
(1956) 03 MAD CK 0059
In the Madras High Court
Case No : A.A.A.O. No. 84 of 1954

Chennammal

APPELLANT

Vs

Chennappa Goundar and others

RESPONDENT

Date of Decision : 27-03-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 103

Citation : AIR 1956 Mad 21

Hon'ble Judges : Basheer Ahmed Sayeed, J

Bench : Single Bench

Advocate : C.S. Swaminathan, for the Appellant; D.R. Krishna Rao, for the Respondent

Final Decision : Allowed

Judgement

Basheer Ahmed Sayeed, J.—This appeal is against the order of the learned District Judge, Salem, setting aside the order of the District Munsif, Dharmapuri, holding that the execution application No. R. E. P. 642 of 1952 in O. S. No. 43 of 1945 was in time, and not barred by the law of limitation.

2. Two points arise for consideration in this appeal. The first is that from a perusal of the records it is found that the appeal preferred by the judgment-debtors against the order of the learned District Munsif was not competent in that it was filed 24 days after the time for the appeal had expired. The order of the learned District Munsif was passed on the 20th March 1953. An application for certified copy of the decree was made on the 30th March 1953. But this application was not proceeded with, and it was dismissed and struck off. Another application was filed on the 22nd April 1953, for the certified copy of the judgment and decree. Even this application was not proceeded with, and it was also struck off. A third application was filed on the 14th May 1953, for a certified copy of the decree and judgment, and on this application action was taken and copies were duly supplied, It is after obtaining copies under this application dated 14th May 1953, that the appeal itself was presented as late as 12th June

1953. When these dates are kept in view, obviously the appeal preferred on the 12th June 1953, was out of time. It is curious that neither the office nor the District Judge who dealt with the first appeal, ever noticed that the appeal was out of time. The appeal was, however, heard and disposed of, against which the present appellant has since preferred this C. M. S\\ Appeal.

3. If the appeal against which this second appeal has been preferred was thus incompetent, the second appeal also becomes incompetent, and both deserve to be dismissed, as not being of any legal validity. If the appeal before the learned District Judge and also the second appeal before this Court are dismissed, then the parties have to be relegated to the position in which they stood as on the 20th of March 1953, when the learned District Munsif passed the order holding that the execution petition in question was in time. I wanted to adopt this course, but the learned counsel for the respondent argues that the adoption of this course will place him in a very prejudicial position, and his suggestion is that the matter should be remanded to the lower appellate Court for investigating into the question of the competency of the appeal, and then give a finding. The learned counsel thinks that such a procedure would give him certain legal reliefs or remedies which he is not able to explain to me or convince me about.

4. However that be, even on the merits I do not think that any relief could be given to the respondent in this appeal. The last order was passed on the 20th April 1948, in E. P. No. 318 of 1947. The order in that execution petition was to the effect that it was dismissed, but above the record showing this order, there is an endorsement. It is not known by whom the endorsement has been made, because it is in a different ink and in different handwriting from that in which the relevant order appears on the docket sheet. This is to the effect that delivery was not effected as the petitioner was absent". In all probability, this endorsement is the result of the return by the bailiff who had been issued the warrant (for delivery of the property) for execution. It will not be wrong to assume that on the basis of this return of the bailiff, endorsed by some person or other on the docket, the learned District Munsif dismissed the application. But what is material is only the order dismissing the application.

5. It is sought to be construed by the learned counsel for the respondent that this order is final order, and therefore, the bar of limitation should apply to it if any further application for execution is net filed within a period of three years thereafter. I cannot agree with the learned counsel for the respondent.

6. Before this dismissal order was passed on the 20th April 1948, the records disclosed that there was a suit instituted by the obstructor, even as early as the 13th of March 1948. That suit was O. S. No. 104 of 1948. It was a suit under O. XXI, R. 103 , C. P. C., to set aside the order made earlier by the District Munsif in the very same E. P. No. 318 of 1947, on the 26th of January 1948. This suit by the obstructor was however dismissed on the 24th November 1948. When the order was passed on the 20th April 1948, it must be presumed that the learned District Munsif was aware that the obstructor had filed a suit, O. S. No. 104 of

1948, in the same Court, and it will not be wrong to assume that one of the reasons that should have prevailed in the mind of the learned District Munsif to dismiss the E. P. No. 318 of 1947 on the 20th April 1948, was that it was futile to continue the E. P. any further in view of the suit having been filed. The learned counsel for respondent would say that the Court cannot be said to have been in the know of the fact that there was a suit O. S. No. 104 of 1948, filed in that very Court by the obstructor. I do not think that such a contention could be raised, much less accepted. It must, on the other hand, be presumed that the Court had full knowledge of the proceedings which were pending on its own file when it was passing the order in the application for execution. So there is nothing improper or strange in believing that the learned District Munsif, when he passed the order on the 20th April 1948, in E. P. No. 318 of 1947, was also influenced by the fact of the filing of the suit which was then pending before it.

7. Not merely is this the situation, but there is also the further fact which has to be taken into consideration, in arriving at a decision as to whether the order made on 20th April 1948 is a final order, or an order which had the effect of keeping the execution proceedings pending. This leads us to the consideration of the proceedings that were initiated by the obstructor prior to the order and which continued until 25th June 1951. The suit was dismissed as already stated on the 24th November 1948, and an appeal was preferred namely, A. S. No. 282 of 1950, and that was dismissed on the 25th of June 1951. The question is whether the time taken in the institution of the suit and the final disposal of the appeal could be availed of by the decree-holders, or whether that would operate against the decree-holders. In my view, for an application to execute, the decree, the time that lapsed in the proceedings by the obstructor in the shape of a suit as also the appeal would be available to the decree-holder, for, as has been held in more than one decision, the suit and the appeal which has been filed by the obstructor should be construed and considered only as a continuation of the execution proceedings, the claim the suit, and the appeal having arisen all out of the same, execution proceedings.

8. Krishnappa Chetti v. Abdul Khader Saheb, ILR 38 Mad 535: (AIR 1915 Mad 495 (2)) (A); C.V. Venugopal Mudali Vs. C. Venkatasubbiah Chetty and Others, ; and AIR 1944 212 (Oudh) seem to be authorities in support of this contention that the time taken by way of claim proceedings, a subsequent suit and an appeal should all enure to the benefit of the decree-holder who is seeking to execute his decree, in view of the fact that all these proceedings are nothing other than a continuation of the same proceedings, though, for the purpose of convenience they are termed as a suit and an appeal. Further, it has been rightly held that this is in the nature of a review of the previous order which arose in execution, and as long as further progress in the execution proceedings is held up, further proceedings must only be considered to have the effect of keeping in suspense the execution petition, so that the decree-holder might renew the execution after the proceedings are finally terminated. In this view, I think the application filed on 7th July 1952, which was ordered by the learned District

Munsif, and which was also the subject-matter of the appeal before the District Judge, being within 1 year after the final termination of the proceedings, namely, the 26th of June 1951, when the appeal in the suit was finally disposed of, should, be considered quite in time, and as not barred by limitation.

9. The question now raised is as to the applicability of the Full Bench decision in Sivaramachari Vs. Bayya Anjaneya Chetty, to this case. Mr. Krishna Rao, appealing on behalf of the respondent has been good enough to take me through the relevant portions of the judgment, and after a careful consideration of the judgments, I am of the opinion that this Full Bench decision does not apply to the facts of the present case. That decision concerns the application of Art. 182, cls. (1) to (4). But so far as I can see, the present application falls within the scope of Art. 182 , cl. (5), of the Limitation Act, and this clause has not been the subject-matter of any consideration in the said Full Bench decision. That being the case, I think the learned District Judge was wrong in having applied the decision of the Full Bench to the facts of this case.

10. On a consideration of the entire facts and the circumstances of this case, and also taking, if I may, the question of equities, I think the order passed by the learned Distract Munsif is the correct one, and that order will be upheld. The appellate order will be set aside, and since the execution petition is in time, it will be proceeded with, according to law.

11. I think I shall not be justified in ordering costs to the appellant while allowing this second appeal, the reason being that he was responsible for allowing the learned District Judge to consider and give a decision on an appeal which had prima facie become incompetent. If he had pressed the point of the appeal having become time barred, the time of the learned District Judge would have been saved, and even the time of this Court would have been saved. Therefore, it is but just and meet that the appellant should be deprived of his costs. (No leave.)