

(2009) 03 KL CK 0008
In the High Court Of Kerala
Case No : C.R.P. No. 152 of 2009

F.A.C.T. Manager's Staff House Construction Co-operative
Society

APPELLANT

Vs

Karthiyani Unni

RESPONDENT

Date of Decision : 02-03-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 1, Order 22 Rule 12, Order 22 Rule 2, Order 22 Rule 3, Order 22 Rule 4
Kerala Co-operative Societies Act, 1969 — Section 16(1)
Limitation Act, 1963 — Article 120, 121, 5

Citation : (2011) 2 KLT 248

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : P. Santhalingam and Innocent Francis Papali, for the Appellant; G. Gopalakrishnan Nair, (Edappalry), for the Respondent

Final Decision : Dismissed

Judgement

K.T. Sankaran, J.—The question involved in this Civil Revision Petition is as to the scope and ambit of Rule 12 of Order XXII of the Code of Civil Procedure. Would the execution proceeding abate on the death of the decree holder/Petitioner in the execution petition? Can the legal representatives come on record at any time? The further question is whether the executability of the decree or otherwise should be gone into at the time when the application for impleading of legal representatives is considered.

2. One Raghavan Unni obtained a decree. The writ Petitioner is the third Defendant in the suit. Respondents 5 and 6 in the Writ Petition are Defendants 1 and 2. Raghavan Unni filed Execution Petition. As per decree, it was declared that "the plaint schedule property including the building was purchased and constructed by the funds supplied by the Plaintiff. The decree also directs the Defendants to execute a proper conveyance in favour of the Plaintiff or his nominee within two months from the date of decree. The decree directs that if

the Defendants fail to execute the sale deed in favour of the Plaintiff or his nominee within two months, the Plaintiff is entitled to get a proper conveyance executed in his name or his nominee through court. The decree also allows the Plaintiff to recover plaint B schedule movables from the Defendant. During the pendency of the execution petition, the decree holder, Raghavan Unni, died on 27.12.2007. His widow and children filed an application to get themselves impleaded as additional Petitioners in the execution petition.

3. The judgment debtors opposed the application for impleading. They contended that though the Petitioners in the application are the widow and children of the decree holder, they cannot be termed as legal representatives, as no rights devolved on them. The Respondents contended that the decree is not executable at the instance of the widow and children of the decree holder. The further contention is that the decree is incapable of execution and it is a nullity as the decree was passed in violation of the provisions of Section 16(1)(a) (iii) of the Kerala Co-operative Societies Act. In the absence of any devolution of interest, the widow and children of the decree holder are not entitled to come on record as additional Petitioners in the execution petition.

4. The court below held that the decree has become final and it was confirmed by the appellate court. It was held that since there is no dispute that the Petitioners before the court below are the widow and children of the decree holder, they are entitled to come on record as additional Petitioners. The court below also observed that the question whether the decree is executable or not is an issue to be heard separately and that question cannot be determined at the threshold when the application for impleadment is filed in the execution proceedings.

5. The learned Counsel for the Petitioner submitted that even before considering the question whether the application for impleading is to be allowed, the executing court was bound to consider whether the decree is executable at the instance of the legal representatives of the deceased decree holder. He also submitted that the question whether the decree is executable at all is also to be considered by the executing court. The learned Counsel for the Petitioner further contended that in view of Rule 12 of Order XXII of the CPC the provisions of Order XXII Rule 3 cannot be made applicable in this case and therefore the legal heirs of the deceased decree holder are not entitled to come on record.

6. Section 2(11) of the CPC defines "legal representative" thus:

Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

7. Section 146 of the CPC provides that save as otherwise provided by the Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or

the application may be made by or against any person claiming under him. Though Sections 50 and 52 of the CPC make provision for the course of action to be adopted if the judgment debtor dies, except Section 146, there is no other specific provision dealing with the subject.

8. Rules 2, 3 and 4 of Order XXII deal with instances where the Plaintiff or Defendant, as the case may be, dies. Rule 1 of Order XXII provides that the death of a Plaintiff or Defendant shall not cause the suit to abate if the right to sue survives. Rule 3 provides for substituting the legal representatives of a deceased Plaintiff. Rule 4 of Order XXII provides for the procedure in case of death of one of several Defendants or of sole Defendant. Rule 2 of Order XXII provides for recording the legal representative of the Plaintiff or Defendant, who is already on record. Rule 12 of Order XXII provides that nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order. The contention of the Petitioner is that in view of Rule 12, Rule 3 has no application and therefore the legal representatives of the decree holder/Petitioner in the execution cannot come on record. This submission, to my mind, is without substance. The meaning of Rule 12 is that there would be no abatement of the execution proceedings in case the legal representatives of the deceased Petitioner are not impleaded within time. Article 120 of the Limitation Act provides for a period of 90 days to implead the legal representatives of a deceased party. Article 121 provides a period of limitation of 60 days to set aside the abatement. Section 5 of the Limitation Act applies for condoning the delay in setting aside the abatement. These provisions relating to suits and appeals do not apply to execution proceedings. In view of Rule 12 of Order XXII, there can be no abatement of the execution proceedings on the death of the Petitioner or the Respondent in the execution petition. If there is no abatement, there is no question of prescribing a period of limitation for impleading the legal representatives or setting aside abatement. For the same reason, there can be no question of delay in setting aside abatement also. In the result, in an Execution Petition, the legal representatives of the deceased Petitioner would be entitled to come on record at any time, provided, it is within the period of limitation of executing the decree. Likewise, the legal representatives of the deceased Respondent in the execution petition (judgment debtor) can be impleaded even after the expiry of the period of 90 days as provided under Article 120 of the Limitation Act. The execution petition can be proceeded with against the legal representatives at any time provided it is within the period of limitation provided under the Limitation Act.

9. The Supreme Court in *V. Uthirapathi Vs. Ashrab Ali and Others*, , considered the question and held as follows:

15. It is clear, therefore, that if after the filing of an execution petition in time, the decree holder dies and his legal representatives do not come on record or the judgment debtor dies and his legal representatives are not brought on record, then there is no abatement of the execution petition. If there is no abatement,

the position in the eye of law is that the execution petition remains pending on the file of the execution Court. If it remains pending and if no time limit is prescribed to bring the legal representatives on record in execution proceedings, it is open in case of death of the decree holder, for his legal representative to come on record at any time. The execution application cannot even be dismissed for default behind the back of the decree holder's legal representatives. In case of death of the judgment debtor, the decree holder could file an application to bring the legal representatives of the judgment debtor on record, at any time. Of course, in case of death of judgment-debtor, the court can fix a reasonable time for the said purpose and if the decree holder does not file an application for the aforesaid purpose, the Court can dismiss the execution petition for default. But in any event the execution petition cannot be dismissed as abated. Alternatively, it is also open to the decree holder's legal representatives, to file a fresh execution petition in case of death of the decree holder; OR, in case of death of the judgment debtor, the decree holder can file a fresh execution petition impleading the legal representatives of the judgment debtor; such a fresh execution petition, if filed, is, in law, only a continuation of the pending execution petition - the one which was filed in time by the decree holder initially. This is the position under the Code of Civil Procedure.

10. The learned Counsel for the Petitioner relied on the decisions in Shri Rajeshwari Prasad Singh Vs. Shashi Bhushan Prasad Singh and others, , Ajmera Housing Corporation Vs. Amrit M. Patel (Dead) Through L.R.S. and Others, , Anil Kumar Singh Vs. Shivnath Mishra alias Gadasa Guru, , Anang Pal Vs. Pearey Lal and Others, , Baisnab Das Sen Vs. Bholanath Sen and Another, and Shri Rikhu Dev, Chela Bawa Harjug Dass Vs. Som Dass (Deceased) through his Chela Shiam Dass, to support his contentions. On a careful consideration of the aforesaid decisions, I am of the view that, the point arising for consideration under Order XXII Rule 12 was not dealt with in any of these decisions.

11. The contention of the Petitioner that the question whether the decree is a nullity should be considered before allowing the application for impleading the legal representatives of the decree holder, is also without substance. Even after impleading the legal representatives of the decree holder, the executability or otherwise of the decree can be adjudicated by the executing court. The accident that the decree holder died before deciding that issue already raised by the judgment debtors cannot be a fetter to the impleadment of the legal representatives of the decree holder. If the contention put forward by the Petitioner is accepted, it would lead to a situation where the legal representatives of the decree holder would be precluded from contending that the decree is executable. If the legal representatives of the decree holder are not impleaded, how can the execution proceedings be continued? With whom on the party array in the Execution Petition, the court will consider the executability of the decree and how can it be considered and decided? I am of the view that the court below was right in holding that the legal representatives of the decree holder are entitled to come on record. The Court below was also right in holding that the

question of nullity or otherwise of the decree can be considered later.
For the above reasons, the Civil Revision Petition is dismissed.