

THE HON'BLE SRI JUSTICE M.GANGA RAO

Civil Revision Petition No. 7630 of 2018

ORDER:

This Civil Revision Petition is filed by the Judgment Debtor/Defendant No.4 under Article 227 of the Constitution of India challenging the order dated 15.11.2018 passed in E.P.No.29 of 2016 in O.S.No.250 of 2010 by the learned Senior Civil Judge, Sompeta, wherein and whereby the Executing Court attached Item Nos.1 to 11 of E.P. schedule properties of J.Dr.Nos.2 and 4 by overruling the objections raised by them.

2. The plaintiff/Decree Holder filed E.P.No.29 of 2016 in O.S.No.250 of 2010 against the Judgment Debtor Nos.1, 2 and 4 to issue warrants to attach their movable properties under Order XXI Rule 43 of C.P.C. and to proclaim and sell the same under Order XXI Rule 64 & 66 of C.P.C. to realise the E.P. amount with costs, on the ground that the D.Hr./Chit Fund company filed the suit against the J.Drs. and obtained decree against them. The 5th J.Dr. paid Rs.2 lakh and it was already deducted from the E.P. amount. The whereabouts of J.Drs.3, 6 and 7 are not known. Therefore, the E.P. is filed against J.Drs.1, 2 and 4 for attaching their movable properties for realisation of the remaining decretal amount.

3. Before the Executing Court, the E.P. against J.Dr.No.1 was dismissed as he was not residing within the jurisdiction of the Executing Court. J.Dr.No.2 remained *ex parte*. J.Dr.No.4 filed counter denying the petition averments and contended that as he is only the surety, without proceeding against the principal borrower, the D.Hr. cannot proceed against him. The D.Hr. cannot attach the properties of J.Dr.No.4 as the schedule of the J.Dr.No.4's property was not specifically mentioned in the E.P. and the properties referred therein were belonging to his wife, and prays to dismiss the E.P.

4. The Executing Court allowed the E.P. by observing that the J.Drs. did not challenge the decree passed against them and the Executing Court cannot go beyond the decree.

5. The learned counsel for the petitioner/J.Dr.No.4 submits that the 11 movable articles sought to be attached are owned and belonged to the wife of J.Dr.No.4, as such the said properties cannot be attached and brought to sale. The house in which movable properties are sought to be attached belongs to his wife and Exs.R.1 to R.3 and R.9 registration extract of sale deed dated 13.11.2002 show the name of the wife of J.Dr.No.4 as well property receipts show the house belongs to her. Exs.R.4 to R.8 – cash bills are filed to the effect that the wife of the J.Dr.No.4 purchased steel almirah, LCD TV, ceiling fans, washing machine and air conditioner.

Thus, the said articles belong to the wife of J.Dr.No.4 and they cannot be attached for discharge of liability of J.Dr.No.4 as the same are prohibited under the Benami Transactions (Prohibition) Act. The D.Hr., without taking remedies against the principal borrower, cannot proceed against the petitioner/J.Dr.No.4.

6. The learned counsel for the 1st respondent/D.Hr. states that except the J.Dr.No.5, none of the J.Drs. paid the decretal amount. Therefore, he filed the E.P. for realisation of the remaining decretal amount by attaching the movable properties of J.Drs.2 and 4. J.Dr.No.4 is working as clerk in cashew nut factory and he is also doing liquor business, but no properties stand in his name. But, surprisingly, the wife of J.Dr.No.4, who is a home maker, is having a house and household articles in her name. Exs.R.4 to R.8 bills are recently obtained in order to prove that the household articles were purchased 6 to 12 years ago and for the purpose of this petition. The Executing Court rightly allowed the E.P. by attaching the properties of J.Dr.Nos.2 and 4.

7. Admittedly, the defendants/J.Drs. did not challenge the decree passed against them and the judgment passed in O.S.No.250 of 2010 became final. Therefore, the Executing Court cannot go beyond the decree. The E.P. against J.Dr.No.1 was dismissed as he is not residing within the jurisdiction of this Court.

8. The distraint of movable property presupposes that the debtor is in actual possession of the same. Under the Code of Civil Procedure, the different procedures have been laid in respect of attachment of movable. Order XXI Rule 43 of C.P.C. provides that where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure. Here, in this case, the wife of J.Dr.No.4 is not doing any business and she is a housewife, whereas J.Dr.No.4 is doing liquor business and also working in cashew nut factory. But, surprisingly, no properties stand in the name of J.Dr.No.4. Therefore, the bills produced by J.Dr.No.4 are not believable and the conclusion of the Executing Court is based on evidence available on record. Therefore, the Executing Court rightly allowed the E.P. by attaching the properties of J.Dr.Nos.2 and 4. The DHr liberty to proceed any one or all DHr by filing E.P. for realisation of the decretal amount, same could not be found fault with.

9. Hence, the Civil Revision Petition is dismissed. It is needless to say that the executing Court may proceed further in the execution proceedings. No order as to costs. As sequel to it, Miscellaneous Petitions, if any pending, shall stand closed.

JUSTICE M.GANGA RAO

15th March, 2019
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