
(2006) 10 AP CK 0045

In the Andhra Pradesh High Court

Case No : Civil Miscellaneous Appeal No. 5151 of 2004

Somiseety Balavenkata Subbaiah Sheety (died) per L.R. S. APPELLANT
Venkateshwarulu Gupta

Vs

P. Sreenivasulu Setty RESPONDENT

Date of Decision : 24-10-2006

Acts Referred:

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

Citation : (2007) 2 ALT 205

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : B. Venkata Rao, for the Appellant; K. Rajanna, for the Respondent

Final Decision : Allowed

Judgement

C.Y. Somayajulu, J.—Revision petitioner, after obtaining a succession certificate, filed an E.P. for recovery of the amount covered by a money decree obtained by his father, seeking arrest of the respondent(judgment debtor) in which the respondent filed a counter contending that as he paid Rs. 26,000/- to the father of the revision petitioner in full satisfaction of the decree on 18-11-1998 and obtained a receipt, the E.P. is not maintainable and in any event since he has no means to pay the decretal amount, he cannot be arrested.

2. In support of his case, the revision petitioner besides examining himself as P.W.1, examined the Income Tax Inspector as P.W.2 and marked Ex.A.1 and Exs.X.1 and X.2. Respondent examined himself as R.W.1 and two other witnesses as R.Ws.2 and 3 and marked Exs.B.1 to B.12. The Executing Court held that the discharge pleaded by the respondent under Ex.B.1 cannot be taken into consideration as it is not a certified payment, and observing that inasmuch as the revision petitioner failed to establish that respondent has means to pay the decretal amount and refused to pay the same, and since it is also the contention of the revision petitioner that the respondent is having immovable property, E.P. for arrest of the respondent, without proceeding against the

immovable properties, is not maintainable and dismissed the E.P. Hence this revision.

3. The contention of the learned Counsel for the revision petitioner is that the executing Court having correctly held that Ex.B.1 cannot be taken into consideration, was in error in observing that the revision petitioner failed to establish that the respondent having sufficient means had neglected and refused to pay the decretal amount, when the evidence adduced by the revision petitioner clearly establishes that the respondent returned an income of more than Rs. 70,000/- for the assessment year 2001-02. The contention of the learned Counsel for the respondent is that since the executing Court clearly held that there is no evidence regarding the "present means" of the respondent, which is very relevant for deciding whether he can be arrested or not, in view of the ratio in Jolly George Varghese and Another Vs. The Bank of Cochin, and since in Pothuneedi Laxmana Rao Vs. Kadasu Muneswara Rao, , it is clearly held that the decree holder has to exhaust the other modes of execution available to him before seeking arrest of the judgment debtor, and since the decree holder had already got attached immovable property of the respondent and is bringing it to sale, the E.P. becomes infructuous and so, the revision petitioner is not entitled for any relief in this revision. In reply the contention of the learned Counsel for the revision petition is that after dismissal of the E.P. for arrest by the executing Court by the order under revision, the revision petitioner had to file another E.P. and got attached the immovable properties of the respondent and that fact is not relevant for deciding this revision.

4. Since the finding of the Executing Court that Ex.B.1 cannot be taken into consideration for deciding the E.P. has become final, the first objection taken by the respondent regarding the maintainability of the E.P. does not survive.

5. The second objection of the respondent is that inasmuch as he has no "present" means to pay, he cannot be arrested. P.W.2, the Income Tax Inspector, who came with Ex.X.2, authorisation letter from the Income Tax Officer, produced the original income tax return filed by the respondent for the assessment year 2001-02 along with an attested copy of the said return, which is marked as Ex.X.1. Ex.X.1 shows that the total income from the house property, returned by the respondent was Rs. 21,964/- and his income from agriculture was Rs. 51,000/-. During cross-examination he denied the suggestion respondent did not file the original Ex.X.1, and that the signature on the said return does not belong to the respondent. He stated that respondent, for the first time, filed the income tax return for the assessment year 2001-02, and denied the suggestion that respondent was not having any income to file an income tax return.

6. The suggestions put to P.W.2 that respondent did not file any income tax return (Ex.X.1) stands belied by the argument advanced in the executing Court by his counsel. It is seen from para 14 of the order under revision, that the counsel for respondent contended that the respondent had to file Ex.X.1 return

because of the standing order of the income tax authorities that all persons owning telephones have to file income tax returns. Assuming that Ex.X.1 return was filed by the respondent to comply with the instructions of the income tax authorities that all telephone owners should file income tax returns, why he had shown the income mentioned in Ex.X.1 is not explained by him. It is not the case of the respondent that the income tax authorities instructed the persons owning telephones to file income tax returns inflating their income. They i.e. income tax authorities only wanted the telephone owners to disclose the income that was actually derived by them by filing an income tax return. So respondent cannot be heard to say that he filed an income tax return for an income not earned by him. The income shown by the respondent in Ex.X.1 is an admission made by him. So it has to be taken that revision petitioner derived a total income of Rs. 72,964/- from his house property and agricultural lands.

7. The contention of the learned Counsel for the respondent that the executing Court has to take into consideration the "present means" of the judgment debtor but not the past income is contrary to the language in Clause (b) in the proviso to Section 51 CPC reading "...has, or has had since the date of the decree, the means to pay...". In any event since Ex.X.1 relates to the assessment year 2001-02 corresponding to the accounting year 2000-01, shows that the income of the respondent during that year was more than Rs. 70,000/- it is a substantive evidence and can be used against him in view of the ratio in Bishwanath Prasad and Others Vs. Dwarka Prasad and Others, . Since the Execution Petition is filed for recovery of Rs. 30,190/-, it is easy to see that respondent, though having the means to pay the decretal amount, either neglected or refused to pay the same to the revision petitioner. So the contention that respondent had no "present means to pay" the decretal amount on the date of execution petition cannot be accepted.

8. In his counter respondent took a plea that he paid Rs. 26,000/- to the father of the revision petitioner in full satisfaction of the decree. As stated earlier that plea was disbelieved by the Executing Court. In my considered opinion, the plea of discharge and plea of "no means" are mutually contradictory. If respondent had no means to pay the decree debt, how could he have paid Rs. 26,000/- to the father of the revision petitioner? In view of Clause (b) in the proviso to Section 51 CPC, a judgment debtor having had the means to pay the decree amount, refusing and neglecting to pay the decree amount is a ground for arrest. Though the Apex Court in Jolly George Varghese and Another Vs. The Bank of Cochin, expressed its displeasure for the wording in Clause (b) of the proviso to Section 51 CPC, that clause still is existing in the proviso to Section 51 CPC even after 1999 and 2002 amendments to CPC. So it is clear that a judgment debtor who had means to pay the decree debt after the decree, and refused or neglected to pay the decretal amount, also is liable to be arrested. The respondent who set up a false plea of discharge of the decretal amount and who submitted a income tax return showing an income of more than Rs. 70,000/- from house property and agricultural lands during the accounting year 2000-01,

which would be his periodic income during the subsequent years also cannot but be said to have neglected and refused to pay the amount of about Rs. 30,000/- due under the decree.

9. The facts in Jolly George Varghese and Another Vs. The Bank of Cochin, relied on by the learned Counsel for the respondent are entirely different from the facts of this case. The contention of the judgment debtors in that case was that their creditor bank apart from the decree put to execution, had obtained two other money decrees against them for a total sum of Rs. 7.00 lakhs, and had attached all their immovable properties and was bringing them to sale for discharge of those decree debts, and that the executing Court had also appointed a Receiver to manage the properties under attachment and so they cannot alienate the properties to raise money for payment and that they have other pressing claims on their means i.e. meeting the medical bills for treatment of cancer and other grave illness of the family members. In those circumstances, the apex Court, while setting aside the orders under appeal, remitted the case to the executing Court to decide de novo the means of the judgment debtors to discharge the decree debt in the circumstances stated by them. In this case none of the properties of the respondent were under attachment nor was a receiver appointed to manage his properties when enquiry in the E.P. was held. The respondent returned an income of more than Rs. 70,000/- from house property and agricultural lands. He took up a false plea of discharge. So he cannot be equated to the judgment debtor in the case before the apex Court i.e. Jolly George Varghese and Another Vs. The Bank of Cochin, .

10. Rents from building, and income from agriculture, as stated earlier are recurring income. So it has to be presumed that the respondent would get an income equivalent to that income even in the subsequent years to 2000-01 also and so the burden to establish that he did not receive such an income is on the respondent. He who has to establish what income he received from agriculture and from the building during the subsequent years did not adduce any such evidence. So it is clear that respondent took a plea of "no means" only with a view to evade or delay the payment of the amount due to the revision petitioner under the decree put to execution.

11. After dismissal of the E.P. for arrest of the respondent by the order under revision, revision petitioner had to seek the other modes of execution available to him and in that process he got the properties of the respondent attached. That fact cannot be a ground for dismissing this revision.

12. The facts in Pothuneedi Laxmana Rao Vs. Kadasu Muneswara Rao, relied on by the learned Counsel for the respondent also are different from the facts of this case. In that case the decree holder who obtained a decree for Rs. 40,000/- filed an E.P. for arrest of the judgment debtor on the ground that he has one acre of wet land and a site and is doing business. Ex.A.1, encumbrance certificate produced by the decree holder showed that one acre land was mortgaged to Primary Agricultural Cooperative Society. He failed to produce evidence to show

that the judgment debtor has a site. The decree holder admitted that he got attached the house of the judgment debtor worth about one lakh, and admitted that the property attached would satisfy the decree. The executing Court ordered arrest of the judgment debtor on the ground that he took a false plea that he is a cooli. That order was reversed in the revision on the ground that one acre of land, which is also under mortgage, could not fetch an income of Rs. 30,000/- p.m. as contended by the decree holder. In the facts and circumstances of the case, the learned judge held that when the decree holder is availing the other modes of execution, and as the judgment debtor is not deriving income from the land due to drought and is working as a cooli, he cannot be arrested. The learned Judge did not lay down as a matter of law that in all cases where other modes of execution are available, a judgment debtor cannot be arrested. That observation was made in the facts and circumstances of that case. In fact the decree holder has right to proceed both against the person and property of a judgment debtor in execution of the money decree obtained by him. Rule 21 of Order 21 CPC confers a power on the Court to refuse simultaneous execution at its discretion. So it is clear that it is for the decree holder to choose whether to proceed against the property or person of a judgment debtor. While proceeding against the person of the judgment debtor, if the decree holder is able to establish the necessary ingredient for his arrest, the Court cannot refuse arrest of the judgment debtor on the ground that the decree holder has a right to proceed against his properties.

13. For the above reasons, the revision petition is allowed with costs and the order under revision is set aside. The executing Court shall issue a warrant for arrest of the respondent, and proceed further according to law.