
(2007) 09 AP CK 0001

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 3623 of 2006

Jasti Subba Rao

APPELLANT

Vs

Lakshmi General Finance Limited and Others

RESPONDENT

Date of Decision : 11-09-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 2, Order 21 Rule 21, Order 21 Rule 37, Order 21 Rule 37(2), Order 21 Rule 38

Citation : (2008) 1 ALD 309 : (2007) 6 ALT 638

Hon'ble Judges : V. Eswaraiah, J

Bench : Single Bench

Advocate : G. Jhansi, for the Appellant; B. Srinivasa Aditya Dutt, for the Respondent

Final Decision : Dismissed

Judgement

V. Eswaraiah, J.

The Civil Revision Petition is directed against the order dated 6-7-2006 in E.P. No.96 of 2004 on the file of the I-Additional Senior Civil Judge, Vijayawada in Arbitration Case No. 30 of 2001.

1. The petitioner is the Second respondent in the Award dated 12- 6-2001 passed by the Sole Arbitrator at Chennai in Arbitration Case No. 30 of 2001 under the Arbitration and Conciliation Act, 1996. The first respondent herein is the claimant in the said Arbitration Case. The Arbitrator passed the award directing the respondents therein namely (1) Mrs. D. Sandhya Rani, (2) Mr. Jasti Suba Rao and (3) Mr. Kolli Venkateswara Rao, to pay the claimant/first respondent herein a sum of Rs. 74,309/- with future interest at 18% per annum from 18-8-1999 till the date of full realization and costs of arbitration proceedings of Rs. 7,200/-. As the respondents in the Arbitration Case failed to pay the award amount, the Decree holder/first respondent herein filed E.P.No.161 of 2003 in the said Arbitration Case No. 30 of 2001 on the file of the Chennai High Court and as per the orders of the Chennai High Court, the Award

is transmitted to the Court of Senior Civil Judge, Vijayawada for execution.

2. Accordingly, the first respondent herein/Decree holder filed E.P. No. 96 of 2004 in Arbitration Case No. 30 of 2001 under Order XXI Rule 2 of the CPC (for short "the Code"), stating that the petitioner herein is the second defendant and decree has been passed on 12-6-2001 and the same has become final. The award was transmitted by the Chennai High Court for execution of the said award amount of Rs. 74,309/- and interest at the rate of 18% from 18- 8-1999 to 24-11-2004 is Rs. 70,444-89, costs of Rs. 7,200/- and Advocate fee of Rs. 5,000/- was added and filed the E.P., for realization of Rs. 1,56,953-89 Ps., against the Judgment Debtor No. 2 alone under order XXI Rule 37 of the Code to issue a notice to the Judgment Debtor and after enquiry commit him to the Civil Prison under Order XXI Rule 38 as provided u/s 55 of the Code and thereby assist the decree holder in realizing the decretal amount.

3. The Decree holder/claimant filed an affidavit stating that the Judgment Debtor was directed to pay the award amount to the decree-holder/claimant company, but in spite of the Judgment Debtor having knowledge of the award, did not pay any amount to the decree holder. The Judgment debtor is capable of paying the award amount in lumpsum and is having means to pay the same, but he is exhibiting supine indifference and failed to pay the amount to the decree holder. The judgment debtor is a lorry operator and is earning substantial sums and is having movable and immovable assets and capable of paying the amount in lumpsum and accordingly, the judgment debtor may be committed to civil prison after enquiry and thereby assist the decree holder in realizing the award amount.

4. The Power of Attorney Holder of decree holder company who filed the Execution Petition, filed the affidavit of examination-in-chief and he was cross-examined. He denied the suggestion that the Judgment debtor has no capacity to pay the decretal amount either in lumpsum or in instalments. The suggestion that the judgment debtor has no vehicles of transportation was also denied. The decree holder has not filed any document regarding the vehicles owned by the judgment debtor and also the particulars of movable and immovable properties, but it is stated that the judgment debtor is having movable and immovable properties and execution petition is maintainable.

5. The Judgment Debtor filed a counter in the execution petition, denying all the allegations about the capability of paying the award amount in lumpsum and exhibiting supine indifference and failure to pay the amount and also earning substantial sums as lorry operator and about the movable and immovable properties. He denied all the allegations, stating that the judgment debtor is not having any movable or immovable properties/assets and he never run the lorry transport business and is not having any lorries in his own name as alleged in the affidavit. He is living on the mercy of the family members as he is an old aged man and is not in a position to pay any amount even by way of instalments or in lumpsum. He is not at all liable to pay any amount to the decree holder. He never dealt with the decree holder company and he is in no way concerned with the

arbitration amount. Thus, there is a total denial of the allegations apart from the liability to pay the said amount under the arbitration award.

6. To the same effect, the judgment debtor filed his affidavit as his chief examination, stating that he is not doing any business, much less lorry transport business. He has no avocation and not getting any income from any source. It is stated that he is suffering from old age problems and unable to incur medical expenses. He also stated that he has no knowledge about the arbitration proceedings and he is not liable to pay any amount to the decree holder as he is in no way concerned with the decree holder company and the arbitration award. The judgment debtor admitted in his cross-examination that he has got lorry transport business. He has not filed any documents about his ill-health. The suggestion that he has got means to pay the entire amount at once and that even though he got means, he is willfully neglecting to pay the decretal amount is denied.

7. The executing Court after considering the rival contentions and the evidence available on record adduced by both the parties, came to the conclusion that when the judgment debtor has got lorry business and got means to pay the decretal amount, in spite of lapse of five years of passing of the award, failed to pay the amount and therefore, the decree holder proved his case for the arrest and detention of the judgment debtor in civil prison for realization of the award amount. The decree holder established that the judgment debtor has got means to pay the award amount and failed to pay the amount due in spite of having means and as such, judgment debtor No. 2 is ordered to be arrested and detained in civil prison for realization of the E.P., amount by issuing Rule 38 warrant by 28-7-2006.

8. Aggrieved by the said order dated 6-7-2006 in E.P. No. 96 of 2004, this Civil Revision Petition has been filed by the judgment debtor No. 2; contending that the said order is contrary to law and is vitiated by material irregularities as the decree holder failed to show his income in the lorry transport business. The Court below thrown the burden on the judgment debtor to show that he has no means to pay the decretal amount even though the decree holder failed to prove that the judgment debtor has got sufficient means and willfully avoided to pay the decretal amount. The lower Court erred in holding that the judgment debtor has got means to pay the decretal amount without there being any evidence. The impugned order do not satisfy the provisions envisaged under order XXI rule 38 of the Code and allowing the Execution Petition, straight away for the arrest and detention of the judgment debtor in civil prison is contrary to Section 55 of the Code.

9. While admitting the Civil Revision Petition on 28-7-2006, this Court granted interim stay, subject to payment of Rs. 30,000/-, within a period of six weeks. The judgment debtor has not paid the said amount, but he filed an application for extension of time, which was allowed, extending time till 10-10-2006 and the judgment debtor deposited the said sum of Rs. 30,000/-.

10. The learned Counsel appearing for the petitioner submits that in the case of T. Doraswamy Reddy v. K. Kodanda Naidu 1997 (3) An. W.R. 47, this Court held that an order for arrest of the judgment debtor without prescribing the period of detention u/s 58 read with Order XXI Rule 40(3) of the Code is illegal and unsustainable. In the said case, there was no any allegation in the execution petition filed by the decree holder about the means of the judgment debtor to pay the amount and the lower Court held that the burden lies on the judgment debtor that he has no property to pay the amount. Under those circumstances, this Court held that in the absence of any material placed by the decree holder that the judgment debtor was avoiding payment in spite of having means and therefore, the finding of the Court below that the judgment debtor failed to establish and that he had no property is perverse and not supported by any acceptable material. It was further held that as per Section 58 of the Code, where the decree is for the payment of a sum of money exceeding one thousand rupees, the period of detention shall not exceed three months. While directing the arrest under Order XXI Rule 40(3), the Court will have to fix the period for which the judgment debtor should be kept under detention, but in the said case, no specific period for which, the judgment debtor should be kept in prison was mentioned and therefore, it was held that the executing Court has not applied its mind and accordingly, the order of arrest which was made giving the time to pay the decretal amount, failing which the judgment debtor would be arrested without any further enquiry was set aside.

The learned Counsel appearing for the petitioner also relied on a Judgment in the case of E. Murugaiah and Anr. v. C. Ekambar Reddy 1996 (2) ALD 373. The perusal of the facts of the said case goes to show that the decree holder has not made any allegations about the means of the judgment debtor to pay the decretal amount and that the judgment debtor was neglecting or refusing to pay the amount. In the absence of any such averments in the execution petition, arrest cannot be ordered. It is stated that there was no any allegation that the decree holder demanded for the payment of decretal amount and the judgment debtor refused to pay the same. In fact, the lower Court has not considered any issue on the said aspect and accordingly permitted the judgment debtor to pay the decretal amount in suitable instalments.

The learned Counsel for the petitioner also relied on a Judgment of this Court in the case of Sikile Moses v. Koturi Seeta Ram Das 1994 (1) An. W.R. 2 (NRC), wherein this Court held that u/s 51 of the Code, the Court shall have to record reasons for committing the judgment debtor to prison. The Court has to record a finding that the judgment debtor has refused or neglected to pay the decretal amount and it is also not mentioned under what provision, the arrest is directed. Therefore, it was held that the order of arrest cannot be sustained.

In the case of K. Vijayakumar Vs. N. Gururaja Rao, , this Court held that the aspect of deliberate refusal or negligence has to be necessarily established by the decree holder to the satisfaction of the executing Court. In the said case, the

judgment debtor was drawing a salary of Rs. 15,000/- per month and he was willing to have his salary attached instead of detaining him in civil prison. This Court held that the judgment debtor was drawing substantial amount towards his salary and the same can be attached for realization of the decretal amount instead of resorting to the ordering of arrest.

My learned Brother Hon'ble Sri Justice D.S.R. Varma, in the case of S. Ismail and Another Vs. Agraseni Chit Funds (P) Ltd. and Others, , held that the executing Court has to follow the procedure prescribed under Order XXI Rule 40 and it cannot straight away order the arrest under Order XXI Rule 37, but the procedure prescribed under Order XXI Rule 40 has to be followed by making an enquiry. The expression "arrest" employed in Sub-rule (2) of Rule 37 of Order XXI of the Code is different from an order passed by the Court sending the judgment debtor to civil prison. After completion of the enquiry under Order XXI Rule 40, an order to secure the presence of the judgment debtor by force or by his arrest has to be made. The order passed to arrest and produce before the Court is only to make an enquiry and the procedure to be followed under Order XXI Rule 40 and unless the procedure under Order XXI Rule 40 is followed, there cannot be any order of arrest for the purpose of sending the judgment debtor to the civil prison. Accordingly, the order of arrest for sending the judgment debtor to civil prison was set aside and directed to secure the presence of the judgment debtor as ordered by way of arrest and conduct enquiry under Order XXI Rule 40 and pass final orders basing on the evidence on record in the enquiry.

The learned Counsel appearing for the petitioner also relied on another Judgment in the case of P. Laxma Reddy Vs. Syndicate Bank, Zaheerabad Branch and Others, , wherein this Court held that every provision relating to the detention of the judgment debtor in civil prison was followed in breach. In the said case, immovable property was attached and as the attached property could not be sold on account of the alleged obstruction, execution petition was filed under Order XXI Rule 21 for simultaneous execution. In those circumstances, this Court set aside the order of the detention on the ground that the executing Court has not recorded any finding as to the stipulations in Clauses (a) to (c) of proviso to Section 51 of the Code. There was no discussion or any finding for ordering arrest.

11. On the other hand, the learned Counsel appearing for the decree-holder relied on the Judgment in the case of Karanti Suryanarayana v. Sri Rama Finance Corporation (Regd.) Miryalaguda 2001 (2) An. W.R. 377 (AP), wherein the executing Court ordered arrest of the judgment debtor and detention in civil prison without specifying the period and non specification of period is only technical procedural defect and accordingly, specified the period of detention as three months. In the said case, execution petition was filed under Order XXI Rule 37 of the Code, seeking to arrest the judgment debtor and the Court issued notice and as the judgment debtor failed to discharge his obligation under the decree having sufficient means and capacity to pay, ordered arrest and detention

of the judgment debtor in civil prison. The said order was questioned. In the said case, the judgment debtor except denying the averments as to the possession of the property, did not place any material before the executing Court and the particulars furnished by the decree holder about the properties was not established to be incorrect by the judgment debtor. The enquiry in the execution proceedings cannot be carried to such a level, as to defeat the very decree. Broadening the scope of such enquiry would amount to creating a second avenue for an unsuccessful defendant and thereby enabling him to defeat the decree. The conduct of the judgment debtor in not caring to obey the decree cannot be countenanced.

My learned Brother Hon'ble Sri Justice L. Narasimha Reddy in the case of K. Munirathnam v. D. Bhaskar Naidu 2006 (4) ALT 169, held that once the judgment debtor is brought before the Court, the decree holder must be examined in his presence and it is only after the Court is satisfied, on an examination of the evidence, that the judgment debtor is possessed of adequate means, further steps can be taken. The nature of enquiry to be undertaken in the execution proceedings in the context of arrest of the judgment debtor and detention in civil prison cannot be equated to the one in the regular civil or criminal proceedings. The effort of executing Court in such case will be only to have a broad idea as to the capacity of the judgment debtor to clear the liability under the decree. It cannot be treated as parallel enquiry to defeat the very basic purpose. The finding need not be measured with scales of accuracy. Such a course would amount to putting premium on the evasive tactics of the judgment debtor and thereby the whole exercise of adjudication of the suit resulting in a decree, would be reduced to an empty formality.

12. Hon'ble Sri Justice B. Seshasayana Reddy in the case of Markapuram Prasad Vs. Mada Subbaraidu, , while considering the similar contention that the order of arrest does specified the period of detention and therefore it is bad in law; it was held that under Order XXI Rule 40 even after judgment debtor is brought before the Court under a warrant, the executing Court is empowered to leave the judgment debtor in the custody of an Officer of the Court for a specified period not exceeding fifteen days or release him on furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period, if the decree be not sooner satisfied. Sub-section (1) of Section 58 of the Code provides, inter alia, that every person detained in the civil prison in execution of a decree shall be so detained where the decree is for the payment of a sum of money exceeding one thousand rupees, for a period of not exceeding three months. This provision gives discretion to the Court to fix the period for which the judgment debtor should be detained in a civil prison, the maximum period for which the judgment debtor could be detained being three months. The period of detention is required to be mentioned while directing the arrest under Order XXI Rule 40(3) of the Code. The period of detention is required to be mentioned while issuing warrant of committal of judgment debtor to jail under Order XXI Rule 40, since the stage of issuing warrant of committal of judgment

debtor to jail has not yet reached and therefore not mentioning the period of detention in the impugned order does not make it ab initio void.

The aforesaid Judgment in the case of Markapuram Prasad (9th supra) squarely applies to the instant case. In the instant case, the petitioner suffered the award in arbitration case for payment of the award amount payable by the judgment debtor jointly and severally along with other two more judgment debtors. The decree holder specifically stated in his affidavit that the judgment debtor is having knowledge about the award, has not paid the amount and is capable of paying the amount in lumpsum and having means to pay the same, he is exhibiting supine indifference and neglected and failed to pay the award amount. Judgment debtor is a lorry operator and earning substantial sum on the said business. He is having movable and immovable properties and capable of paying the amount in lumpsum. Though the decree holder has not filed any documentary evidence, but the fact that goes to show that having denied all the allegations, the judgment debtor clearly admitted in his cross examination that he has got lorry transport business. In view of the specific admission of the judgment debtor that he has got lorry transport business and in view of the fact that he has not made any attempt to pay the decretal amount and as the judgment debtor is totally denying his liability to pay the said amount under the arbitration case, I am of the opinion that the conduct of the judgment debtor is nothing but an act of negligence and carelessness to satisfy the decretal amount. In view of his admission that he has got lorry transport business, it cannot be said that he has no income on the lorry transport business and that he is not avoiding payment of money.

13. One of the mode of executing the decree u/s 51(c) of the Code is by arrest and detention in prison for such period not exceeding the period specified in section 58, where arrest and detention is permissible. But under proviso to section 51(b), the executing Court cannot order for the detention or commit the judgment debtor to the civil prison unless reasons are recorded in writing to the effect 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 or neglected to pay the same.

In the instant case, the allegation made by the decree holder is only on the ground under Clause (b) of proviso to Section 51, wherein it has been specifically averred that the judgment debtor since the date of the decree refused and neglected to pay the same having sufficient means of lorry transport business. Therefore, the relevant provision that applies in the instant case is Section 51 Clause (b) proviso. u/s 58(a), where the decree is for the payment of a sum of money exceeding five thousand rupees, the period of detention in civil prison shall not exceed three months. In the instant case, execution petition has been filed under Order XXI Rule 2 of the Code and the executing Court after conducting enquiry passed the impugned order, ordering the arrest of the judgment debtor No. 2 and detain him in civil prison for realization of the amount

by issuing Rule 38 warrant. In the instant case, the said order has been passed after issuing show cause notice under order XXI Rule 37 by issuing warrant under Rule 38.

Rule 38 of the Code reads as follows:

38. Warrant for arrest to direct judgment-debtor to be brought up : Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, to be sooner paid.

The warrant under Rule 38 has not at all been issued in the instant case. Therefore, the question of prescribing the period of detention does not arise, as the case has not been reached at the stage of Order XXI Rule 40 of the Code. After issuing the warrant of arrest under Rule 38, it is open for the judgment debtor to pay the amount and if no amount is paid, the judgment debtor has to be brought before the Court. After appearance of the judgment debtor pursuant to the warrant under Order XXI Rule 38, the executing Court may make an order of detention of the judgment debtor in the custody of an officer of the Court for a period not exceeding 15 days or release him on furnishing security to the satisfaction of the Court for his appearance. Therefore, the discretion vested in the executing Court to fix the period of civil prison will arise only after producing the judgment debtor before the Court while committing him to civil prison by prescribing the period of detention. Therefore, I am of the opinion that the ratio laid down by this Court in the case of Markapuram Prasad (9th supra) is squarely applies to the instant case, as the Court has only directed to issue warrant under Order XXI Rule 38 of the Code to issue warrant for the arrest of the judgment debtor to bring him before the Court if the amount has not been paid.

In view of the aforesaid facts and circumstances of the case, I do not see any infirmity legal or otherwise in the impugned order. Accordingly, the Civil Revision Petition is dismissed. No order as to costs.