

**(1971) 03 AP CK 0002**

**In the Andhra Pradesh High Court**

**Case No : Letter Patent Appeal No. 84 of 1968**

Bhoganadham Sessaian

APPELLANT

Vs

Budhi Veerabhadrayya (Died) and Others

RESPONDENT

**Date of Decision : 15-03-1971**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 18, Order 21 Rule 19, 151, 153, 47  
Limitation Act, 1963 — Article 182

**Citation : AIR 1972 AP 134**

**Hon'ble Judges :** Ramachandra Rao, J; Madhava Reddy, J; Gopal Rao Ekbote, J

**Bench :** Full Bench

**Advocate :** M.V. Ramana Reddy, for the Appellant; N.C.V. Ramanujachari, for the Respondent

## **Judgement**

Gopal Rao Ekbote, J.—This Letters Patent Appeal has come to us on a reference made by our learned brothers Narasimham and Parthasarathi, JJ. The learned Judges thought that the main issue and the only question involved in the appeal is "whether the amendment by including a new prayer, which was tantamount to a fresh execution petition. could be ordered after 12 years disregarding the provisions of Section 48 of the Civil Procedure Code." They noticed that conflict of views exists in the Judgments of Jorama v. Latchanna Dora, AIR 1940 Mad 19 and Sri Raja D.K. Venkata Lingama Nayanam Bahadur Varu (since deceased) and Another Vs. Rajah Inuganti Rajagopala Venkata Narasimha Rayanim Bahadur Varu and Others, . They consequently felt that the point involved being one of sufficient important and as the fate of the appeal depended in their view upon the answer to the said question, they referred the appeal for decision to the Full Bench.

2. The facts relevant for the purpose of appreciating the contentions raised before us lie in a narrow compass and are to a large extent (not ?) disputed. The respondent obtained a money decree in O. S. No. 30 of 1949 on the file of the Subordinate Judge's Court, Nellore against the appellants, judgment-debtors on

30-10-1950.

3. The decree-holder filed E. P. No. 160 of 1951 for execution of the said decree. By attachment and sale of a house property of the judgment debtors, the decree-holder realised Rs. 2946-4-0. The E. P. was dismissed recording part satisfaction of the decree.

4. The decree-holder then filed E. P. No. 21 of 1961. He showed in his Execution Petition Rs. 26,977-45 Ps. as the amount due. He requested the Court to arrest the 1st judgment-debtor and to detain him in civil prison.

5. In O. S. 383 of 1954, the judgment-debtor obtained a money decree on the basis of accounts of partnership on 29-8-1960. The judgment-debtor filed a counter in E. P. No. 21 of 1961 contending that the decree-holder was aware of the decree passed against him in O. S. 383/54. He further averred "This respondent submits that under the provisions of the Civil P. C., the present decree-holder is to given credit to the amount decreed against him in O. S. 383 of 1954, Kavali District Munsif's Court. This respondent submits that after satisfaction of the present decree, now under execution, some more amount will be due by the present decree-holder to this respondent under the decree in O. S. 383/54".

6. The judgment-debtor also filed a memo of calculation on 5-9-1961. In the said memo, the judgment-debtor showed amount of Rs. 30,302-0-2 due under the decree passed in O. S. 383 of 1954 from the decree-holder.

7. The decree-holder filed a memo on 2-9-1961 agreeing to adjust and set off the decretal amount of O. S. 383 of 1954 which by then stood at Rs. 17,126-22 Ps. The executing court seems to have recorded the adjustment and set off of Rs. 17,126-22 Ps. on account of the decree passed in O. S. No. 383 of 1954. The E. P. was then continued for the recovery of the balance amount.

8. Since the judgment-debtor was resisting his arrest, the Executing Court after a proper enquiry reached the conclusion that "there is no proof to show that first judgment-debtor has got the means to pay the balance of the E. P. amount and his evading payment." The learned Judge held that "there ate no grounds for sending the first judgment-debtor to civil prison for realisation of the balance of the E. P. amount."

9. Aggrieved by that order of the learned Subordinate Judge made on 24-6-1963. the decree-holder preferred C. M. A. No. 220 of 1964 to this Court.

10. We have already noticed that the judgment-debtor had obtained a money decree against the decree-holder in O. S. No. 383 of 1954 on 29-8-1960. As the judgment-debtor, in that case was not awarded interest from the date of the suit to the date of realisation of the amount but was granted interest only from the date of the decree, he preferred finally S. A. No. 367 of 1964 in this Court. This appeal was allowed partly on 19-9-1967 decreeing the plaintiff's suit even in regard to the interest from the date of the suit at 5 per cent per annum. Under

this modified decree in O. S. No. 383 of 1954 the judgment debtor thus became entitled to a further sum that that was adjusted towards the part satisfaction of the decree in O. S. 30 of 1949 passed against him.

11. The decree-holder therefore filed two C. M. Ps. in this Court in C . M. A. No. 220 of 1964, C. M. A. Ps. Nos. 11021 and 11022 of 1967. The substances of these petitions is that the decree-holder requested the Court "to direct recovery of the E. P. amount by attachment of the decree in O. S. 383 of 1954 as modified by the decree of the High Court of Andhra Pradesh in S. A. No. 367/64 and direct set off the amount due thereunder to the first respondent from the petitioner against the amount due to the petitioner from the first respondent under the decree in O. S. No. 30 of 1949 Sub-Court, Nellore" and "to record part satisfaction for the amount as may be set off".

12. The judgment-debtor in his counter agreed that he had stated in his counter filed in E. P. No. 21 of 1961 that the decretal amount in O. s. No. 383 of 1954 may be set off and accordingly the amount was in fact set off. His main contention was that if the amount to which he is entitled under the modified decree passed in S. A. No. 367/64 is allowed to be set off against the decree in execution against him in E. P. No. 21 of 1961 by amendment of E. P. this amendment would be beyond twelve years from the date of the decree in O. S. No. 30 of 1949. Such an amendment would amount to a fresh execution petition and since it is filed beyond 12 years of the date of the decree, it has to be dismissed.

13. Mr. Justice Krishna Rao, who heard the C. M. A. No. 220 of 1964 and the above said C. M. Ps. by his judgment dated 30-1-1968 agreed with the Subordinate Judge "that there are no ground for arrest of the Judgment-debtor having regard to the facts and circumstances obtaining on the date E. P.". The learned judge however held that "this is an eminently fit case to allow the applications for amendment filed by the appellant-decree-holder. c. M. Ps. Nos. 11021 and 11022 are therefore allowed and the E. P. remanded for disposal on the basis of the plea raised in the amendment petition. The District Munsif will be directed to carry out the amendment in the E. P. and the Court below is directed to pass incidental orders, viz., recording satisfaction of the decree obtained by the first respondent against the appellant t in S. A. No. 367 of 1964 (O. S. 383/54)." The learned Judge also observed that "since there were n grounds for arrest and the judgment debtors had not other properties, no question of execution for the balance of the amount due in favour of the appellant arises."

14. It is against this judgment that L. P. A. 84 of 1968 is filed and now has been referred for our decision.

15. The principal contention of Sri M. V. Ramana Reddy, the learned counsel for the judgment-debtor, was that the amendment allowed by the learned Judge makes the E. P. a fresh E. P. and as a result it would be time barred because the amendment was sought beyond 12 years of the date of the decree. He argued

that the attachment of the decree passed in S. A. No. 367 of 1964 and which is set off is a new relief claimed for the first time after the lapse of 12 years. E. P. No. 21 of 1961 was for the arrest of the judgment to be amended so as to include a relief of attachment of the said decree and for set off, it would be a fresh execution petition and Section 48, Civil P. c. declares such an execution petition as barred by limitation.

16. The first question therefore is whether the relief claimed by the decree-holder in the said two C. M. Ps. for the purpose of set off of the cross-decrees amounts to a fresh execution petition within the meaning of Sec. 48, Civil P. C.

17. Now, Order 21, Rule 18, Civil P. C. provides that cross decrees for the payment of money shall be set off against each other. However, in order to attract the said Rule, following conditions must be satisfied:

- (a) the decrees must be for the payment of definite sums of money;
- (b) they must have been passed in separate suits;
- (c) the decree-holder in one must be the judgment-debtor in the other;
- (d) the parties must fill the same character in both the suits;
- (e) both decrees must be capable of execution and must be so at the same time and by the same Court; and
- (f) application should have been made to the Court for execution of both decrees.

18. If the above conditions are satisfied, the set off would be worked out in accordance with the said Rule. If the amounts under the two decrees are not equal, full satisfaction will have to be entered upon the decree for the smaller amount. and part satisfaction upon the decree for the larger amount; and execution would be allowed only under the latter decree and for so much only as remains due after the set off. It is, however, necessary that the Court passes an order of set off. There would be no adjustment merely because two applications for execution of the cross-decrees are filed. it must, however, be remembered that the set off of decrees under Rule 18 to 20 of Order XXI, Civil P. C. is not a discretionary matter depending upon equitable considerations. Whatever they arise from, circuitry of proceedings thereunder can be avoided and should be avoided. This is the underlying principle of the said rules.

19. While conditions (a) to (d) both inclusive are undisputable satisfied in the present case, conditions (e) and (f) have raised controversy between the parties. It is not , in our view, necessary to consider and decide anything relating to condition (e). It is enough to state that since the two applications by the two decree-holders have to been made to the Court for execution because the judgment-debtor had not filed any execution petition to execute his modified decree, in our judgment condition (f) is not satisfied, and consequently Rule 18 of Order 21, Civil P. C. cannot be said to apply to the present case.

20. The question then is whether apart from the provisions of Rule 18, the Court has general or inherent power to allow a set off in executions proceedings. The matter seems to us beyond any pale of doubt that the Court does possess a general or inherent power to allow a set off of cross-decrees even in cases where Rule 18 or 19 Order 21, Civil P. C. is not applicable.

21. On general principles and in exercise of its inherent power an executing court can entertain and give effect to a claim of set off even in cases which do not fall strictly within the provisions of Rule 18 or 19 of Order 21, Civil P. C. It must be remembered that while Rule 18 is applicable to cases passed in two different suits, Rule 19 relates to cases where there is a decree under which two parties are to recover sums of money from each other. These provisions are not however exhaustive. De hors these Rules, there is general and inherent power in the executing court to grant what is called equitable set off.

22. The principle of set off may be defined as the extinction of debts of which two persons are reciprocal debtors to one another, by the credits of which they are reciprocally creditors to one another.

23. While Order VIII, Rule 6, Order XXII, Rules 18 and 19, Civil P. C. are instances of legal set off, the equitable set off is mainly based on the principle of equity, justice and good con-science. The provisions for legal set off do not take away from the parties any right to set off which they had independently of the Code. For example in cases of natural debits the credits, that is in mutual open and current account cases and in cases where cross decrees arise out of the same transaction or cases where cross demands arise from different sets of transactions but are so connected in their nature and circumstances as to make it inequitable that the plaintiff or the decree-holder should recover from the defendant and the judgment-debtor driven to a cross suit or execution petition. This set off is known as equitable set off, if one may like to call then so and such a right is well recognised in India apart from the provisions of the Civil P. C.

24. The distinction between the two has, however, to be borne in mind. The difference between the legal set off and an equitable set off is that while in the former case the Court is bound to entertain and adjudicate upon the plea when raised, the defence of equitable set off cannot be claimed as a matter of right, but the Court has a discretion to adjudicate upon it in the same suit or execution proceedings or to order it to be dealt with in a separate suit or execution proceedings.

25. From what is discussed above, it would be plain that equitable set off can be claimed in a case where cross-demands, arise out of the same transaction as well as in cases where the cross-demands may not arise out of the same transaction but they are so connected in the nature or circumstances that it would be inequitable to allow one party to execute his decree driving the other party to separate proceedings of execution. No hard and fast rules can be laid down, nor it is desirable to do so as to in what circumstances in such cases

equitable set off can be permitted. The granting of equitable set off rests in the discretion of the Court. This discretion is a judicial discretion and we conceive that the dominant feature of judicial discretion is that it has to be exercised accordingly to settled rules rather than individual fluctuating and unsettled opinion. Thus where a Court thinks that investigation into the claim of equitable set off will cause great delay it may refuse to allow it or may order the enquiry to proceed on such terms as it thinks fit.

26. The equitable set off, however, cannot be treated as a strait-jacket formula. It cannot be bound down to the procedural limitations. Since the matter is in the discretion of the Court, it may grant equitable set off in a proper case in spite of the fact that no execution petition is independently filed for that purposes. It can grant such a set off if an execution petition is pending albeit seeking a different mode of executing the decree such as arrest of the judgment-debtor.

27. It is also not relevant that execution petition of a decree which is sought to be set off is or is not filed by the other decree-holder. And even in a case where an independent execution petition if necessary and if filed for the purpose of claiming set off is time barred, that would not deter the Court from granting an equitable set off like legal set off would not be permitted if the claim separately enforced would be time barred. But the jurisdiction of the Court exists to grant equitable set off if special circumstances permit even in a case where claim for set off is time barred.

28. That the Court has general and inherent power to grant equitable set off de hors the provisions of Order XXI, Rule 18 or 19, Civil P. c. is well supported by the following decisions. We are first referring to the decisions in which the cross demands had arisen out of a single transaction or were so connected with each other as to attract equitable considerations. See *Mt. Nonibai v. Jethanand* AIR 1938 Sind 31 *Badri Nath v. Moti Ram* AIR 1939 Lal 85, *Adwaita Chandra Saha Vs. The Chittagong Co. Ltd. and Another*, *Rama Rao v. Venkatramanachar* AIR 1951 Mys 20 ; *Chinnammal Vs. Chidambara Kothanar* (since alleged to have become insane and caused to be represented by G. Raghava Kothanar as his guardian ad litem), ; *Bank of Dacca, Ltd. Vs. Gour Gopal Saha, and Ramu Sahu and Another Vs. Thakur Dayal Rai and Others*,

29. Counter claims arising out of two separate transactions are not treated to fall outside the jurisdiction of the Court in granting equitable relief de hors the said provisions of the Civil Procedure Code. Whatever may be the position in legal set off under Order VIII, Rule 6, Civil P. c. the provision of Order XXI, Rule 18, Civil P. C. recognises the legal set off of two cross decrees arising out of separate transactions. Whatever may be the considerations for the allowing distinctly separate transactions to be the basis of the set off under Order VIII, Rule 6. in executing proceedings the two cross decrees not only can be legally set off by observing Rule 18, but they can also be equitably set off obviously because after the decrees are passed, there is precious little-unlike a claim of set off based on separate transaction in a suit under Order VIII, Rule 6 to be enquired into. Thus

on the execution side the two cross decrees although arising out of two separate and unconnected transactions when legally can be set off under Rule 18 of Order XXI, Civil P. C., one fails to see why in such cases equitable set off cannot be permitted. If power exists to grant equitable set off apart from Rule 18, as we comprehend it does exist, then equitable set off in proper cases can be permitted although the decrees may have been the result of unconnected and independent transactions. The said position of law gathers support from the following decisions: *Bangar Raj v. Kalidindi Suriahmma* AIR 1957 AP 403 and *Narayanan v. Krishnaru* AIR 1951 TravCo. 78.

30. The proposition that cross-decrees can be set off only when they are attempted to be executed is not applicable to a case of equitable set off. Even without filing any execution petition, the claim under cross decrees could be set off and adjusted either (a) by agreement of parties or (b) under orders of Court. This view is supported by the following decisions. *Narayanan v. Krishanaru* AIR 1951 TravCo 78 and *Hira Lal Singh v. Ramjiram* AIR 1919 Pat 312 (1). In cases of agreement see *Raja Sri Shiva Prasad Singh Vs. Lalit Kishore Mitra and Others*, and *Nathulal v. Kacharalal* ILR (1953) Raj 278 : AIR 1955 (Raj) 273. In cases of orders of Court directing set off, see AIR 1919 Pat 312 (1).

31. Applying these principles of law as we comprehend them to be to the facts of the present case, it will be clear that the instant case is a case of cross demands although arising out of two separate transactions. Circumstances have connected them with each other attracting the principle of equitable set off and the learned Judge, in our view, was right in directing equitable set off. We have already narrated the facts indicating as to how the decretal amount in O. S. No. 383 of 1954 was set off by mutual consent and agreement of the parties. It has been seen that the amount so set off was the amount for which the trial Court had passed the decree. But the decree was subsequently modified by the High Court whereby the amount of the decree was increased. The consensus of the parties in regard to the set off of the decretal amount would naturally cover the amount covered by the modified decree as well. The language employed by the judgment debtor in his counter and the calculation memo which he filed showed that a larger amount was due to him than what was granted by the trial court and being aware of the pendency of the appeal the suggestion was made by the judgment-debtor himself that the decretal amount to adjusted and set off which must necessarily mean not only the amount which the trial court had granted but also the amount which may be granted by the appellate Court in the said suit. The intention of the parties was not to set off merely a specified amount but clearly the intention was to adjust and set off the entire amount of the decree in O. S. No. 383 of 1954 towards the satisfaction of the decree under execution in E. P. No. 21 of 1961. This is clear from the counter and the calculation memo which the judgment-debtor filed as well as the memo filed by the decree-holder and the order made by the executing Court in that behalf. Thus the agreement was to set off the cross decree and not to set off a specified amount. Merely because at that time that was the amount decreed by the trial Court. it would not

alter the position and under the arrangement arrived at between the parties, the set off has to be made even in regard to the modified decree amount as that also is decretal amount in O. S. No. 383 of 1954. What is manifest is that the parties themselves by their express submissions connected the two decrees with the consequence that it would be inequitable that the decree-holder in O. S. No. 383 of 1954. I. e., to say the judgment-debtor be allowed to execute the decree and recover the amount while the decree-holder in E. P. 21 of 1961 should be driven to continue the execution petition of the said decree in one form or the other. It is in these circumstances that Krishna Rao, J., in our judgment, correctly observed that "The object of the judgment-debtor is that the present decree holder's E. P. should be dismissed while he should realise the money due to him from the appellant as per the decree."

32. What must follow is that the equitable set off granted by the learned Judge in the circumstances of this case cannot be said to be an improper exercise of the discretion which undoubtedly is vested in him. The two decrees were so connected with each other because of the circumstances adumbrated above that it would be unfair to disallow set off.

33. Except the question of limitation, no other ground was or could be shown as to why it is not a fit case for the equitable set off. And in cases of equitable set off, the question of limitation need not stand in the way as a complete bar in ordering equitable set off. We are fortified in our view by the two following decisions AIR 1938 Sind 31 at page 32 and AIR 1939 Lah 85 at page 86; not only that the question of limitation cannot be a complete bar but it cannot override the special circumstances to which we have made reference. The parties expressly or in any case tacitly agreed to such a set off and the judgment-debtor cannot now be permitted to turn round and object to such a set off. We cannot therefore find that there is any error in principle on the part of the learned Judge in exercising his discretion as he did in allowing the set off.

34. Even if the two decrees are considered unconnected they can be equitably set off as we have seen above.

35. In the view which we have taken it would be plain that in this case it was neither necessary to file an independent execution petition claiming set off nor was it necessary to amend the present execution petition. It was also unnecessary to attach the modified decree passed in S. A. No. 367/64. We have already noticed that in this very execution petition previously set off the decretal amount was given without being required to file a separate execution petition or by attaching the decree in O. S. No., 383 of 1954.

36. It may be that in order to get a case within the ambit of Order XXI, Rule 18, Civil P. C. in some cases the decree-holder requested to keep his E. P. pending till such time as his judgment debtor files an E. P. in is decree obtained against the decree-holder or the decree-holder seeks to attach the cross decree passed against him with a view to file as representative of the decree-holder in the cross-

decree. These devices are only meant for the purpose of the satisfying the requirements of Order XXI, Rule 18, Civil P. C. or where equitable set off is granted in the circumstances of the case. Therefore the direction to the case. Therefore the direction to amend the E. P. was really unnecessary. The substantial direction given by the learned Judge is to the effect that "incidental orders of recording satisfaction of the cross-decree be passed." was itself more than enough. The learned Judge after allowing set off here and now could have directed the executing court to workout the amount which would thus be set off. The amendment of the execution petition thus became a superfluous adjunct of the substantive order of set off. The learned Judge in his operative portion of the order has not directed the execution court to attach the cross-decree although that was also prayed for by the decree-holder and in our view the learned Judge was right in not directing the attachment. We are therefore satisfied that no valid grounds could be shown for our interference with the equitable set off ordered by the learned Single Judge.

37. That should be enough to dispose of the Letters Patent Appeal. but, since another Court may take a different view of the question of law just now discussed it seems desirable and in deference to the order of reference and also to the helpful arguments advanced in full by the learned Advocates on both sides, it is perhaps right that we should consider the question "whether the amendment by including a new prayer which was tantamount to a fresh execution petition could be ordered after twelve years disregarding the provisions of Section 48, Civil P. C."

38. In order to appreciate the Implication of this argument, it is necessary to read Section 48, Civil P. C.

"(1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from-----

(a) the date of the decree sought to be executed, or

(b) Where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(1) Nothing in this section shall be deemed-----

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application; or

(b) to limit or otherwise affect the operation of Article 183 of the First Schedule

to the Indian Limitation Act, 1908."

39. It would immediately be plain that this section imposes a restriction on the rights of decree-holder by fixing a maximum limit of time for execution and by enacting that no order for execution shall be made. "upon any fresh application presented after the expiration of the 12 years." The object of the section is to prevent execution proceedings being kept pending indefinitely to the harassment of judgment-debtors and to require sufficient diligence on the part of the decree-holder. It cannot be in doubt that "fresh application" means a substantive application for execution and not merely an ancillary one made with the object of moving the Court to pass ancillary orders in the matter of a substantive application already on its file.

40. The real question in this case however is whether the substantive application made by the decree-holder for arrest of the judgment-debtor can be amended introducing a relief of equitable set off a cross decree after 12 years of the date of the decree under execution in E. P. No. 21 of 1961.

41. Now except Order XXI, Rule 17 (2), Civil P. C., under provision in Order XXI, under which amendment in execution proceedings can be allowed. And Rule 17 (2) contemplates the amendment of defects in the execution petition before admission and registration. Consequently the said Rule does not apply where the defect in the execution application is one which has no reference to Rules 11 to 14 of Order XXI, Civil P. C.

42. Order VI, Rule 17, Civil P. C. admittedly in terms does not apply to execution proceedings. According to its terms, it applies to alteration or amendment of pleadings and the expression "pleadings" according to Order VI, Rule 1 means "Plaint" or "written statement."

43. There is however a general provision in Section 153, Civil P. C. which enacts that "the Court may amend any defect or error in any proceedings in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceedings."

44. Thus apart from Order XXI, Rule 17, Civil P. C. this section confers very wide powers on the Courts in matters relating to amendment. Obviously the object of the section in allowing amendments is to minimize litigation and avoid multiplicity of proceedings and also to see that the proceedings and also to see that the merest technicality may not be allowed to stand in the way of substantial justice. Hence the Court has power to allow all necessary amendments for deciding the real question at issue between the parties provided of course that no injury or injustice is caused to the opposite party or the injury, if any, is such as can be sufficiently compensated for by costs or otherwise.

45. The term "proceedings" employed in this section is of wide import and must be constructed as including any application to a Court of Justice, however made, in the enforcement of rights, for reliefs, for redress of injuries, or for any other

remedial object. Vide Pallipurayil Asan Kutti Vs. Mukkolakkal Koyyaman Kutti, at page 343.

46. It was not doubted that execution of a decree is a proceeding in a suit and consequently Section 153 Civil P. C. would apply to such execution proceedings. There is abundant authority to hold that Section 153, Civil P. C. is applicable to execution proceedings.

47. In its general acceptation "proceeding" means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments and of executing.

48. Likewise the term "suit" is a very comprehensive one and is said to apply to any proceedings in a court of justice by which an individual pursues that remedy which the law affords him. The modes of proceeding may be various but if the right is litigated between the parties in the court of justice, it would be a proceeding in a suit.

49. Thus both the terms "proceeding" as well as "suit" are of wide amplitude and between them cover even the execution petitions. The principles laid down in the following cases therefore will apply to this case also. See Banwari Lal Vs. Municipal Board of Cawnpore Bhulji Bechar v. Bawaji Daji (1881) ILR 5 Bom 448 and Gokul Kristo Chunder v. Aukil Chunder Chatterjee, (1889) ILR 16 Cal 457.

50. The principles on which the power to amend should be exercised by now are fairly well settled. The principles underlying Order VI, Rule 17, Civil P. C. are substantially the same as underlying Section 153, Civil P. C. The width and the amplitude of this power is well illustrated in L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co., ; Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others, and A.K. Gupta and Sons Vs. Damodar Valley Corporation, .

51. One class of cases in which it is quite often pointed out that amendment might work injustice to the other side is where it takes away from that party a right accrued to him by expiration of certain time. In such class of cases it is now thoroughly well established that ordinarily a decree-holder will not be allowed to amend his execution petition by including a new relief which since the date of the decree has become barred by the provisions prescribing limitation.

52. There is no reason to make any distinction between cases to which Section 48, Civil P. C. or Article 182 applies on the one hand and the cases covered by Section 3 of the Indian Limitation Act read with relevant entries in the schedule to the Indian Limitation Act.

It is a mistake to think that Section 48, Civil P. C. lays down any inflexible rule in not allowing any amendment whatever may be the circumstances of the case, to the execution petition merely on the ground that if permitted it would be contrary to Section 48, Civil P. C. or Article 182 of the Limitation Act. The same argument can relevantly be raised in regard to suits in which amendment is sought, and is quite often so raised. The two situations therefore are similar and

not different in so far as the principle underlying the amendment is concerned. In either case the amendment would not normally be allowed if the effect of the amendment is to deprive the other side of a valuable right to plead limitation. Nevertheless there can be exceptional cases where special circumstances demand that in order to do substantial justice between the parties and with a view to settle all disputes necessary for the effective disposal of the cases amendment may be allowed. The rule therefore that ordinarily in such cases amendment should not be allowed is not a universal rule and in peculiar or special circumstances an amendment may be allowed even where it has the effect of depriving the other side of his right to plead limitation. What follows is that the question of limitation is one of the factors to be taken into account in the exercise of the Court's discretion as to whether the amendment should be allowed. It would be erroneous to confuse this discretion of the court with its power to permit amendment. It does not affect the power of the Court to order amendment, if that is required in the interests of justice.

53. In *Charandas v. Amir Khan* AIR 9121 PC 50 at pages 51 and 52, Lord Buckmaster in delivering the judgment of the Privy Council observed "that there was full power to make the amendment cannot be disputed and though such a power should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time. yet there are cases where such considerations are outweighed by the special circumstances of the case." To the same effect are the following decisions of the Supreme Court: *L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co.,* ; *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others,* and *A.K. Gupta and Sons Vs. Damodar Valley Corporation,* .

54. Whether there are any special circumstances or not is a question of fact and like any other fact it has to be decided on the material on record and keeping in view the circumstances of the case.

55. We have already noticed that the same principles apply to amendment to execution petitions.

56. Let us then examine the cases cited at the Bar to find out whether in special circumstances a pending execution petition can be permitted to include a new relief in spite of S. 48, Civil P. C.

57. *Varadiah v. Rajakumara Venkata Perumal* 26 Mad LJ 83 : AIR 1914 Mad 663 was a case where the mortgagee after the decree abandoned the claim against the mortgaged property and sought to proceed against the person or other property of the mortgagor. When he found that it was not competent for him to proceed against the other property of the mortgagor before selling the mortgaged property, he requested for an amendment of the execution petition at a time when twelve years period had expired. The Bench thought that to be a fit case to allow the petitioner to amend his application by praying for the sale of the mortgaged properties. As there was nothing to show that the decree-holder

did not believe in good faith that he was entitled to attach other properties the Court said "hence the petitioner unless he is allowed his application might be barred by the 12 years rule and we allow him to so amend it ....."

58. In Kumara Venkata Perumal Rajah Bahadur Varu, Rajah of Karvetnagar, by guardian Mr. W.A. Varadachariar Vs. Velayuda Reddi and Others and Saravapalli Subramania Aiyar, another Bench reiterated the principles that "except under very special circumstances the Court should not allow amendments when they prejudice the rights of the opposite party." As no special circumstances in that case existed, the Court declined to permit the amendment.

59. In Vemuri Pitchayya Vs. Ankineedu Bahadur Zemindar Garu, the facts were: An application for execution was presented within the twelve years allowed u/s 48, Civil P. C. but no schedule of immovable property belonging to the judgment debtor was attached to it as prescribed by Order XXI, Rule 13, Civil P. C. The omission was afterwards supplied but at a time when the 12 years period had expired. The learned Judges held that nevertheless the application was not barred u/s 48 of the Code.

60. In (Bethapudi) Tandavamurti Vs. (Bethapudi) Durgamba and Others, the Bench held that Section 48 does not apply if the previous application for execution should be treated as rightly amended, while it was pending though the amendment was ordered after the expiry of the 12 years. The application for amendment though made after 12 years from the date of the decree is not as such ultra vires. Whether the amendment can or cannot be allowed depends upon the circumstances of each case and is discretionary with the Court.

61. In Jhorama Vs. Viswasarayi Latchanna Dora, the argument before the Bench was that the application for amendment was not made within 12 years of the decree. No amendment it was argued can be allowed which would deprive the respondent of the plea of limitation. The court observed:

"The authorities however which he has brought to our attention on this point do not go so far as to say that there is no discretion left to the Court. They lay down the very salutary rule that ordinarily an amendment should not be allowed which would have the effect of depriving the respondents of putting forward such a plea. They do not say that in special circumstances the Court is powerless to order such amendment. We are clearly of opinion that the circumstances in this case are so exceptional as to justify the amendment proposed."

62. Then comes the decision in Sri Raja D.K. Venkata Lingama Nayanam Bahadur Varu (since deceased) and Another Vs. Rajah Inuganti Rajagopala Venkata Narasimha Rayanim Bahadur Varu and Others, This is also a Bench decision. Since this decision is said to be in conflict with Jhorama Vs. Viswasarayi Latchanna Dora, , it is necessary to carefully consider this decision. The contention in that case was that E. A. 379 of 1939 should not be regarded as a fresh application for execution within the meaning of Section 48, Civil P. C. but should be treated as one for amending and continuing E. P. No. 20 of 1930 which

was still pending. At the end of the application, a list of seven villages was filed against which execution was sought. These villages were not among the villages included in E. P. 20 of 1930. The villages mentioned therein had all been sold. Although nothing more remained to be done in E. P. 20 of 1930, since the petition was not closed, it was on the file of the Court. It is in these circumstances that the question posed was "whether E. A. No. 379 of 1939 should or should not be regarded as a fresh application for execution." The learned Judge observed that the previous Execution Petition No. 20 of 1930 cannot be said to be really pending when the said E. A. was filed. The observed:

"..... although the E. P. had not been formally terminated all the villages which the respondent then required to be sold, had been sold, and no further could be granted on the basis of that petition which must therefore be regarded as no longer pending for the purpose of including by way of amendment new properties sought to be sold for realising the balance of the decree amount."

63. The learned Judge , if they had dismissed the E. A. on that ground there could not have been any controversy whatsoever. They however considered cases cited to them. And while doing so they observed:

"It may well be that as laid down in B. Bandhu Singh Vs. K.T. Bank Ltd. on which also the learned Judges relied, the Court had ample powers of allowing amendment of execution petitions apart from remedying formal defects under Order 21, Rule 17, But, with all respect, we are enable to agree that a decree-holder can be allowed to amend a previous execution petition by including fresh properties more than twelve years after the date of the decree."

64. It this passage is taken to mean that under no circumstances amendment of execution petition after 12 years can be allowed, with due respect, we must express our disagreement with such a wide proposition. We do not however consider that their Lordships wanted to lay down any such inflexible or rigid rule. That can be seen from the very opening words of the said passage.

65. The learned Advocate in that case placed reliance on Kumara Venkata Perumal Rajah Bahadur Varu, Rajah of Karvetnagar, by guardian Mr. W.A. Varadachariar Vs. Velayuda Reddi and Others and Saravapalli Subramania Aiyar, and (Bethapudi) Tandavamurti Vs. (Bethapudi) Durgamba and Others, and submitted that in view of the peculiar circumstances of the case the Court should allow the execution petition to be amended that continued in respect of the new items of property. Repelling that contention of Court said:

"We are unable to accede to this suggestion."

66. This sentence taken by itself would unmistakably point out that the Court thought that there were no special circumstances to adopt the course suggested in the argument. But their Lordships continued:

"With all respect, we are not satisfied, that the observations referred to above

(made in the two cases relied upon by the learned Advocate) which must be regarded as obiter, correctly state the position. If an application to proceed against fresh properties of judgment-debtor is to be regarded, as in our opinion it should be, as a fresh application for execution it is difficult to see how the Court can have a discretionary power of allowing the decree-holder to proceed against new items of properties after the expiry of twelve years by way of amending a previous petition for execution filed within that period, for to do so would plainly contravene the provisions of Section 48, sub-section (1). Sub-section (2) amply safeguards the decree-holder's right to execute the decree even after the expiry of twelve years in certain cases, and the Court should not, as it seems to us, allow him in other cases to evade the provisions of the section under colour of amending a previous application so as to include fresh properties which he may wish to proceed against after the expiry of such period."

In regard to this passage also, if it means to lay down that as sub-section (2) exists in Section 48 which permits execution in certain cases after 12 years, the Court in no circumstances should allow the amendment to the execution petition, we must express our disagreement with any such wide statement of law. After all sub-section (2) has little relevance with the question of power of amend. It does not take away the power of the Court to allow amendment in exceptional cases as is seen above. On the other hand, if the said observation is meant to apply and is confined to the facts of that case, we can have nothing to say. In that case, in the opinion of their Lordships the previous Execution Petition although pending was lifeless and no amendment to such a petition could be made. It is in this context that the above said observation seems to have been made. We agree respectfully with the view expressed in C.T.A. CT. Nachiappa Chettiar Vs. M.G. Ramaswami Pillai, in regard to the understanding and appreciation of the above said passage in the said Madras case, it is said :

"But that is clearly distinguishable upon the facts, for it was held in that case, that, though the former execution proceeding had not been formally terminated, everything had been done in that proceeding to grant relief, so that the further petition was really an unjustified enlargement of a closed proceeding, in order to levy execution against new properties."

67. This understanding of the above said observations is supported by what their Lordships then said immediately in Sri Raja D.K. Venkata Lingama Nayanam Bahadur Varu (since deceased) and Another Vs. Rajah Inuganti Rajagopala Venkata Narasimha Rayanim Bahadur Varu and Others, . They said:

"We find nothing opposed to this view in R.V. and Co. Vs. The Hindu Religious Endowments Board and Others, "

and then the learned Judges proceeded to consider that case. If their Lordships were in fact deciding contrary to what was held in Jhorama Vs. Viswasarayi Latchanna Dora, they would have had to refer the case to a Full Bench. The very fact that they did not do so, but on the contrary expressed their agreement with

Jhorama Vs. Viswasarayi Latchanna Dora, would indicate that it would be unreasonable to say that they have decided something contrary to the earlier decision in Jhorama Vs. Viswasarayi Latchanna Dora, In the circumstances, our attempt on the other hand should be to appreciate the observations made in the course of the judgment in the light of this and try to harmonise them with what their Lordships have clearly stated. We therefore venture to think that the said observation must be read with careful regard to their context and to the facts to which in truth and reality they relate. And if so understood, then there would be no difficulty in appreciating 1940 Mad 19. It is also relevant to mention that Kumara Venkata Perumal Rajah Bahadur Varu, Rajah of Karvetnagar, by guardian Mr. W.A. Varadachariar Vs. Velayuda Reddi and Others and Saravapalli Subramania Aiyar, and (Bethapudi) Tandavamurti Vs. (Bethapudi) Durgamba and Others, are cases which directly decide the point that the Court might in special circumstances allow amendment of execution petition in spite of Section 48, Civil P. C. It is difficult to agree with the view that the observations to that effect made in those cases are mere obiter, nor could it be said that they do not state the correct position of law.

68. We do not therefore consider that Sri Raja D.K. Venkata Lingama Nayanam Bahadur Varu (since deceased) and Another Vs. Rajah Inuganti Rajagopala Venkata Narasimha Rayanim Bahadur Varu and Others, really decides any principle of law which is inconsistent with the earlier four Madras Bench decisions to which we have already made reference.

69. In C.T.A. CT. Nachiappa Chettiar Vs. M.G. Ramaswami Pillai, another Bench of the Madras High Court was concerned with a case where the pending Execution Petition was for arrest and for attachment of moveables. In that E. P. the decree-holder filed E. A. No. 194 of 1960 for the relief of attaching certain money due from a debtor of the judgment-debtor. The Court following the principles laid down in L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co., allowed the amendment of the pending execution petition so as to include a new relief although it was beyond 12 years of the decree.

70. There are, however, two decisions of learned Alapati Syamaladoss and Others Vs. Doradla Subbayya and Others, and Lakshminarasinga Rao v. Balasubrahmanyam AIR 1949 Mad 251, which seem to strike a somewhat discordant note. They cannot therefore be taken to be good law in the presence of the several clear Bench decisions of the same High Court.

71. In so far as the Andhra Pradesh High Court is concerned, we were told that there are no direct authorities on the question under our consideration except the decision of a learned single Judge given in A. A. O. No. 316 of 1970 on 23-10-19780 (Andh Pra). In that case, a decree was passed on 29-10-1956 for a certain sum. E. P. No. 6 of 1956 was filed and a certain amount recovered. The decree-holder then transferred the decree on 31-8-1963 in favour of the petitioner. He then filled E. A. No. 67 of 1963 on 9-10-1963 for two reliefs, firstly for recognition of the transfer, and secondly to transfer the decree for execution

to another Court. Before, this E. A. could be disposed of E. A. No. 54 of 1968 was filed on 5-10-1968. to amend the prayer in E. A. 67/63 for execution of the decree in the District Court itself instead of transmitting it to another Court. The said E. A. was dismissed on the ground that on the date of the execution Application seeking amendment. the decree was barred by time u/s 48, Civil P. C. On an appeal, the learned single Judge after considering certain decisions summed up his conclusions. In so far as they are relevant they read as under:

"Amendment sought to be made in an application for execution after 12 years have elapsed from the date of passing of the decree and introducing reliefs different and distinct from those contained in the last application filed within time should be treated as a fresh application within the meaning of Section 48, Civil P. C.

The Court will have no jurisdiction to allow execution against properties mentioned for the first time in a list filed 12 years after the date of the passing of the decree, even though that list happened to be filed when an execution application filed within time was pending."

72. If the above said conclusions are taken to mean that in no circumstances the petition to amend a pending execution petition can be allowed after twelve years of the decree, then we must register our disagreement with that view. We do not however think that the learned Judge intended to lay down any such rigid rule because earlier the learned Judge considered Jhorama Vs. Viswasarayi Latchanna Dora, and in a way approved of it when he said that normally no amendment should be allowed in Execution Petition unless there are special circumstances. The above said conclusions therefore must be read subject to that qualification. We do not however agree with the vie that in such a case the Court can be said to have no jurisdiction to allow amendment of a pending execution petition. We have already seen that the Court always has jurisdiction to allow amendment in the execution petition. It is however altogether a different thing to say that in the absence of special circumstances the Court should not normally allow amendment after twelve years of the decree. This rule, which is normally followed, does not mean that the Court has no jurisdiction, but the Court in such cases will normally reject the applications filed after twelve years. if there are no special reasons. That is done in the exercise of the jurisdiction and not for lack of jurisdiction.

73. Our conclusion finds enough support from the following decisions also: Hanamappa v. Ningappa AIR 1948 Bom 116; Dolagobinda Sahu Vs. Chakradhar Mohapatra and Others, and Ujagar Singh Vs. Kahan Singh and Others,

74. Pentapati Chinna Venkanna and Others Vs. Pentapati Bengararaju and Others, cannot be said to be taking a different view in regard to the question of amendment of execution petition after twelve years of the decree. In fact such a question was not before the Supreme Court. The decision lays down what constitutes a fresh application and there can be little doubt about the import of

the said term. That decision however, cannot be taken to be an authority for the proposition that under no circumstances the pending execution petition can be amended after twelve years introducing a new relief.

75. We are conscious that in this judgment we have, although considered, not referred to some of the decisions of the other High Courts cited to us in the course of the hearing. But those decisions do not, we think, affect the conclusion which we have reached. It is enough to say that no decision takes a rigid or inflexible view that even in the presence of special circumstances the execution Court can in no case allow amendment of a pending execution petition so as to contravene Section 48, Civil P. C.

76. In this connection it is better to bear in mind that the decisions which treat the petitions to amend pending execution petitions of Section 48, Civil P. C. can only be understood to mean that they are not allowing amendments because there were no special circumstances a power to amend an execution petition even after 12 years should not be confused with a fresh application substantively filed after twelve years of the decree. The considerations in the two cases are different and have to be appreciated separately. Otherwise confusion is likely to result.

77. The question then is are there any special circumstances in the present case which could persuade the court to depart from the normal rule and allow amendment of a pending execution petition for arrest introducing an additional relief of set off of a cross decree ad modified in S. A. No. 367 of 1964. Even if it is assumed that although clause (j) of Order XXI, Rule 11, Civil P. C. does not specify set off as one of the modes of execution and further assuming that such a mode may come under clause (k), which is somewhat of a general character, even then introduction of that relief in the pending execution petition can be permitted only on showing that special circumstances exist which would warrant such an introduction after twelve years of the decree thus depriving the judgment-debtors of their defence of limitation u/s 48, Civil P. C.

78. We have already referred to the circumstances under which adjustment of the decretal amount partially has taken place. The same circumstances were taken into account by the learned Judge in allowing the amendment of the pending execution petition. Since we have already considered them in detail above, it is unnecessary to repeat them here. It is enough to say that in our judgment those are special circumstances which can persuade any Court to allow amendment as in fact is done by the learned Judge. We do not think that the learned Judge has in any manner erred in principles in exercising his discretion to permit amendment even beyond twelve years of the decree. Any other view would only mean effecting injustice and allowing the judgment-debtor to take unfair advantage and deprive the decree-holder of his legitimate claim. The decree-holder was prompt and quite diligent in taking steps immediately after the modification of the decree in S. A. No. 367 of 1964 which itself had taken place at a time when twelve years had already expired. Moreover, a major

portion of the same decree was already set off by consent of the parties. And it was either a case of an express consent as we comprehend that to be or in any case it was necessarily implied in their consent that the modified decretal amount would like wise be set off. That consensus and agreement to set off the decretal amount was agreed to by the parties within twelve years of the decree and we do not think there is any impediment or obstacle in the way of the decree-holder to request the court to amend the execution petition with a view to give full effect to that arrangement. In these peculiar circumstances, the Court had ample power to allow the amendment of the pending execution petition in the manner in which it is allowed even though twelve years have elapsed. We do not therefore find any valid reason to interfere with the view taken by the learned Judge or differ with the conclusion to which he has reached.

79. For the reasons we have given, we dismiss the appeal with costs throughout.

80. Appeal dismissed.