
(2011) 01 MAD CK 0435

In the Madras High Court

Case No : C.R.P. (NPD) (MD) No. 877 of 2004 and M.P. (MD) No. 1 of 2009

Gomathy (Died) and Others

APPELLANT

Vs

Rajeswaran

RESPONDENT

Date of Decision : 25-01-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 37, Order 21 Rule 37, Order 21 Rule 40, Order 21 Rule 40, 51, 51

Citation : (2011) 01 MAD CK 0435

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : K.N. Thambi, for the Appellant; B. Christopher, for the Respondent

Final Decision : Allowed

Judgement

M. Venugopal, J.—The present Civil Revision Petitioner has been filed by the Revision Petitioners/Petitioners/Plaintiffs as against the order dated 19.12.2003 in E.P. No. 13 of 2003 in O.S. No. 108 of 1997 passed by the Executing Court (namely, the Principal District Munsif, Kuzhithurai).

2. Pending adjudication of the Civil Revision Petition, the Civil Revision Petitioner/Petitioner/Plaintiff has died and her legal heirs 2 to 6 have been brought on record as Civil Revision Petitioners in the present case before this Court.

3. The Executing Court viz. the Principal District Munsif, Kuzhithurai, while passing orders in E.P. No. 13 of 2007 in O.S. No. 108 of 1997 on 19.12.2003 in paragraph No. 7 has inter alia observed as follows:

Based upon the arguments and evidence produced from both sides I hold that the Petitioner choose this Respondent by living other Defendants for realisation of the decree amount. The Petitioner did not prove that the judgment debtor is having sufficient means to satisfy the decree amount by production of any deposits or any banking amount or any amount which has been kept idle in the name of the judgment debtor in anyone of the nationalised bank or any private

banks or any other mode of cash security has been found in the name of the judgment debtor at the time of realisation of the decree amount. As far as the document and evidence of the PW1 is concerned, no such evidence was given by the Petitioner to discharge the decree amount by this judgment debtor and the Petitioner has failed to establish the capacity to pay the decree amount by the judgment debtor. The Petitioner has filed the Ext.P1 document shows that the property stands in the name of the judgment debtor. It is open to the decree holder to file a petition for attachment of sale of immovable property which found in the name of the judgment debtor. The decree holder in this case has not taken recourse to those provisions. At the time of execution or ordering to arrest after hearing the both side arguments the Petitioner has to establish that judgment debtor is having sufficient means and he must possess that decree amount at the time of execution of this E.P. In this case, the Petitioner did not establish that the judgment debtor is possessing the decree amount during this period. Hence, this petition is dismissed

4. Being aggrieved against the orders passed by the Executing Court in E.P. No. 13 of 2003 in O.S. No. 108 of 1997 dated 19.12.2003 after the death of the mother, namely, erstwhile Revision Petitioner, her legal heirs have subsequently been brought on record and arrayed as Revision Petitioners in the present case and they continue to prosecute the Civil Revision Petition before this Court.

5. The Learned Counsel for the Revision Petitioners primarily contends that as per Section 51 of C.P.C a decree holder is entitled to seek an order of attachment and sale of the judgment debtor's property and also that the Decree Holder is entitled to seek an order of arrest and detention in prison of the judgment Debtor and this relief is sought for by a Decree Holder before the Executing Court. It is the prerogative of the Decree Holder and as such, the Executing Court is not correct in observing that the Plaintiff/Decree holder has filed the Ex.P.1 Document, which shows that the property stands in the name of the judgment Debtor and the trial court dismissed the E.P. stating that it is open to the Petitioner to file a petition for attachment and sale of the immovable property, which is found in the name of the judgment Debtor, but the decree holder has not taken recourse to those provisions etc.

6. The Learned Counsel for the Revision Petitioners contends that the observation of the Executing Court in its order in E.P. No. 13 of 2003 dated 19.12.2003 to the effect that the Petitioner(deceased Plaintiff/Petitioner) has not proved that the judgment Debtor is having sufficient means to satisfy the Decree amount by production of any deposits or any banking amount or any amount which has been kept idle in the name of the judgment Debtor in any of the nationalised bank or private banks or any other mode of cash security has been in the name of judgment Debtor at the time of realisation of the decree amount etc. is not a valid one in the eye of law because of the simple fact that the Revision Petitioner/ Decree Holder before the Executing Court in E.P. No. 13 of 2003 on her behalf has marked Ex.P.1 Certificate issued by the President Maruthancode Pnachayat

Union, Kanyakumari District to the effect that the building bearing No. 13/102 owned by Rajeswaran/Respondent herein is valued at Rs. 24,000/-(Rupees twenty four thousand only) for which a house tax of Rs. 120/-(Rupees one hundred and twenty only) and library fee of Rs. 12/-(Rupees twelve rupees only) and in a sum of Rs. 132/-(Rupees one hundred and thirty two only) is collected per year.

7. In a case of arrest, the relief sought for by the particular person/party it is for the concerned party to prove that the judgment Debtor /Defendant is possessing or having the requisite/sufficient means. In the instant case on hand, the Revision Petitioner/Decree Holder before the Executing Court has filed Ex.P.1 Document, a Certificate issued by the President, Maruthangode Panchayat dated 1.10.2003 to the effect that the judgment Debtor is owning a building in his name valued at Rs. 24,000/-(Rupees twenty four thousand only) etc.

8. Though a plea is taken on behalf of the Respondent that the Respondent has no job, no source of income and no means to pay the E.P. amount etc. and also that it is for the Petitioner/Decree Holder to prove the means of the judgment Debtor, this Court very aptly points out that before the Executing Court in E.P. No. 13 of 2002 on behalf of the Revision Petitioner(Deceased/Plaintiff) Ex.P.1 Certificate has been marked in and by which it is made clear that the judgment Debtor owns a building worth Rs. 24,000/-(Rupees twenty four thousand only).

9. It is the contention of the learned Counsel for the Respondent/Judgment Debtor that son of the deceased Plaintiff as P.W.1 in E.P. No. 13 of 2003, before the Executing Court, has deposed that he knows the Survey numbers of the properties, which stands in the name of judgment Debtor and these properties are in Survey No. 141/29 one and a half cents, in Survey No. 147/11 16 1/4 cents, in Survey No. 208/11A 20 1/2 cents and these properties have come into the custody of the Respondent/Judgment Debtor after the demise of his father and that the Respondent/Defendant's father has two male and three female sons and daughters and it is incorrect to state that the properties standing in the name of the Respondent/Defendant and no income has yielded therefrom and since the Respondent/Defendant has got only a share in the properties that have devolved upon him after the death of his father. It cannot be said that the Respondent/Defendant is absolute owner of the properties refer to above and further he has sufficient or requisite means/income to satisfy the decree amount.

10. A perusal of the E.P. No. 13 of 2003 filed under Order 21 Rule 37 CPC goes to show that the relief of arrest of the Respondent/ Judgment Debtor has been sought for by the erstwhile Revision Petitioner/Plaintiff/Decree Holder.

11. Admittedly, for the cut and removal of trees, a Decree has been passed by the trial court namely, the learned District Munsif Court, Kuzhithurai in O.S. No. 108 of 1997 for a sum of Rs. 10,000/-(Rupees ten thousand only) along with interest at the rate of 6% per annum from the date of filing of the suit till date of decree together with costs and also to pay a further 6% interest from the date of

decree till date of payment against the fifth Defendant. However, the Revision Petitioner/ Plaintiff/Decree Holder has chosen to file a Executing Petition No. 13 of 2003 for arrest of the Second Defendant/Judgment Debtor namely, the Respondent in the Execution Petition.

12. It is to be noted when a successful party obtains a valid decree against the judgment Debtor, it is for the successful party/Decree Holder to execute the decree by seeking appropriate relief against the judgment Debtor in the manner known to law and in accordance with law as per relevant provisions of C.P.C whether to seek attachment to the property or to seek the relief of arrest of judgment Debtor/Judgment Debtors is purely within the domain realm of a Decree Holder and it is not for the Court of law to suggest to the Decree Holder what type of action is to be taken by him against the concerned judgment Debtor. In short, this Court points out that it is not the province or domain of a court of Law much less as Executing court to say or point out that the Decree holder should have opted to seek a particular kind of relief instead of other relief and this kind of observation by the Executing Court in the course of its order in E.P. No. 13 of 2003 dated 19.12.2003 is not a palatable one in the considered opinion of this Court. As a matter of fact, the Revision Petitioner/Plaintiff/Decree Holder, as already made mention of by this Court, has marked Ex.P.1 Certificate issued by the President of Maruthancode Panchayat on 1.10.2003 to the effect that the building No. 13/102 stands in the name of the Respondent/Judgment Debtor which is valued Rs. 24,000/-(Rupees twenty four thousand only) etc.

13. When there is Ex.P.1 Document marked on the side of the Revision Petitioner/ Plaintiff/Decree Holder/Deceased, wherein it is mentioned that the Respondent is owning a building bearing No. 13/102, which is valued about Rs. 24,000/-(Rupees twenty four thousand only) then, it is not correct for the Executing Court to observe in its order in E.P. No. 13 of 2003 that the Revision Petitioner/Plaintiff/Decree Holder has not established that the judgment Debtor is possessing the decree amount during this period. In short, the Executing Court is incorrect when it has observed in paragraph No. 7 of its order in E.P. No. 13 of 2003 that it is open to the Decree Holder to file a petition for attachment of sale of immovable property which found in the name of the judgment Debtor, as opined by this Court.

14. Even if the Respondent has got a some fraction of quantum of share in the properties as made mention by the Son of the Deceased Plaintiff/Decree Holder even then, the Respondent/Defendant has some kind of means in immovable property. Therefore, it cannot be said by any stretch of imagination that the Respondent/judgment Debtor has no means to pay the Decree amount or to satisfy the decree amount. Indeed, the Executing Court except averring in the order in E.P. No. 13 of 2003 dated 19.12.2003 that the Revision Petitioner/Decree Holder though the Ex.P.1 to show that the property stands in the name of the judgment Debtor has not gone into in detail of the contents of the Ex.P.1 Document nor it discussed the merits of the contents found therein. It is to be

pointed out merely referring to Ex.P. 1 Document as the property stands in the name of the judgment Debtor will not be a sufficient one by the Executing Court which ought to have discussed about the value of building bearing No. 13/102 standing in the name of the Respondent valued at Rs. 24,000/-(Rupees twenty four thousand only) in a detailed manner.

15. It is to be noted that the burden lies on the decree holder to establish that the judgment debtor has sufficient means to pay the decretal amount and is negligent in paying the amount. Also, the refusal or neglect envisages the capacity to pay, but deliberate non-payment as per the decision of this Court in *V. Ganesa Nadar v.K. Chellathai Ammal* reported in AIR 1989 MADRAS 8.

16. Further, this Court aptly points out that a Court of law cannot insist on a decree holder to proceed against the property before applying for arrest.

17. is not out of place for this Court to pertinently quote that Order 21 Rule 40 of the CPC enjoins that an opportunity to be given to the parties to adduce evidence in the case.

18. case of simultaneous proceedings for enforcement of a decree against a person as well as the property of the judgment debtor, it is the discretion of a Court of law not to permit the sale of immovable property of the judgment debtor if the disposal of movable property is sufficient to satisfy the decree.

19. Inasmuch as the Revision Petitioners have clearly marked Ex.P.1 Certificate issued by the President, Maruthancode Panchayat dated 1.10.2003 to the effect that the Respondent/Defendant owns a building at bearing No. 13/102 valued about Rs. 24,000/-(Rupees twenty four thousand only) then, it cannot be said that the Respondent/Defendant has no right in the property mentioned in Ex.P.1 in the name of the Respondent etc.

20. going through the impugned order passed by the Executing Court in E.P. No. 13 of 2003 this Court comes to an inevitable conclusion that the Executing Court has committed an error in observing that the Revision Petitioner/Decree Holder/Plaintiff has not proved that the Respondent/Judgment Debtor is having sufficient means to satisfy the decree amount by production of any deposits or any banking amount or any amount which has been kept idle in the name of judgment Debtor etc. and as a matter of fact, the Executing Court has wrongly dismissed the Execution Petition on the incorrect premise that the Revision Petitioner/Plaintiff has not established that the judgment Debtor is possessed the decree amount during this period and therefore, this Court has no other option but to interfere with the said order passed by the Executing Court in E.P. No. 13 of 2003 and accordingly sets aside the order dated 19.12.2003 for the reasons stated in this Writ Petition.

21. Viewed in that perspective, the Writ Petition is allowed leaving the parties to bear their own costs. The Executing Court is directed to consider the entire gamut of the matter in Execution Petition afresh and it is open to the parties to

adduce fresh oral and documentary evidence in the manner known to law. In any event, the Executing Court is directed to pass necessary orders in E.P. No. 13 of 2003 in O.S. No. 108 of 1997 within a period of forty five days from the date of receipt of copy of this order. The parties are directed to lend helping hand to the Executing Court in regard to the completion of proceedings so as to enable the Executing Court to put an end to the disputes involved between the parties at an early date.