

(1945) 03 MAD CK 0015
In the Madras High Court

Divakaran Nambudripad and Another	APPELLANT
Vs	
Koodalur Manakkal Brahmadathan Nambudripad and Another	RESPONDENT

Date of Decision : 01-03-1945

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 17

Citation : (1946) ILR (Mad) 117 : (1945) 58 LW 211 : (1945) 1 MLJ 447

Hon'ble Judges : Mockett, J;Clark, J

Bench : Full Bench

Judgement

Mockett, J.—The judgment-debtors are the appellants and the decree-holder is the first respondent. The essential facts may be very shortly,

stated. 10th November, 1931, is the date of the decree. On 10th November, 1943, the decree-holder filed E.P. No. 319 of 1943, seeking to

attach the properties of the defendants. The execution petition was in the usual form and prayer (10) in the petition is as follows :

It is prayed that the amounts mentioned in columns 7 and 8 with future interest and costs should be recovered by attaching and selling the movable

properties belonging to the first defendant shown in the schedule below. The decree-holder should be given permission to bid at the auction.....In

addition to the properties mentioned in the schedule below all the movable and immovable properties of defendants 1 and 2 should be attached

and also a warrant of arrest against second defendant issued and the decree amount should thus be collected and paid.

It continues:

The schedule of the remaining properties will be filed after enquiry and ascertainment hereafter. Affidavit also will be filed hereafter.

Then follows a schedule and it refers to three cauldrons, four copper vessels" and other movable properties. There is no reference to any

immovable properties. On January 24th, 1944, only a little more than two months after, E.A. No. 56 of 1944 was filed for permission to amend.

E.P. No. 319 of 1943 by adding an item of immovable property in the schedule. By January 4th, 1944, a period of more than 12 years had expired since the decree.

2. It is argued by the appellants that an amendment should not be allowed and that this is virtually an attempt to turn the old petition into a new

petition but without the disadvantages of the limitation imposed u/s 48. A number of cases were cited to us which refer to the discretion which was

vested in the Court under Order 21, Rule 17, with regard to the remedying of defects in execution petitions. In Madras Rule 17 is in the following

terms:

On receiving an application for the execution of a decree as provided by Rule 11, Sub-rule (2) the Court shall ascertain whether such of the

requirements of Rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court

may reject the application if the defect is not remedied within the time to be fixed by it.

There is no option or discretion in the Court with regard to ascertaining whether the requirements of Rules 11 to 14 have been complied with. Rule

13 provides that in the case of immovable properties description of the properties sufficient to identify them and if possible, the boundaries and the

survey numbers, etc., should be given.

3. The executing Court appears to have made no comment whatever about E.P. No. 319 of 1943. learned Counsel for the appellants argues that

that was because the petition did not refer, never intended to refer and was never understood by any one to refer to the sale of immovable

properties. It is true that the rules to which reference is made at the head of the petition do not relate to immovable property, and it is true that the

execution petition is in somewhat vague terms. But it seems, to me that the effect of it is that the petition is, apart from the movable properties,

aimed at the immovable properties also belonging to the defendants, and this seems to me to be emphasised by the words that "" the schedule of the

remaining properties will be filed after enquiry and ascertainment hereafter." I accordingly think that there was before the executing Court a petition

for the sale of the immovable properties of the defendants, but unquestionably it was defective. No particulars such as are required by Rule 13 are

given and it was the duty of the Court to return the petition for amendment to the petitioner after giving suitable time to enable the defects to be

remedied. No such action was taken and the respondent says that by E.A. No. 56 of 1944, dated the 24th January, 1944, the order in which is

the subject-matter of this appeal, he sought to call upon the executing Court to do what it should have originally done. In my view this correctly

summarises the position. A very similar case came before my learned brother Kuppuswami Ayyar, J., in which a situation such as now before us

was most fully discussed, and I have derived the utmost assistance from that judgment. Referring to the facts of the case (C.M.S.A. No. 21 of

1944) the learned Judge observes:

Since I have construed the petition as a petition for execution of the decree against the legal representatives by proceeding against their joint family

properties, the duty of the Court was to have given an opportunity to the appellant to rectify the defects by giving the description of the properties

to be proceeded against and the petition could be dismissed only in case he refused to comply with it. That has not been done by the Court. On

the contrary when the appellant wanted to have the defects remedied by himself by filing a petition for amendment it was dismissed on the ground

that more than twelve years have elapsed from the date of the decree. The delay was evidently due to the neglect on the part of the Court official,

the petitioner and the respondents to notice that there was this defect which will have to be cured. If the defect is noticed, the amendment can be

made even after the expiry of twelve years, because the Court is bound to give a time and within that time the defect could be cured. In this case

no time had been given by the Court to rectify the defects.

Those observations apply to the present case. The lower Court having had its attention drawn to the fact that this is a defective application has

allowed the defect to be remedied by means of an amendment. The argument of and the cases cited by the learned Counsel for the appellants are

almost entirely based on the state of the law when there was a wide discretion in

the Court; but I am not concerned to discuss that position as this

Court is governed by (Madras) Rule 17. In my opinion, the learned Judge rightly allowed the amendment and I would dismiss the appeal with

costs.

Clark, J.

4. I agree and do not desire to add anything.