

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.6044 OF 2016

ORDER:

The present Civil Revision Petition, under Section 115 of the Code of Civil Procedure, 1908 (for short 'Code'), is filed by the petitioner - judgment debtor - defendant, questioning the order, dated 10.08.2016, passed in E.P. No.81 of 2015 in O.S. No.166 of 2012, by the Senior Civil Judge at Narsimapatnam, whereby the Executing Court ordered the arrest of judgment debtor for realization of the decretal debt in O.S. No.166 of 2012, disbelieving his contention that he has no means to pay the decretal debt and that there was no willful negligence or default on his part to pay the decretal debt.

2. The respondent - decree holder - plaintiff filed the suit O.S. No.166 of 2012 for recovery of amount and obtained a decree 07.11.2013.

3. For realization of the decree debt, the respondent filed E.P. No.81 of 2015 in O.S. No.166 of 2012 under Order XXI, Rule 37 of the Code for committing the petitioner to civil prison, alleging that E.P. is filed for realization of amount is for Rs.1,22,433/- together with subsequent interest and costs, and that the petitioner - judgment debtor has sufficient means to pay the decretal debt, having possessed Acs.2-10 cents of land of his own and neglected or refused to pay the decretal debt despite passing a decree.

4. The petitioner - judgment debtor filed counter denying the material allegations, while raising a plea that he did not possess sufficient means to pay the decretal amount and has no means and capacity to discharge the decretal amount as crop is damaged and no money was realized on the crop due to drought conditions. He is living by doing a coolie work and his financial condition is not well and requested to dismiss the E.P.

5. During inquiry, under Order XXI, Rule 37 of the Code to find out the proof of means of petitioner herein, PWs.1 and 2 were examined on behalf of the respondent herein and marked no documents, and on behalf of the petitioner herein, though he himself examined as RW.1, marked no documents.

6. Upon hearing argument of both sides, the Executing Court concluded that the petitioner owns Acs.2-10 cents of land at Nathavaram village and its value is about Rs.7.00 to 8.00 lakhs as per the then existing market value, and the respondent herein is also attached the land vide orders, dated 08.02.2012, in I.A. No.909 of 2012, besides the income from the land, he is receiving Rs.400/- per month as rent from the house, thereby he possessed sufficient means to pay the debt.

7. Aggrieved by the order, the revision under Section 115 of the Code is filed by the judgment debtor, mainly on the ground that the Executing Court failed to consider the plea of his incapacity to pay the

decretal debt by throwing burden on him to prove that he has no means and it is an illegality committed by the Executing Court. When the property was attached by order, dated 08.02.2012, in I.A. No.909 of 2012 by the original Court which is made absolute at the time of passing decree, Executing Court ought to have ordered sale of the property instead of ordering his arrest, and thereby committed an error. Apart from that, there is no basis for ordering arrest of the petitioner and the order under challenge is contrary to the law laid down by the Hon'ble Supreme Court in **Jolly George Varghese v. The Bank of Cochin**¹ and, therefore, order passed by the Executing Court is erroneous on the face of record and the same is liable to be set aside and requested to set aside the order under challenge.

8. During course of hearing, learned counsel for the petitioner - judgment debtor, while reiterating the contentions urged in grounds of revision, placed reliance on the judgment of the Apex Court in **Jolly George Varghese**¹, and another judgment of this Court in **Pandugayala Subbarayadu v. Kattamuri Sree Krishna**², and requested to allow the revision

9. Whereas, learned counsel for the respondent - decree holder contended that in view of the interim order passed by this Court on 07.12.2016, in CRPMP No.7901 of 2016, the petitioner - judgment debtor paid 50% of the E.P. amount and this itself is sufficient to

¹. AIR 1980 SC 470

². 2008 (4) ALD 454

conclude that the petitioner possessed sufficient means. He also further contended that when the petitioner owned and possessed Acs.2.10 cents of agricultural land, he is supposed to realize the income by raising crops in the land, since it was not his case that the land is not fit for cultivation, but, on the other hand, the petitioner contended that due to drought condition, he could not realize any amount from the land raising any crop. Therefore, the means of the petitioner are established and requested to dismiss the petition.

10. Obtaining decree for recovery of amount and filing E.P. to realize the decretal amount invoking Order XXI, Rule 37 of the Code by the respondent - decree holder is not in dispute. The respondent specifically contended that the petitioner - judgment debtor possessed sufficient means to pay decretal debt and avoiding to discharge the same intentionally and requested to arrest the petitioner to recover the amount. Whereas, the petitioner - judgment debtor contended that he has no means to pay the decretal debt and he suffered huge loss due to drought condition.

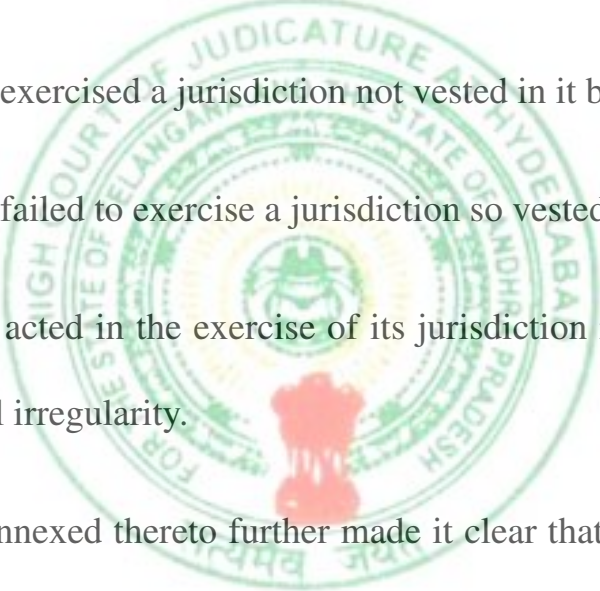
11. The decree-holder himself was examined as PW.1, besides examining a neighbouring land owner as PW.2, to prove the capacity of judgment debtor to discharge the decretal debt, and the evidence of PWs.1 and 2 is consistent that the petitioner - judgment debtor owned Acs.2.10 cents of land at Nathavaram village and the property was also attached by order, dated 08.02.2012 in I.A. No.909 of 2012 in O.S. No.166 of 2012, and this fact was not denied by the petitioner -

judgment debtor. Therefore, when the petitioner owned and possessed agricultural land to an extent of Acs.2.10 cents at Nathavaram village, he is expected to realize substantial amount by way of raising crop during seasons. But, the petitioner - judgment debtor pleaded that he did not realize any amount due to drought condition. If really, drought condition is prevailing in the area of Nathavaram village, Cultivation Account of the village would disclose the crop raised and realized during the every crop season. But, no such material is produced before the Court below. Therefore, disbelieving the evidence of judgment debtor, the Executing Court concluded that the petitioner owned and possessed Acs.2.10 cents of agricultural land at Nathavaram village. But, the contention of the petitioner that mere possession of the property is not sufficient to conclude that he has got sufficient means to discharge the decretal debt and placed reliance on the judgment of the Apex Court in **Jolly George Varghese**¹, where the Apex Court held that in the absence of *mala fides* and dishonesty on the part of the judgment debtor to pay the decretal debt, arrest and detention cannot be ordered as it is violative of Article 11 of the International Covenant on Civil and Political Rights (1966) and Article 21 of the Constitution of India. In the said judgment, the facts are that a suit was filed for recovery of Rs.2.5 lakhs and decree was obtained for recovery of amount against the judgment debtor by the decree holder. The E.P. is filed for realization of decretal debt by issuing warrant of arrest and detention of the judgment debtor in civil prison and, accordingly, a warrant was issued under Order XXI, Rule

37 of the Code, and the petitioner- judgment debtor pleaded that he has no sufficient means to pay decretal debt, the Court concluded that in the absence of any *mala fides* or dishonesty on the part of the judgment debtor, order of arrest cannot be ordered for realization of decretal debt by exercising power under Order XXI, Rule 37 of the Code as it is a violative of Article 11 of the International Covenant on Civil and Political Rights and Article 21 of the Constitution of India.

12. An identical question came up before this Court in **Pandugayala Subbarayadu**², and this Court also held that arrest is illegal by following the principle laid down in **Jolly George Varghese**¹. In the present facts of the case, the only plea of the petitioner herein is that he failed to realize any amount due to drought prevailing in Nathavaram village, where Acs.2-10 cents of land belonging to him is situated. But, no piece of evidence is produced, more particularly cultivation account to establish that he has not realized any amount during crop season of the year 2015. It is not the case of petitioner - judgment debtor that he has no *mala fides* or dishonesty for non-payment of decretal amount. He simply pleaded that he failed to realize any amount during crop season due to drought condition prevailing in the village, and at the same time, the decree holder also failed to plead any dishonest intention on the part of the judgment debtor. But, copy of the affidavit filed along with E.P. is not placed on record to find out whether decree holder pleaded that the judgment debtor is avoiding to pay decretal debt with dishonest

intention or with *mala fide* intention, and no such plea was urged before the Executing Court calling upon it to answer the lack of *mala fides* or dishonest intention in payment of decretal debt. When such plea was not raised before the Executing Court, the petitioner - judgment debtor is not entitled to raise such plea as the scope of revision under Section 115 of the Code is limited and this Court can exercise such power only in three circumstances enumerated therein. The power under Section 115 of the Code can be exercised only when Subordinate Court appears-

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- i. to have exercised a jurisdiction not vested in it by law; or
 - ii. to have failed to exercise a jurisdiction so vested; or
 - iii. to have acted in the exercise of its jurisdiction illegally or with material irregularity.

The proviso annexed thereto further made it clear that the High Court or the District Court by exercising power under Section 115 of the Code, shall not vary or reverse any order, including an order deciding an issue, made in the course of a suit or other proceedings, except where-

- i. The order, if so varied or reversed, would finally dispose of the suit or other proceedings; or
- ii. The order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

Therefore, in view of the language used and the circumstances enumerated under Section 115 of the Code, this Court can exercise power of revision only in three circumstances. But, in the present facts of the case, no such ground is raised covered by sub-sections – (a), (b) and (c) of Section 115 of the Code. Therefore, the contention raised by the learned counsel for the petitioner that the Executing Court did not record any finding on the *mala fides* or dishonest intention of the judgment debtor in non-payment of the decretal debt cannot be entertained, at this stage, for the first time, in the revision under Section 115 of the Code.

13. In pursuance of the direction issued by this Court, the petitioner admittedly paid 50% of the decretal amount, but the amount to be paid is only remaining 50%. Therefore, payment of 50%, which is more than Rs.50,000/-, at a time is also one of the circumstances to conclude that the petitioner has capacity or means to pay the decretal debt. The means may be different, that he may borrow any amount and discharge the decretal debt, or he may arrange and discharge the same. Therefore, when the conduct of the petitioner - judgment debtor is taken into consideration throughout the proceedings including payment of 50% of the decretal amount with proportionate interest and costs, is suffice that he had sufficient means to pay the decretal amount, and such a dishonest intention can be inferred from the circumstances also, however, it is not necessary since no such plea was raised before the Executing Court. Therefore, I find no ground to interfere with the order passed by the Executing Court.

14. In view of the aforesaid discussion, the present revision is dismissed, affirming the order, dated 10.08.2016, passed by the Executing Court in E.P. No.81 of 2015 in O.S. No.166 of 2012, however, no order as to costs. At this stage, learned counsel for the petitioner - judgment debtor requests to grant installments for payment of balance amount, but it is for him to file appropriate application for claiming installments.

Consequently, Miscellaneous Petitions, if any, pending in the Civil Revision Petition stand closed.

October 25, 2018
Mgr

M. SATYANARAYANA MURTHY, J

