THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.202 OF 2011

ORDER:

This civil revision petition, under Section 115 of the Code of Civil Procedure, 1908 (for short 'CPC'), is filed questioning the order dated 10.12.2010 in E.P.No.90 of 2009 in O.S. No.111 of 2008 passed by the Senior Civil Judge, Amalapuram, whereby the learned Senior Civil Judge dismissed the E.P. filed under Rule 37 of Order XXI of CPC for arrest of the Judgment Debtor/ respondent and commit him to the civil prison for realisation of the decree debt due.

The respondent is the judgment debtor No.6, the decree was obtained by the petitioner against the judgment debtors 1 to 7, who are principle debtor and guarantors, making them jointly and severally liable to pay the debt due under the decree. After obtaining the decree, the petitioner initiated execution proceedings against the respondent under rules 37 and 38 of Order XXI of CPC to realise the decree debt. The specific contention of the petitioner before the executing court is that the respondent is an income tax assessee and earning Rs.50,000/- per month and he is having movable and immovable property. The petitioner personally demanded all the judgment debtors to discharge the decree debt, but none discharged the debt. Inspite of having capacity, respondent failed to pay the decree debt due. Hence, the petitioner filed the execution petition under Rules 37 and 38 of Order XXI of CPC to realise the decree debt.

The respondent filed counter denying the material allegations *interalia* contending that the Court at Amalapuram has no jurisdiction to entertain the petition and filed for simultaneous execution without obtaining prior permission and therefore, the execution petition is not maintainable and that apart the decree was already transmitted to the Senior Civil Judge Court, Narsapur, and that the respondent did not own and possess any means to discharge the decree debt and prayed for dismissal of the petition.

During enquiry, on behalf of the petitioner, P.Ws.1 and 2 were examined, marked Exs.A.1 to A.3 and on behalf of respondent, R.Ws.1 and 2 were examined and Ex.B.1 was marked.

Upon hearing argument of both the counsel the execution petition was dismissed holding that the petitioner failed to prove that the respondent did not discharge the debt due under the decree. Aggrieved by the same, the present revision is filed under Section 115 of CPC on various grounds mainly on the ground that the court failed to consider the stamp duty and registration charges paid on Ex.A.1 to A.3 impounding approximate amount of Rs.1,29,000/- in all that itself indicates that the petitioner own and possessed sufficient means to discharge the debt due under the decree and apart from that the judgment debtor was an income tax assessee, earning Rs.50,000/- per month, the court below did not consider the evidence in proper perspective and committed an error in dismissing the execution petition and prayed to set aside the order impugned in this revision.

During hearing, Sri. P.Durga Prasad, learned counsel for the petitioner, while reiterating the contention urged in the revision petition drawn the attention of this Court that the stamp duty is paid on Ex.A.1 to 3 incurring approximate amount Rs.1,29,000/- is suffice to conclude that the petitioner possessed sufficient means, but the respondent intentionally avoiding to discharge the debt due under the decree; the trial court did not consider the means of the respondent and committed an error and hence prayed to set aside the order exercising power under Section 115 of CPC as the court below failed to exercise jurisdiction that vested on it.

Whereas Sri. T.V.S. Prabhakar Rao, learned counsel for the respondent supported the order in all respects and prayed to dismiss the revision.

The decree was obtained by the petitioner against the judgment debtors 1 to 7. The first judgment debtor is the principle borrower and judgment debtors 2 to 7 are the guarantors whose liability is coextensive with that of the principle debtor.

According to Section 128 of the Indian Contract Act, 1872 when a decree was passed making all the judgment debtors liable to pay debt due, the decree holder is entitled against any one of the judgment debtor for recovery of the money. Here the petitioner filed the execution petition against the judgment debtor No.6 for his arrest after making necessary enquiry under Rule 37 of Order XXI of CPC and commit him to the civil prison on payment of necessary process and subsistence allowance for realisation of the decree debt.

The learned counsel for the respondent contended that the respondent has no sufficient means to pay decree debt. To disprove the contention of the respondent, the petitioner relied on Exs.A.1 to A.3 registered sale deed dated 23.11.2006, 11.12.2006 and 31.07.2007 evidencing purchase of various properties by the judgment debtor No.6/ respondent herein and stamp duty paid on the document is more than Rs.1,20,000/- in all.

When the judgment debtor No.6 is able to invest more than Rs.1,20,000/- paying stamp duty on the documents marked as Exs.A.1 to A.3, it can be inferred that he has got sufficient means to discharge the debt. But the court below totally ignored these three documents and did not advert to the contents of the documents and stamp duty paid on the said documents. The executing court recorded a finding though referred Exs.A.1 and A.2 and according to R.W.1, as per endorsement on the reverse of page 2 of Ex.A.1, an amount of Rs.56,810/- was collected by the registration authority in the year 2009 towards deficit stamp duty; as per Ex.A.2 an amount of Rs.50,825/- was paid by him towards deficit stamp duty in the year, 2009 and he has also paid an amount of Rs.23,895/- towards deficit stamp duty on the document marked as Ex.A.3.

Thus, in all the respondent herein paid more than Rs.1,20,000/- as deficit stamp duty on Exs.A.1 to A.3. The properties covered by Exs.A.1 to A.3 are situated within the jurisdictional limits of Amalapuram and they are valuable properties, according to the observation made by the court below. When the respondent herein paid such huge amount depositing the stamp duty payable on Exs.A.1 to A.3, it can safely be concluded that the respondent possessed sufficient means to pay debt due under the decree for Rs.2,38,774/- by the date of filing EP with subsequent interest.

These documents further establishes that he possess valuable properties and therefore, the order passed by the court below is erroneous on the face of record as it failed to consider Exs.A.1 to A.3

in proper perspective. The executing court relied on the Judgment of the Apex Court in **Jolly George v. Arghese v. Bank of Cochin (AIR 1980 SC 470)** and **Y.Saratchandra v. Lakshmi Narasimha Finances (2004(5) ALT 449)**, wherein the Apex Court held that simple default by the judgment debtor in paying decreetal dues does not warrant his arrest and detention in execution of decree and Decree holder must prove that Judgment debtor had enough funds but he is purposefully avoiding and delaying to pay the decree amount etc.

If this principle is applied to the present facts of the case, payment of deficit stamp duty more than Rs.1,20,000/- towards stamp duty and purchase of property covered by Exs.A.1 to A.3 is itself indicates that he possessed sufficient means to discharge the debt, which is not a simple default. Even after execution petition, he did not pay any amount though he was able to pay Rs.1,20,000/- towards deficit stamp duty on Exs.A.1 to A.3, when the execution petition was filed during the same year. Therefore, the evidence on record oral and documentary clinchingly established that the respondent possessed sufficient means to discharge the debt, but the court below committed an error in dismissing the execution petition.

Though the powers of this Court are limited under Section 115 of CPC, this Court may call for record of any case which has been decided by any court subordinate to it and interfere with the orders, if the court failed to exercise jurisdiction illegally and irregularly. Here it is the case, exercise of jurisdiction illegally and irregularly, this court can interfere with such order and set aside the order passed by the court below. Hence, I find that the order passed by the court is nothing but illegal, irregular exercise of jurisdiction, warrants interference of this court.

Hence, the revision petition is allowed, setting aside the order dated 10.12.2010 in E.P. No.90 of 2009 in O.S. No.111 of 2008 passed by the Senior Civil Judge, Amalapuram, while directing the executing court to issue necessary warrant of arrest to commit the respondent/ judgment debtor No.6 to civil prison on payment of process fee or batta and subsistence allowance for a period of three months and pass appropriate orders. No costs.

Consequently, miscellaneous petition, if any, pending shall stand closed.

M.SATYANARAYANA MURTHY, J

13.03.2018
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