

(1947) 09 MAD CK 0002
In the Madras High Court

A.K. Govindarajulu Naidu

APPELLANT

Vs

L.A.K. Lakshmana Aiyar Firm

RESPONDENT

Date of Decision : 11-09-1947

Acts Referred:

Citation : (1948) 61 LW 350 : (1948) 1 MLJ 437

Hon'ble Judges : Frederick William Gentle, C.J;Tyagarajan, J

Bench : Full Bench

Judgement

Frederick William Gentle, C.J.—The appellant is the judgment-debtor in O.S. No. 141 of 1932 wherein a sum exceeding Rs. 12,000 was

decreed by the learned Subordinate Judge of Trichinopoly on the 31st August, 1933. In execution of the decree the decree-holder instituted E.P.

No. 392 of 1934 for sale of certain properties belonging to the judgment-debtor, which had been attached pending suit. Sale was ordered and on

the 20th November, 1935, the decree-holder became the purchaser. The sale was confirmed on 27th July, 1936 and part satisfaction of the

decree was recorded in respect of the net sale proceeds. Two of the items of property sold were houses Nos. 9 and 10, Sayakara Street,

Trichinopoly. In order to obtain possession, the decree-holder instituted E.A. No. 857 of 1936 and possession was ordered. When the Amin went

to give delivery to the decree-holder, on 12th November, 1936, obstruction was offered by one Ayyammal, the widow of the judgment-debtor's

brother. She claimed right of residence during her life-time in both the properties, Nos. 9 and 10. Thereupon the decree-holder filed E.A. No. 983

of 1936 on 4th December, 1946, to remove the obstruction pursuant to Order 21, Rule 97. On 31st August, 1937, the Court found in favour of

the obstructor, so far as No. 9 was concerned, being satisfied that she was entitled during her lifetime to residence in that house. Her claim

regarding house No. 10 was rejected. In the course of the order it was observed by the Court that the decree-holder was directed to establish his

right by a separate suit. On 31st August, 1937, E.A. No. 857 of 1936 came up for consideration, when delivery of possession of house No. 10

was ordered and the matter was adjourned until 2nd October, 1937, to enable delivery to be given. The B diary in respect of E.A. No. 857 of

1936 contains an endorsement including "" vide order in E.A. No. 983 of 1936 "". The decree-holder was duly put in possession of No. 10. On the

2nd October, E.A. No. 857 of 1936 again came before the Court and an order was made which was endorsed upon the application, as follows:

House bearing door No. 10 delivered. Recorded.

2. Thereafter the decree-holder, by other execution applications, sought to obtain the fruits of his decree, so far as they were unsatisfied by the

proceeds of the sale arising out of E.P. No. 392 of 1934, but he was unsuccessful. The last of those applications was dismissed on 30th January,

1942. On 23rd June, 1945, the decree-holder instituted E.A. No. 411 of 1945. That was more than three years after the dismissal and final

disposal of the last execution application and about eight years after E.A. No. 857 of 1936 had last been before the Court. By E.A. No. 411 of

1945 it was sought to continue, or to revive, E.A. No. 857 of 1936 on the ground that it had never been finally disposed of and was still pending

and to obtain symboli-cal possession of house No. 9, that in which the widow of the judgment-debtor's brother had right of residence, it being

appreciated that during her lifetime actual possession could not be obtained. Symbolical possession of house No. 9 had not been directed on the

last occasion when E.A. No. 857 of 1936 was before the Court. No notice was given to the judgment-debtor of E.A. No. 411 of 1945 and the

Court directed symbolical possession of house No. 9 on 5th July, 1945 and which was given on 31st July. The present matters coming before us

are C.M.A. Nos. 115 of 1946 and C.R.P. No. 1474 of 1945, instituted by the judgment-debtor challenging the correctness of the order made on

5th July, 1945, in E.A. No. 411 of 1945.

3. Learned Counsel for the appellant judgment-debtor, first contended that, since

the decree-holder had instituted other execution applications

between 1937 and 1945, it must be deemed that he has abandoned any rights, which otherwise he might have, with regard to E.A. No. 857 of

1936 as he sought execution against other properties belonging to judgment-debtor.

4. I am unable to accept that argument. So far as the judgment-debtor is concerned the properties, including Nos. 9 and 10, were sold in

execution of the decree and the judgment-debtor, after he had unsuccessfully objected to confirmation of the sale, took no step whatever with

regard to those properties; the net proceeds of the sale were insufficient to discharge the decretal debt. The subsequent applications in execution

were for the purpose of recovering the balance due to the decree-holder pursuant to the decree. In support of this contention reference was made

to *Maharaj Bahadur Singh v. A.H. Forbes* (1929) 57 M.L.J. 184 (P.C.) a decision by their Lordships of the Judicial Committee. In that case it

was held, upon the facts, that there had been an abandonment inasmuch as the decree was sought to be treated as a money decree, when

apparently it was not, and execution had been attempted to be made upon properties other than those in respect of which the decree was passed.

In my view that decision of the Board is in no way in point. I can see no substance whatever in the argument that the decree-holder had abandoned

any rights which he may have in regard to the earlier execution application by reason of proceedings, which he was entitled to institute, to recover

the balance of the sums due to him under the decree.

5. It was next argued that, since more than three years had elapsed between the last disposal by the Court in E.A. No. 857 of 1936 and the filing

of E.A. No. 411 of 1945, the latter application is time barred. Support for the contention was sought to be obtained from a decision of a single

Judge of the Allahabad High Court in *Mt. Basanti Vs. Sirdar Mal-Hardit Rai*. There, it was held that since more than three years had elapsed

before an undisposed execution application was sought to be revived or continued, an application to revive or continue was time barred. I am

unable, with respect, to agree with that decision. If it is correct, then it seems to me that when an execution application is pending in Court, the

same consequences affect it as would be the case had it been finally disposed of,

that is to say, the provisions of Article 181 of the Limitation Act are sought to be applied to a pending and undisposed execution application.

6. It is to be recalled that the last matter in respect of E.A. No. 857 of 1936 on 2nd October, 1937, was, as stated above, that an endorsement was made that possession had been given of house No. 10 to which is added the word "" recorded."" That word in no way amounts to final disposal

of an execution application. The use of such a word, and of other words such as "" struck off"" has been condemned on many occasions by this

Court. In *Pattanayya v. Pattayya* (1925) 50 M.L.J. 215 it was observed by Devadoss, J., delivering judgment with which Waller, J., agreed, as

follows:

If instead of following the procedure laid down by the Code, the executing Court orders that the petition be lodged or recorded, or be struck off,

such an order is not one sanctioned by the Code and it only amounts to this : petition is adjourned sine die.

7. In that case an execution application for possession of certain items of property was filed on 11th March, 1915; delivery of the properties was

ordered on 21st July, 1915; some third parties objected to delivery; objection was removed with regard to one item which was delivered on 27th

March, 1916, on which day the Court passed an order that the item in question was delivered to the decree-holders and the petition was

recorded ""; subsequently, a suit filed by the obstructors for delivery of another item was dismissed; on 3rd September, 1921, the decree-holders

filed an execution application and prayed for delivery of the item, the subject-matter of the dismissed suit; that was about six years after their

application for possession had been made; it was held that they were entitled to succeed, that the previous application was still a pending one, that

it was still on the file and could then be dealt with. A Full Bench of this Court in *Abdul Azim Sahib and Others Vs. Chokkan Chettiar and Another*,

held that, when an execution application has not proceeded to final disposal, it remains to be dealt with by the Court.

8. In the application No. 857 of 1936, the decree-holder asked for actual possession of house No. 9 as well as of No. 10. When it was instituted

he could have had no knowledge that there was any objection against the Court ordering what was sought. It was only when the obstruction arose

from the judgment-debtor's sister-in-law on the ground that she was entitled to right of residence, that he became aware that his right to actual possession might have to be postponed before it could be satisfied. Seeking actual possession in an application in execution does not prevent, when actual possession cannot immediately be obtained, an order being made for delivery of symbolical possession when the decree-holder is entitled to it. In the present instance actual possession of house No. 10 was ordered and was obtained because the obstructor had no right in regard to that house. There was no objection by the judgment-debtor and no obstruction by him. The learned Counsel for the judgment-debtor emphasised that his client had not been served with all proceedings. That may well be but I cannot close my eyes to the likely prospect that he knew exactly the whole position throughout. In any event he must have been aware that possession was likely to be sought inasmuch as the decree-holder was the purchaser. It is not suggested that there is any reason against the decree-holder being given actual possession of the two houses save that the sister-in-law is entitled to a right of residence during her lifetime in house No. 9. That being so, clearly the decree-holder should have been given symbolical possession of that property in the same way as he would have been entitled had there been a tenant for years in occupation. Since E.A. No. 857 of 1936 was not disposed of finally, it remained a pending application and execution application No. 411 of 1945 was, to use the language in one of the cited cases, an intimation to the Court that the decree-holder wished to exercise the right he had with respect to that application. In my opinion the decision of the Court below was correct. E.A. No. 857 of 1936 had not been finally disposed of, it was still pending and the decree-holder was entitled, by E.A. No. 411 of 1945, to have it brought before the Court--I do not use the word "" revived "" as I am not sure it is strictly apt--and to have orders passed upon it in accordance with his rights.

9. Some point was made that in E.A. No. 983 of 1936 the order includes that the decree-holder was directed to establish his right (to possession) by a separate suit (to which order reference is made in the B diary of E.A. No. 857 of 1936) and that no suit had been instituted. It would have been worthless to have sued the sister-in-law when she is entitled to right of residence in No. 9 and the decree-holder's rights under E.A. No. 857

of 1936 are not affected by such suit not having been instituted.

10. For reasons given, in my view, C.R.P. No. 1474 of 1945 should be dismissed with costs.

11. It will follow that C.M.A. No. 115 of 1946 and C.P.R. No. 289 of 1946 which are applications to revise the order refusing to review the

previous decision and where the same facts and considerations arise, should also be dismissed with costs, one set.

Tyagarajan, J.

12. I agree and have nothing to add.