegations made by the D. Hr., by way of his cross-examination to P.W. 1 it appears that the allegations made by the D. Hr., in respect of the means of the J. Dr., are remained unchallenged and they have been taken as admitted by the J. Dr.

15. The executing Court having recorded a finding that the judgment-debtor has sufficient means to discharge the decretal amount, committed error in dismissing the execution petition. Therefore, the order impugned in the civil revision petition is not legal and proper and the same is liable to be set aside.”

12) A reading of the material would show that after passing of the decree, the decree holder demanded the judgment debtor for payment of the decretal amount, but he failed to pay the same. Except giving suggestions to PW.1 with regard to his version in chief, nothing came to be elicited to show that the judgment debtor has no means to pay the decretal amount. Though it was claimed by the judgment debtor that he was suffering with severe ill health and that his spinal card was badly damaged, no material was placed before the executing Court to prove the same.

However a certificate issued by KIMS Hospital, Amalapuram, is now placed on record, which only speaks about disc changes in L4-L5, leading to root compression. That by itself cannot be a ground to deny payment.

13) In *Voona Surya Rao v. Salina Sarathi*<sup>4</sup> this Court held as under:

“11. It would thus appear from the provisions of Rule 41 of Order 21 of CPC that the Judgment-Debtor is required to show whether he has any and what other property or means of satisfying the decree for enabling the Court to arrive at a conclusion whether the Judgment-Debtor is liable to be detained in civil prison. A satisfaction is required to be rendered to the Court whether any or what debts are owing to the Judgment-Debtor and whether the Judgment-Debtor has any and what other property or means of satisfying the decree after orally examining the Judgment-Debtor.”

14) In *Karri Venkata Rama Reddy v. Megalapu Viswanatham*<sup>5</sup>, this Court held as under:

"The debtor should first enter into the witness box and produce prima facie proof that he is entitled to the benefits of Act 7 of 1977 i.e., the debtor falls within the definition of Section 3(j). Thereafter, the onus shifts to the creditor, Under Section 13, to establish that the debtor is not entitled to the benefits of the Act."

15) It is to be noted that, PW.1, the decree holder in his evidence deposed about the income earned by the judgment debtor through property and also in coconut and paddy business.

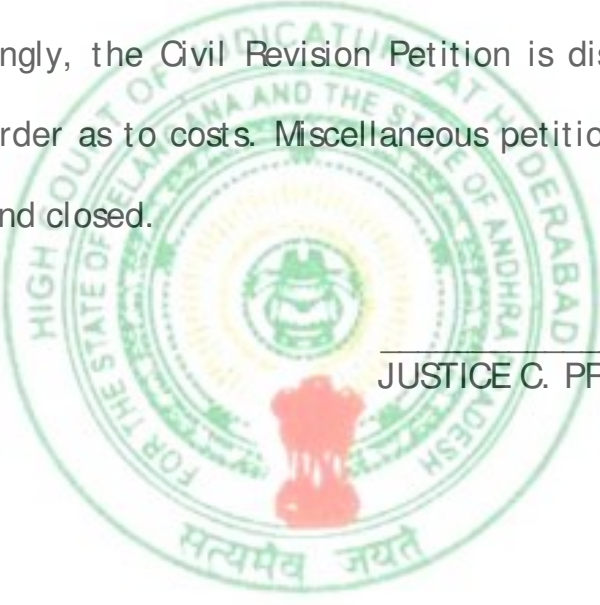
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<sup>4</sup> (1998) 5 ALT 690

<sup>5</sup> (1993) 3 ALT 176

The suggestions given by the judgment debtor with regard to his income were all denied by PW.1. To deny the version of PW.1, the judgment debtor should have atleast entered the box and deposed on oath, his version of the case. In the absence of the same, the argument that no evidence has been placed on record by the decree holder to show that the judgment debtor has sufficient means to pay the decretal amount and is intentionally evading the payment of decretal amount cannot be accepted. Hence, I see no reasons to interfere with the impugned order.

16) Accordingly, the Civil Revision Petition is dismissed. There shall be no order as to costs. Miscellaneous petitions, pending, if any, shall stand closed.



JUSTICE C. PRAVEEN KUMAR

15.06.2018  
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