

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

C.R.P.No.2650 OF 2017

ORDER:

This revision petition is filed under Section 115 C.P.C. questioning the order dated 28.04.2017 in E.P.No.38 of 2014 in O.S.No.56 of 2011 passed by the I Additional District Judge, Rajamahendravaram, ordering arrest of the Judgment Debtor for realization of the decree debt.

2. The decree holder filed suit for recovery of amount and obtained decree for recovery of Rs10,92,500/- together with interest @ 12 % per annum from the date of suit till the date of decree and 6% per annum from the date of decree till the date of realization and costs. As there was a typographical mistake, the decree was got amended vide orders in I.A.No.472 of 2014. It is alleged in the affidavit filed in E.P. under Order XXI Rules 11, 37 and 55 to 58 C.P.C. for realization of the decree debt that the Judgment Debtors having sufficient means to pay the decree debt besides possessing movable and immovable properties worth lakhs of rupees and earning Rs.1,00,000/- each per month by doing business. They are proclaiming that they will procrastinate the proceedings for years together and they will not pay single pie towards debt due under the decree. Therefore, prayed to commit them to civil prison for recovery of amount due under the decree.

3. The second Judgment Debtor filed counter and Judgment Debtors 1 and 3 filed memo adopting counter filed by the 2nd Judgment Debtor. The contention of the Judgment Debtors in brief is that Judgment Debtors 1 and 2 are suffering from hypertension and heart problem and they are aged 65 years and

they have no occupation and that they are depending upon their children and that the doctors advised them not to undergo strain and advised to take bed rest. The calculation of E.P. amount is not correct. The decree holder obtained decree by playing fraud against the judgment debtors. The decree holder is no other than the Viyyanka of the 1st judgment debtor. The son of the decree holder, who is the son-in-law of the judgment debtor is behind the litigation and he is not permitting his wife to see the judgment debtors and their family members. The respondents have no means to discharge the decree debt and prayed to dismiss the execution petition.

4. During enquiry, on behalf of the decree holder, PW.1 and PW.2 were examined. On behalf of the respondents, RWs.1 and 2 were examined. Though RW.3 filed affidavit as examination in chief, did not tender himself for cross examination, hence, his evidence was eschewed. No documentary evidence was produced on either side.

5. Upon hearing both counsel, the executing Court recorded a finding at para 23 that the petitioners admitted about possessing of properties and letting out shops etc. and that petitioners are willfully evading to pay the debt due under the decree to the decree holder and ordered arrest of the petitioners while committing them to civil prison under Section 51 read with Order XXI Rule 37 C.P.C.

6. Aggrieved by the impugned order, the present revision petition is filed on three grounds. The first ground is that the petitioners have no means to pay the debt due under the decree, which is about Rs.14 lakhs and even if the admission is accepted that the judgment debtors did not possess sufficient means to pay

the debt due and that the petitioners did not avoid to pay the debt due and in the absence of recording such finding, the impugned order passed by the Court below is not sustainable this Court while exercising power under Section 115 C.P.C. to pass an order setting aside the same.

7. During hearing, learned counsel for the petitioners while reiterating the contentions drawn the attention of this Court to the evidence of PW.1, PW.2 and RW.2 to contend that they have no means to pay the debt due and the Court below did not appreciate the evidence in proper perspective either recording the evidence in para 23 of the order under challenge and placed reliance on **Jolly George Verghese and another v The Bank of Cochin**¹. Based on the principles laid down by the Apex Court, the petitioners sought to set aside the order under challenge dismissing E.P. while allowing the present revision.

8. Learned counsel for the decree holder supported the impugned order in all respects while opposing the claim of the petitioners on the admissions made by RW.1 with regard to possessing shops and letting out two shops for Rs.10,000/- each per month, which is sufficient to conclude that the petitioners did possess sufficient means to pay debt due and avoiding willfully to pay the debt due under the decree and prayed for dismissal of the revision.

9. The scope of revision under Section 115 C.P.C. is limited and this Court can exercise such power only in three circumstances, and the High Court may call for the record/return of any case which has been decided by any court subordinate to such High

¹ 1980 AIR 470

Court and in which no appeal lies thereto, and if such subordinate court appears (a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit. If the Court below fails to exercise jurisdiction that confer on it, illegal or irregular exercise of jurisdiction, this Court can interfere with such findings. While deciding an application filed under Section 115 C.P.C., the Court has to look into all the material and if it indicate the ground within the parameters of the section for exercise of revisional jurisdiction, this Court can interfere with such order and thus, the jurisdiction of this Court is limited.

10. Keeping in mind the limited scope of jurisdiction that conferred on this Court under Section 115 C.P.C., I would like to advert to the material available on record to decide the alleged irregularity or illegality in exercise of jurisdiction by the Court below or failure to exercise jurisdiction that vested or exercise of jurisdiction in excess of the jurisdiction that conferred.

11. Obtaining decree by the decree holder against the petitioner for recovery of Rs.10,92,500/- together with interest and costs is not in dispute and similarly the relationship is also not in dispute. The dispute is only with regard to avoidance and ability to pay the decree debt by the judgment debtors and wilful negligence in payment of the debt due under the decree.

12. To substantiate the contention of both parties, they examined themselves as witnesses, besides other witnesses. The decree holder was examined as PW.1 and in his affidavit in lieu of

examination in chief, he reiterated the allegations made in the verifying affidavit filed along with the execution petition while contending that the judgment debtors have sufficient means to pay debt due and willfully avoiding to pay the debt due and that they owned and possessed shops. But in the cross examination PW.1, the decree holder elicited about certain facts with regard to the capacity of the decree holder, which are not relevant at present since this Court cannot go beyond the decree. In second para of cross examination of PW.1 expressed his inability to state whether judgment debtor No.2 is having independent income or not, but he is having properties in the Perumalla Complex at A.V.Apparao Road. Similarly, Judgment Debtor No.3 is residing at Duvva, West Godavari District near Tanuku. In the entire cross examination of PW.1 except a suggestion that judgment debtor No.2 is having no independent income, nothing was elicited to disprove that either judgment debtors did not possess any means to pay the decree debt or willfully avoided to pay the decree debt.

13. Coming to the evidence of PW.2, who is no other than the son of PW.1, from the shopping complex, judgment debtors are getting rent Rs.5,000/- to Rs.10,000/- to each shop besides pagidi and out of 16 shops already alienated two shops and rest of the shops are fetching rental income. In the cross examination, PW.2 expressed his inability as to how the judgment debtors are getting income.

14. At this stage, it is relevant to advert to the evidence of RW.1, who is contesting E.P. along with others and that he has no means. In the cross examination, he clearly testified that he has no means to discharge the decree debt at present and that he got

joint share in the house, but he could not realize any amount or income on the said property, while denying the evidence of PWs 1 and 2. In the cross examination, RW.1 admitted that judgment debtors 2 and 3 are his brothers and residing at Anala Venkata Apppa Rao Road, Rajahmundry having shopping complex in the name of Perumallu Shopping Complex at Gunduvari Street, bearing Door No.9-25-73, Rajahmundry, consists of 16 shops and the petitioners owned 14 shops out of 16 shops in busy area surrounded by silver and gold shops and that RW.1 let out two shops on rent and getting Rs.5,000/- each. RW.1 also denied the suggestion put to him that he is carrying on kirana business at his residence and admitted that his son carrying on kirana business and one of his brother doing kirana business and that the 2nd judgment debtor let out two shops and getting Rs.10,000/- from each shop as rent. Thus RW.1, admitted about letting out two shops by himself and two shops by judgment debtor No.2 and earning Rs.10,000/- each and JDr No.2 is earning Rs.20,000/- as rent from two shops, as he let out the shops @ Rs.10,000/- each per month.

15. The evidentiary admissions of RW.1 are suffice to conclude that he owned property i.e. a commercial complex in down town surrounded by silver and gold shops at Rajahmundry, but he let out only two shops and his brother let out two shops out of 14 shops. He did not disclose nothing whether the other 10 shops were kept idle or in occupation of any person or let out by any other person. But this appears to be artificial for the reason that gold and silver shops are located in busy town or heart of the Rajahmundry town, no premises will be kept unoccupied or idle.

The contention of the petitioners appears to be improbable to the natural circumstances of an ordinary businessman.

16. RW.2, who is another brother of RW.1 and 2nd petitioner, also denied his ability to pay the debt due under the decree as usual. But in the cross examination, he admitted about owning shopping complex, which is surrounded by gold and silver business. There are 16 shops in the complex and he himself and his sons have four shops and his sons are doing business in the four shops. But he did not possess any shop carrying business. He went to the extent of denying rent receipt, income contrary to the evidence of RW.1, who is no other than the brother of RW.2 and contest is identical. If the evidence of RWs.1 and 2 read together, it is clear that both judgment debtors are not testifying truth and their evidence is tissue of lies and no credence can be attached to such testimony since the honest attempt is to avoid decree debt.

17. The main endeavour of learned counsel for the petitioners is that the Court below did not record any finding about proviso to Section 51 C.P.C. Section 51 C.P.C. deals with powers of the Court to enforce execution in different modes, they are by delivery of any property specifically decreed; by attachment and sale or by sale without attachment of any property; by arrest and detention in prison; by appointing a receiver; or in such other manner as the nature of the relief granted may require.

18. The proviso annexed thereto is clear that the decree for payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment debtor an opportunity of showing cause why he should not be committed to prison, the

Court for reasons recorded in writing is satisfied that the judgment debtor, with the object or effect of obstructing or delaying the execution of the decree (i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or (ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property; or that the judgment debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused to pay the same or that the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account. The Court is required to record a finding as required under (b)(ii)(a) of proviso to Section 51 C.P.C.

19. When the petitioners raised the contention that they have no means the enquiry has to be conducted under Rule 37 C.P.C. and after conducting enquiry, the Court below record a finding. The application under Order XXI Rule 37 C.P.C., it is not for the executing Court to automatically order arrest of the judgment debtors, follow the procedure prescribed under Rule 40 C.P.C which mandates that an enquiry has to be conducted before passing the order sending the judgment debtor to civil prison vide judgment of this Court in **S.Ismail and another v Agrasen Chit Funds P.Ltd and another**² . As the executing Court issued notice under Order XXI Rule 37 C.P.C. and conducted an enquiry as contemplated under Rule 40 C.P.C. compliance of procedure is suffice based on evidence before ordering arrest of the judgment

² AIR 2005 AP 33

debtors to civil prison, the Court has to record finding about the sufficient means to pay the decree debt or substantial part thereof. The executing Court recorded a specific finding with regard to the possessing means after appreciation of entire evidence.

20. The judgment of the Apex Court in **Jolly George Verghese and another** referred supra, relied on by learned counsel for the petitioners, in para 11, that if the judgment debtor once had the means but now has not or if he has money now on which there are other pressing claims, it is violative of the spirit of Article 21 to arrest and confine him in jail so as to coerce him into payment and finally concluded that mere failure is not sufficient and there must be some evidence to prove that he neglected to pay the amount due under the decree etc.

21. The law declared by the Apex Court is not in quarrel, even if the principles laid down in the above judgment are applied to the present facts of the case, the evidence on record is clear that the petitioners possessed and owned 14 shops in a highly commercial area at Rajahmundry surrounded by gold and silver business and judgment debtor No.1 (RW.1) let out two shops and earning Rs.10,000/- as rent and judgment debtor No.2 is earning Rs.20,000/- as rent for two shops while occupying two shops by judgment debtor No.2 and his sons, who are carrying on kirana business therein. At the same time, RW.1 admitted that judgment debtor No.2 is carrying on kirana business at his residence. But still they refused to pay the amount though a decree was passed long ago. Even according to bare reading of Section 51 C.P.C. mere recording a finding that though JDr had means to pay entire decree debt or part of the decree debt and failure to pay the decree

debt is sufficient to pass such an order of arrest of the judgment debtors for realization of the decree debt. Therefore, the trial Court rightly passed the order under challenge which do not call for interference of this Court by exercising power under Section 115 C.P.C. since there is absolutely nothing to accept that the petitioners did not possess means to pay the decree debt which was substantial part thereof as it is only the requirement under (b)(2)(i) of proviso to Section 51 C.P.C. Apart from that, the powers of this Court are very limited as stated above and the petitioners failed to show that the Court failed to exercise jurisdiction conferred on it or exercised jurisdiction in excess of the jurisdiction that confer on it or exercised jurisdiction illegally or irregularly in passing such an order.

22. In the absence of any proof of requirement to exercise power under Section 115 C.P.C., it is difficult to interfere with the order under challenge. Therefore, I find no merit in the revision petition and consequently, the same is liable to be dismissed as it devoid of merits.

23. Accordingly the revision petition is dismissed. There shall be no order as to costs.

Pending miscellaneous petitions in the petition, if any, shall stand closed.

M. SATYANARAYANA MURTHY,J

05.02.2018
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