

(1907) 12 MAD CK 0011
In the Madras High Court

Chalavadi Kotiah and Others

APPELLANT

Vs

Paloori Alamelammal and Another

RESPONDENT

Date of Decision : 13-12-1907

Acts Referred:

Citation : (1908) ILR (Mad) 71 : (1908) 18 MLJ 46

Judgement

1. On the 3rd of October 1899, an application was made to execute the decree in O.S. No. 260 of 1893, by attachment and sale of certain

Immovable property mentioned in the application. An order was obtained on the 7th October 1899. The judgment-debtor objected that the

decree had been satisfied, but that objection was disallowed on the 31st October. The judgment-debtor appealed to the District Judge and

obtained an order for stay of execution pending the hearing of the appeal. Upon this the District Munsif, on the 15th December 1899, passed the

following order on the execution petition: ""Execution ordered to be stayed. Petition dismissed."" On the same day, as a diary entry shews, the

Immovable property was attached. The District Judge disposed of the appeal of the 20th July 1900, remanding the matter for further enquiry, and

on the 25th January 1901, the District Munsif decided that the decree had been satisfied before the attachment. On nth December 1901, the

District Judge reversed this order, and on the 29th of October 1903, his decision was confirmed by the High Court.

2. The execution petition now under consideration was presented on the 9th July 1905; it asks for a notice u/s 248 of the CPC for the attachment

of"" certain Immovable property, for the issue of a proclamation of sale of the property already attached, for the attachment of moveables, and for

the arrest of the defendants.

3. The question for our decision is whether this petition is barred by limitation as held by the District Munsif, or not so barred as held by the District

Judge in appeal from him. There is no doubt that when on the nth December 1901, the District Judge reversed the District Munsif's order

declaring the decree already satisfied, it was open to the decree-holder to proceed with the execution, and the fact that an appeal was preferred to

the High Court presented no obstacle, no order for stay of execution having been obtained. It is impossible, therefore, to accede to the contention

that limitation commences to run from the decree of the High Court, and the petition of the 7th July 1905 is clearly barred so far as it is a fresh

application for execution, that is to say, so far as it asks for attachment of property not proceeded against in proceedings instituted by the

application of the 3rd October 1899. In so far as it asks for a proclamation of the sale of the property already attached in pursuance of the petition

of 1899, the case is different. For the appellant it is contended that the order of the 15th December 1899 dismissing the petition closed the

proceedings, that the attachment closed with them, and the subsequent" application is throughout a new petition for execution. If that be the true

position, the respondents must fail not merely on the ground of limitation but also because they do not ask for attachment of the property previously

attached. But that is not the position. There is nothing to show that the order of the 15th December 1899 was passed after notice to either party. It

is not stated in the order that either party was heard, and the diary entry does not indicate any hearing on the 15th December. It has been held in

Sasivarna Tevar v. Arulanandam Pillai ILR (1897) M. 261 that the Court has no legal authority to dismiss a petition for execution simply because

execution has been stayed, but if that is so, the order of dismissal is not necessarily ineffective to dispose of the proceedings. If wrong, an appeal

might lie to set it right. But here, the order being made without notice, and in the absence of both parties, cannot be regarded as an order between

the parties at all. It amounts to no more than a direction to officers of the Court to remove the proceedings from the pending list. Cf. the case of

Narayan v. Sono ILR (1890) B. 345. Indeed it appears not improbable that this is the view taken of the matter by the District Munsif himself, for

the record contains no indication of any order to remove the attachment or for costs. However that be, the order had not the effect of closing the

proceedings, and they must be considered to have been still pending when the application was made in 1905.

4. The question then arises, whether even in that view it was not necessary in order to save limitation to present the application within 3 years of the

District Judge's order, dated the nth December 1901. A number of cases have been cited in the bar in which applications similar to that in question

have been treated as applications to revive or continue earlier proceedings, and in some of these cases, Article 178 of Schedule II of the Limitation

Act is referred to as applicable to the matter, while in others no reference is made to any particular provisions of law. The cases establish the

position that if the execution has been stopped by the interposition of some obstacle, the proceedings may be revived or ""continued"" by an

application made within 3 years of the removal of the obstruction, and though in some cases, notably in the decision of the Privy Council in Qamar-

ud-din Ahmad v. Jawahir Lal ILR (1905) A. 334 the application is referred to as reviving a pending execution, it was not necessary in any of them

to decide whether Article 178 ought to be applied to the case. It is not clear what course the proceeding took in Narayan v. Sono ILR (1890) C

345 whether execution was stayed pending the decision of the High Court in. S.A. No. 133 of 1892 or whether the Court of the First Appeal

replaced the obstacle removed by the Court of First Instance. It seems to have been assumed on both sides that the obstacle was not removed

until the date of the decision of the High Court and the petition under the consideration of the learned Judges was within 3 years from that date. No

doubt, there is a remark in the judgment to the effect that there was no bar under Article 178, because the application was not ""a fresh application

for execution;"" but it is quite clear, as the report stands, what is the precise import of that remark, for, if the application is a fresh application for

execution, it would prima facie be governed by Article 179.

5. There are, however, cases not cited before us from which we may derive the rule that Article 178 ought not to be applied when the Court is

asked to do something which it is bound to do see Kylasa Goundan v. Ramasami Ayyan ILR (1881) M. 172 and Vithal Fanardan v Vithojirav

Putlajirav ILR (1882) B. 586 and that so long as proceedings are pending, limitation will not begin to run against an applicant vide Kedarnath Dutt

v. Hurrachand Dutt ILR (1882) C. 420. In Venkatappiah v. Jagannadha Rao (1901) 12 M.L.J. 24 an application made in 1898 was held to be

made in proceedings instituted in 1886 still undisposed of in 1898 and so not barred, and that case is also an authority for the rule that, if in an

execution petition a decree-holder asks for sale as well as attachment of the property of the judgment-debtor, a subsequent application for sale of

the same property will not be barred by Article 178, though not made within 3 years of the attachment. The decision in Foobraj Singh v. Buhooria

Alumbasee Koer (1880) 7 C.L.R. 424 seems to proceed on the assumption that in that case a separate application for sale was necessary; the

question is not discussed.

6. It may be somewhat difficult to reconcile the view taken in Kylasa Goundan v. Ramasami Ayyan ILR (1881) M. 172 with that taken in

Pichaippa Achari v. Poojali Seenan ILR (1905) M. 557 where it was held that an application for execution not as such in accordance with law,

will suffice to save limitation if it contains an application for the issue of a notice u/s 248 of the Civil Procedure Code. The Court is by. Section 248

directed to issue a notice and by Section 316 to order a certificate, and in neither case is any application required by the Code. If then an

application for a notice is an application within the meaning of Article 179 it is not very easy to see why an application for a certificate is an

application within the meaning of Article 178.

7. Possibly we are on safer ground if we hold with Wilson J. in Kedarnath Dutt v. Harrachand Dutt ILR (1882) C. 420 that so long as the

proceedings initiated by the decree-holder are pending, his right to apply for their continuance occurs from day to day, (i.e., on every day on which

the Court does not suo motu continue them). The right to apply will then not be barred till 3 years have elapsed after the proceedings have ceased

to be pending.

10. Whichever be the better view, the result is the same, and the petition under our consideration is not barred in so far as it asks for sale of the

property attached under the petition of the 3rd October, 1899.

8. The decree of the District Judge must be modified accordingly. Execution must

proceed only against the Immovable property described in the

Execution Petition of the 3rd October 1899 (E.P. No. 1086 of 1899). The parties will bear their own costs throughout.