
(2001) 12 AP CK 0035
In the Andhra Pradesh High Court
Case No : C.R.P. No. 526 of 2000

Kasi Subbaiah Mudali

APPELLANT

Vs

Kasi Veeraswamy Mudali and Others

RESPONDENT

Date of Decision : 28-12-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 11A, Order 21 Rule 37, Order 21 Rule 37(1), Order 21 Rule 37(2), Order 21 Rule 40

Citation : (2002) 3 ALT 240

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : C.V. Nagarjuna Reddy, for the Appellant; M.P. Chandra Mouli, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—The judgment-debtor in E.P.No. 44/99 is the petitioner in this revision.

2. The petitioner filed O.S.No. 25 of 1991 on the file of the Senior Civil Judge, Srikalahasthi, for recovery of certain amount from the respondent. The suit was dismissed with costs on 19-11-1996 and it became final. The respondent filed E.P.No. 44/99 under Order 21 Rule 11-A for arrest of the petitioner herein on the ground that though he possessed sufficient means, he did not deposit the costs awarded in the decree. The executing court ordered the arrest of the petitioner by order dated 31-1-2000. The petitioner challenges the same in this revision.

3. Sri C.V. Nagarguna Reddy, learned counsel for the petitioner submits that the order under revision is passed in utter disregard of the provisions of the Order 21 Rules 37 and 40 and Section 55 of the C.P.C. and the same cannot be sustained in law. He submits that the executing court, having issued a notice under Order 21 Rule 37 (1), had chosen to proceed with the examination of the decree-holder i.e. the respondent herein, and passed an order directing the arrest. The procedure adopted by the executing court is not in conformity with Rule 40.

4. Sri M.P. Chandramouli, learned Counsel for the respondent, on the other hand, submits that the procedure contemplated under Rule 40 would apply only in cases where the judgment-debtor appears before the court in response to a notice issued under Order 21 Rule 37 (1) or to those who are arrested in pursuance of warrant issued under proviso to Rule 37 (1). Inasmuch as the petitioner did not respond to the notice issued under Rule 37 (1) and was later brought before the court only under Rule 37(2), the examination of the respondent in the presence of the petitioner does not arise and that no exception can be taken to the order of the executing court.

5. The record of the executing Court discloses that the respondent filed E.P.No. 44 of 1999 before the Executing Court on 27-9-1999. On 4-11-1999, the court ordered notice to the petitioner. On 12-11-1999 the court had set the petitioner ex parte on account of his non-appearance. Thereafter, it was posted for the evidence of the respondent herein. On 30-11-1999 the respondent was examined. The court recorded a finding that the petitioner herein is having sufficient means to pay the decretal amount and is avoiding to pay the same. Accordingly, the court issued warrant for arrest and production of the petitioner before it. The matter was directed to be listed on 1-2-2000. The same was advanced to 28-1-2000, obviously, because the petitioner was arrested and brought before the court on that day. The petitioner submitted a memo stating that he intends to file I.P. and sought for release. The same was rejected and his detention was continued. Subsequently, on 30-1-2000 he filed a memo stating that he is aged 75 years and is a chronic patient and sought for release. That plea was also rejected by the order of the court on 1-2-2000 stating that the memo was filed belatedly and the same has become infructuous.

6. To verify as to whether the order passed by the executing court and the procedure adopted by it is in conformity with the one prescribed under the relevant rules, it is necessary to extract Rules 37 and 40 of Order 21 C.P.C.

Rule 37. Discretionary power to permit judgment-debtor to show cause against detention in prison.

(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the court shall, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

Provided that such notice shall not be necessary if the court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the court.

(2) Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-

debtor.

Rule 40. Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

(1) When a judgment-debtor appears before the court in obedience to a notice issued under Rule 37, or is brought before the court after being arrested in execution of a decree for the payment of money, the court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison.

(2) Pending the conclusion of the inquiry under Sub-rule (1) the court may, in its discretion, order the judgment debtor to be detained in the custody of an officer of the court or release him on his furnishing security to the satisfaction of the court for his appearance when required.

(3) 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 shall in that event cause him to be arrested if he is not already under arrest:

Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the court may, before making the order of detention, 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 his 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.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) When the court does not make an order of detention under Sub-rule (3), it shall disallow the application and, if the judgment-debtor is under arrest, direct his release.

7. A plain reading of Rule 37 would show that it contemplates 3 situations viz.,

(a) The executing court shall issue notice calling upon the judgment-debtor to appear before the court on a date to be specified and show-cause as to why he should not be committed to civil prison. (Rule 37(1)).

(b) The court can straightway issue warrant of arrest of the judgment-debtor in case it is satisfied that the delay in issuance of notice under Rule 37 (1) would enable the judgment-debtor to abscond from or leave the local limits of the jurisdiction of the court, (proviso to Rule 37(1)).

(c) The court can issue warrant of arrest in case the judgment debtor fails to appear even after the receipt of notice issued under Rule 37 (1). (Rule 37(2)).

8. Further steps to be taken after the appearance of the judgment-debtor either

voluntarily or on being brought before the court after arrest are provided under Rule 40.

9. According to this Rule, once the judgment-debtor appears before the court in obedience to the notice or, brought before it on being arrested, the court shall proceed to hear the decree-holder and take all evidence in the presence of the judgment-debtor. The judgment-debtor shall be given an opportunity of showing cause why he should not be committed to civil prison. Rule 40 contemplates almost an uninterrupted enquiry in the matter. That is the reason why it provides for detention of the judgment-debtor in the custody of an officer of the court or releasing on furnishing security pending conclusion of the enquiry under Sub-rule (1). Any order of arrest to be made after conclusion of the enquiry under Sub-rule (1) of Rule 40, is once again subject to Section 51 C.P.C.

10. The learned counsel for the petitioner Sri C.V. Nagarjuna Reddy, submits that admittedly, the respondent was examined in the E.P. before the petitioner was brought before the court. He contends that recording of a finding as to his possession of means and his refusal to pay and consequential order of arrest are in total infraction of the procedure contemplated under Rule 40.

11. Sri. P. Chandra Mouli, learned Counsel for the respondent submits that the procedure contemplated under Rule 40 i.e., examination of the decree-holder in the presence of the judgment-debtor would arise only when the judgment debtor voluntarily appears in response to the notice issued under Rule 37 (1) or when he is brought before the court after being arrested in pursuance of a warrant issued under proviso to Rule 37 (1). According to him, it is not at all necessary to adhere to that procedure when the arrest of the judgment-debtor is in pursuance of a warrant issued under Rule 37 (2).

12. According to the learned Counsel, even though the respondent was examined by the court on 30-11-1999, on which date the petitioner was not before the court either voluntarily or having been brought before the court after arrest, no illegality has crept into the proceedings. He argues that Rule 40 can be said to have been violated if the petitioner were to have been ordered to be arrested under proviso to Rule 37 (1) and if the court proceeded to examine the respondent in the absence of the petitioner.

13. The facts stated above would clearly indicate that the executing court had recorded a finding even before the petitioner was brought before it. Therefore, it is necessary to see whether Rule 40 maintains any distinction as to the categories of arrest under which the judgment debtor is brought before it.

14. Arresting of the judgment-debtor and sending him to civil prison is a matter touching the personal liberty, even if it is, a step in a civil proceedings. Notwithstanding the difference as to the cause of deprivation of the liberty of the person, C.P.C. ensures the proper protection of the personal liberty. That is why several precautions are provided, before the liberty of a person is deprived. Rule 40, in categorical terms, insists that when a person appears before the court in

response to a notice or, is before the court, on having been arrested in pursuance of a warrant, the court shall examine the decree-holder in the presence of the judgment-debtor. The decree holder will be placed under obligation to prove his contention in respect of the plea raised by him in the execution petition. Normally, in execution proceedings otherwise than through arrest, there is no burden cast upon the decree-holder to prove any other fact. Since the liberty of a citizen is involved, law places a further obligation upon the decree-holder to prove certain facts as contemplated under Rule 40 (1), that too, in the presence of a judgment-debtor. The other provisions contained in Rule 40 as well as the provisions of Sections 51 and 55 of the C.P.C. add strength to these provisions. In a way, those provisions, in their cumulative effect, ascribe an element of criminal trial, to the proceedings under Rule 11-A of Order 21 of C.P.C.

15. Rule 40 by itself does not maintain a distinction between the types of arrest, whether it was in pursuance of a warrant issued under proviso to Rule 37 (1) or 37 (2). The emphasis, in Rule 40 is to ensure the presence of the judgment-debtor when the decree-holder is being examined. It is only then that the judgment debtor will have an opportunity to contradict the statements. At any rate, an ex parte finding as to the capacity or possession of means by the judgment debtor is not at all contemplated under Rule 40 or any other provision. On the other hand, the letter and spirit of these provisions referred to above would only suggest otherwise.

16. Admittedly, in the present case, the court has undertaken an ex parte enquiry and recorded an ex parte finding about the possession of means by the petitioner herein. The said exercise by the executing court was contrary to the express or unambiguous provisions of Order 21, particularly Rule 40. The docket orders passed by the executing court from time to time would indicate that it has not at all taken into account the requirement under Rule 40 of Order 21 or Section 55 of the C.P.C. The executing court has not followed the express provisions of C.P.C., in passing the order under revision. The order cannot be sustained either in facts or in law. Accordingly, the same is set aside and the C.R.P. is allowed. However, there shall be no order as to costs.

17. The petitioner was directed to deposit an amount of Rs. 8,000/- as a condition for granting stay at the time of admission of C.R.P. It is represented that the amount is already deposited. Since the order under revision is set aside, the petitioner is entitled for refund of the same.