

A.No. 1875 of 2019
in
E.P.No. 117 of 2015

R.SUBRAMANIAN, J.

This application has been filed in the nature of an appeal against the order of the learned Master dismissing the A.No. 1480 of 2019 filed by the decree holder seeking a direction to the police to secure custody of the judgment debtor.

2. The applicant had filed E.P.No. 117 of 2015 seeking execution of an award for payment of money passed against the respondent under Rule XXI Order 37 of Code of Civil Procedure seeking arrest and detention of the judgment debtor in the Civil Prison. The learned Master ordered notice to the judgment debtor and upon service of notice, the judgment debtor appeared through counsel and also filed a counter. Thereafter, despite several opportunities, judgment debtor was not ready for arguing the matter. The judgment debtor was set exparte on 10.08.2016. The execution petition was thereafter posted for means evidence.

3. On 24.08.2016 evidence of P.W.1 was recorded. On the basis of the said evidence, the learned Master concluded that the judgment debtor has got means and he is wilfully avoiding payment of the decree amount. Upon such

conclusion, the learned Master ordered arrest of the judgment debtor by 05.10.2016. Thereafter, the judgment debtor filed A.No.5110 & 5111 of 2016 seeking to set aside the exparte order dated 10.08.2016. It is seen from the records that the applications were dismissed on 22.02.2017. Since the warrant could not be executed, the applicant filed an application in A.No. 1865 of 2017 seeking police aid and the same was allowed on 23.03.2017. Despite several attempts, the warrant could not be executed. Therefore, the applicant was constrained to file A.No.1480 of 2019 seeking a direction to the police to secure the judgment debtor. The said application was dismissed by the learned Master on the conclusion that it will lead to wrong procedure. Pending this application, the applicant / decree holder died and his legal representatives have been brought on record.

4. Heard Mr.Gagan Bothra, the second petitioner, appearing in person on behalf of himself and on behalf of the petitioners 3 and 4.

5. Mr.Gagan Bothra would submit that despite order of arrest having been made, the respondent is evading arrest and unless the police was directed to secure his presence, the Master's arrest order could not be executed. Though

this appeal against the order dismissing the A.No. 1480 of 2019, on a perusal of the orders passed in the execution petition, I find that an error had crept in, in the process of execution even on 24.08.2016. Order 21 Rule 37 of C.P.C prescribes the procedure for execution of a decree by arrest of the judgment debtor. Order 21 Rule 37(1) provides that the Court shall before ordering arrest issue notice to the judgment debtor requiring him to show cause as to why he should not be committed to the civil prison. Order 21 Rule 37 (2) provides that if the judgment debtor does not appear pursuant to the notice, the Court may issue warrant of arrest of the judgment debtor. Rules 38 and 39 of Order 21 deal with issuance of 'the warrant of arrest' and 'payment of subsistence allowance'. Rule 40 of Order 21 prescribes that the procedure to be adopted by the Court when the judgment debtor appears in response to the notice.

6. From the facts narrated above, it could be seen that the judgment debtor appeared and responded to the notice and also filed a counter. The means evidence was recorded and the learned Master found that the respondent though has got means and is evading the payment of money due under the decree. Once, the Executing Court finds that the judgment debtor is having means and is evading payment of the decree amount under Rule 40, the Court has to pass an order of detention prescribing the period of detention also. It will

be useful to extract the provisions of Order 21 Rule 40(3) which reads as follows:-

"Upon the conclusion of the inquiry under Sub-Rule 1 the Court may, subject to the provisions of Section 51 and to the other provisions of this Code, make an order for the detention of the judgment debtor in the Civil Prison and in shall in that event cause him to be arrested if he is not already under arrest."

7. The same has not been done in this case. The learned Master had after concluding that the judgment debtor is not paying the decree amount, despite having sufficient means, has ordered only arrest without prescribing the period of detention. Hence, I am constrained to interfere with the proceedings in execution. The entire proceedings after 24.08.2016 are set aside, the Execution Petition is remitted back to the Master to be proceeded in accordance with law. The provisions of Order 21 Rule 40 from the stage after the means evidence had been recorded shall be strictly adhered to.

8. As already stated, the learned Master has concluded that the judgment debtor has got means to pay the decree amount and he has not paid the amount

on 24.08.2016. To that extent the proceedings are perfectly justified. But, the learned Master ought to have ordered a detention and mentioned the period of detention as required under Section 51 of Code of Civil Procedure. Therefore, the learned Master is directed to recommence the proceedings after 24.08.2016 and conclude the same in accordance with the procedure prescribed under Order 21 Rule 40(3) r/w Sections 51 and 52 of the Code of Civil Procedure.

9. Accordingly, A.No. 1875 of 2019 disposed of with the above directions.

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