

(2006) 09 J&K CK 0008
In the Jammu And Kashmir High Court
Case No : Civil Revision A/o. 53 Of 2006

Ghulam Mohammad Khan & Ors.

APPELLANT

Vs

Ali Mohammad Lorihanji & Ors.

RESPONDENT

Date of Decision : 12-09-2006

Acts Referred:

Jammu and Kashmir Civil Procedure Code, 1977 — Order 21 Rule 17, 115

Citation : (2006) 3 JKJ 273 : (2007) SriLJ 28

Hon'ble Judges : Mansoor Ahmad Mir, J

Bench : Single Bench

Advocate : Z.A.Qureshi, M.Abdul Qayoom, Advocates appearing for the Parties

Judgement

1. This revision petition is directed against the order dated 8th April, 2006 passed by the court of SubJudge (Judge Small Causes), Srinagar, in

execution petition No.8, date of institution 07.08.1991, whereby and where under an application moved by the decree holders for amending the

execution petition on 19.07.2005 came to be allowed, which shall be hereinafter referred to as impugned order.

2. This petition is outcome of a suit which came to be, filed on 11th March, 1983 and, diarized as Civil Suit No.16/N. After going through the

cumbersome procedure it came to be decreed on 26.06.1991.

3. Execution petition came to be filed on 7th August, 1991 but could not be preceded ahead because decree holders were caught by labyrinth of

civil courts with their layers upon layers of appeals, revisions and other procedural laws and the procedural wrangles and tangles. Ultimately the lis

ended in favour of the decree holders and decree passed on 26th June, 1991 came to be upheld and thereafter executing court proceeded with the

execution petition.

4. The execution petition came up for effective hearing on 19th May, 2005. It appears that Mr. Qureshi filed objections on 24th June, 2005 and

resisted the execution of the decree on various grounds taken in the objections and also on the ground that the subject matter disclosed in the

execution petition is a shop but decree came to be granted in respect of a room and prayed that it be dismissed.

5. On noticing this objection, decree holders filed an application for rectifying the error by amendment along with proposed amended execution

petition which came to be resisted by the judgment debtors.

6. Learned executing court after hearing learned counsel for the parties granted the application and allowed the decree holder to rectify the error.

7. Heard. Perused. Considered. The bone of contention in this petition is whether the executing court was within its jurisdiction to allow the decree

holders to rectify the error and whether the amended petition is to be treated as fresh execution petition so far as it relate to the room and is barred

by limitation.

8. In order to determine this controversy, it is necessary to notice relevant provisions of Civil Procedure Code, for short Code, herein.

Order 21 Rule 17 of the Code reads as under:

17. Procedure on receiving application for execution of decree. (1) On receiving an application for the execution of a decree as provided by rule

11, subrule (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 shall allow] the defect to be remedied then and there or within a time to be fixed by it.

[(1A) If the defect is not so remedied, the Court shall reject the application:

Provided that where in the opinion of the Court, there is some inaccuracy as to the amount referred to in clauses (g) and (h) of subrule (2) of rule

11, the Court shall, instead of rejecting the application, decide provisionally (without prejudice to the right of the parties to have the amount finally

decided in the course of the proceedings) the amount and make an order for the execution of the decree for the amount so provisionally decided]

(2) Where an application is amended under the provisions of subrule (1), it shall be deemed to have been an application in accordance with law

and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialed by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and

shall, subject to the provisions hereinafter contained order execution of the decree according to the nature of the application:

Provided that, in the case of a decree for payment of money, the value of the property attached shall, as nearly as may be, correspond with the

amount due under the decree.

9. While going through this provision of law one comes to an inescapable conclusion that it was for the executing court to notice the defects and to

direct the decree holder to rectify the defects. But it appears that executing court without noticing the defects admitted the petition and proceeded

to issue notice to the judgment debtors in terms of SubRule (4) of Rule 17 of Order 21 of the Code. In terms of SubRule 1 of Rule 17 of Order 21

of the Code, it was duty of the executing court to see whether the decree holder has specifically mentioned the property in respect of which

execution was sought in the execution petition. It appears that executing court has not done so but on objections of judgment debtor, after lapse of

14 years, the defect was noticed. Thereafter, decree holders immediately moved an application for amendment.

10. It is necessary to notice the law laid down by the Hon'ble Supreme Court and various High Courts herein.

11. Madras High Court in case titled (Guda) Balarnbhotlu v. Mandela Bapanarnma and others, reported in AIR 1930 Madras 172 has held as

under:

Where execution was applied for, the name of the deceased defendant being wrongly mentioned, that was held to be in accordance with law:

Sainia Pillai v. Chokkalinga Chettiar (1) When the plaintiff applied for a relief not granted by the decree, it was held that the defect did not render

the application invalid: RajamAiyar v. Anantharatnam (2). When execution was applied for against original defendants, although in the meantime the

mortgaged property passed to third parties, the Court held that the application was in accordance with law: Parakat Devaswom v. Venkatachellam

Vachyar (3). I shall cite a passage from the judgment of Muthuswami Aiyar and Best, JJ, in *Samia Filial v. Chokkalinga Chettiar* (1), the first of the

three cases mentioned above:

Where there has been in fact an application for execution made by the party entitled to make it, the mere fact of a mistake having been made in

giving the particulars required by S.235, Civil P.C., cannot, we think, have the effect of rendering the application a nullity." With this proposition I

entirely agree. The order of the lower Court is set aside and the appeal is allowed with costs.

12. Nagpur High Court in case titled *Fulchand Hirchand v. Pal Marian*, reported in AIR (30) 1943 Nagpur 296, has observed as under:

We find it impossible to lay down any general rule as to what errors vitiate an application in law and what are to be regarded as irregularities.

Each case must be decided on its own merits. No useful purpose will be served by repeating the long list of errors collected by commentators

which have been held not to affect the legality of the application. Considering that copies of civil Court registers can be obtained and the

information accurately given, there was no doubt much to be said for the view that applicants who have incorrect details and failed to correct them

after being told to do so should be penalized, and that those who put in such haphazard application hoping that court clerks would assist them to

put them right and then failed to put them right, with the result that their applications were dismissed, should be treated as having made no

application at all. But in view of the weight of authority and the decisions to which we have called attention we do not consider that we should seek

to reopen the matter decided in the Full Bench decision. We would found our decision in the present case on the facts of this case, namely, that it

was a matter of record that Suganchang was dead and that it was a venial error for his son when applying and stating that he was the son of

Suganchand not to mention Suganchand's name as a party to the suit and not to mention that Suganchand had died. The error was bona fide and

(vide A.I.R.1932 Pat.306) it is, we think, reasonable to take this fact into consideration. And though we are not concerned with the main question

which arose in 12 Pat.42, that case is a further authority in support of our conclusion. The appeal is therefore allowed. The proceedings in

execution will continue. Any defects in the present application may be amended.

13. Full Bench of the Mysore High Court in case titled Marulasiddappa v. Lakshmipathi, reported in AIR (37) 1950 Mysore 64, has observed as

under:

15 There is nothing to prevent this being done after the execution application is registered and even after the expiry of the period of twelve years

from the date of the decree. Our answer, therefore, to point No. 1, referred to the Full Bench, is that the failure to file a schedule of immovable

properties along with the execution application is a mere defect which can be cured by filing a schedule of such properties more than twelve years

after the date of the decree.

14. Apex Court in case titled Jugalkishore Saraf v. Mis Raw Cotton Co. Ltd., reported in AIR 1955 SC 376, has observed as under:

61. This defect however was not such as to preclude the Respondents from obtaining the necessary relief. The application which was filed by them

in the City Civil Court was headed ""application for execution under O.21, R.11, C.P.C."" and the only defect was in the specification of the mode in

which the assistance of the Court was required. The particulars which were required to be filled in column 'J' were not in accordance with the

requirements of O.21, R.11(2)(i) and should have specified one of the modes therein prescribed and certainly a declaration that the Respondents

were the assignees of the decree and the order for their substitution as the plaintiffs was certainly not one of the prescribed modes which required

to be specified in that column When the application for execution in the present case was received by the City Civil Court, the Court should have

scrutinized the application as required by O.21, R.171(1) and if it was found that the requirements of Rule 11 to 14 as may be applicable were not

complied with as it contended for by the Appellant, the Court should have rejected the application or allowed the defect to be remedied then and

there or within a time to be fixed by the Court. Nothing of the kind was ever done by the City Civil Court nor was any objection in that behalf

taken on behalf of the Appellant at any time until the matter came before this Court.

15. Rajasthan High Court in case titled Sunder Rai and others v. Tarachand and others, reported in AIR 1962 Rajasthan 161, has observed as

under:

(6) An error in giving the number of the suit may at the most be considered to be an irregularity and such a defect cannot be regarded to be an

illegality so as to make the execution petition invalid in the eye of law.

16. Rajasthan High Court in case titled Rameshwar Lal v. C. C. Bank Ltd, reported in AIR 1972 Rajasthan 46, has observed as under:

28. A review of the authorities discussed above shows that where in an execution application Rules 11 to 14 of Order 21 C.P.C. as may be

applicable are not complied with, the executing Court can get the defect remedied even after the period of 12 years from the date of decree,

provided the execution application is pending. This will be treated as amending the original application itself. If, therefore, an execution application

prays for the attachment and sale of immovable property, but at the same time no list of the immovable property is given, it is noncompliance of

Order 21, Rule 19 C.P.C. and under Order 21, Rule 17 C. P.C the executing Court is empowered to get the defect removed at any time, even

beyond the limitation of 12 years period, if the execution application is pending. But where there is no such defect at the initial stage, but later on

some more property is sought to be added to the former list with a view that fresh property may be got attached and sold, then this will be treated

as a fresh application and will not be allowed, if filed beyond the period of 12 years from the date of decree. The case in hand falls in the first

category and the allowance by the executing Court of the filing of the list of the immovable properties of judgment debtor Biseshwar Lal will be

treated as allowing the amendment to the execution application as required under Order 21 Rule 17 C.P.C.

17. Mysore High Court in case titled Baburao Vithalrao Sulunke v. Kadarappa Prasappa Dabbannauar and anr., reported in AIR 1974 Mysore

63, has observed as under:

2. It seems to me that this order is clearly unsustainable. This Court in C. R. P. NHO.2745 of 1972 decided on 22/1/73, has laid down that a

Court which is seized of a suit which has been stayed pursuant to the provisions of Section 10, C. P. C. had nevertheless jurisdiction to make

interlocutory orders, if relief in that behalf, is claimed by any of the parties. Section 10, C. P. C. also seems to refer to the stay of trial of a suit and

not other proceedings of an interlocutory character.

18. Apex Court in case titled Smt. Jiwani v. Rajmata Basantika Devi and others, reported in AIR 1994 SC 1286, has observed as under:

6. It is no doubt correct that the rules of procedure are handmaids of justice and ordinarily the provisions of Order 21, Rule 17 are to be

interpreted liberally and an amendment to the execution application should be permitted. It is further not disputed that an amendment when

permitted dates back to the original filing of the application. The facts of the present case, however, do not warrant the liberal approach indicated

by us. The execution application was filed in the Court on May 8, 1974, under the signatures of a dead person and as such there was no

application in the eyes of law before the court. No notice of the said application was given to the appellant and warrant of possession was issued

on the same date. The order which was passed in violation of the rules of natural justice was void and was rightly set aside by the High Court It

was only after the remand of the case by the High Court that the appellant got an opportunity of filing objections before the Executing Court which

he did on August 13, 1981,. Even on the date when the appellant filed objections before the Executing Court the execution application bore the

signatures of late Randhir Singh and no other person had signed or verified the same. It is thus obvious that even in the year 1981 when the

executing court took notice of the execution application after remand from the High Court there was no signed application before 4 the said court

on behalf of the decreeholders. No attempt, not even a prayer, was made before the Executing Court for the amendment of the application. It was

only on September 29, 1984 after the dismissal of appellants objections that the Executing Court suomotu permitted the amendment of the

application. The procedure on the face of it was violative of the provisions of Rules 11 and 17 of the Civil Procedure Code. The suit in this case

was decreed on December 31, 1965 and as such in the year 1981, when the Executing Court issued notice to the appellant the unamended

execution application was even time barred.

19. Keeping in view the mandate of Rule 17 Order 21 of the Code and the law laid down as referred hereinabove, it was duty of the court to

scrutinize the execution petition and it was for the executing court to find out the

defect and command the decree holder to remove the defect and after rectifying the defect the petition was to be admitted. But, at the risk of repetition, it appears that petition came to be admitted without noticing the defect and after lapse of 14 years, as discussed hereinabove, the judgment debtor raised the plea and decree holder sought amendment.

20. The Rules of the procedure are aimed at to achieve the purpose of speedy justice as early as possible. The provisions are to be interpreted liberally. The procedural wrangles and tangles have no role"" to play and shall not come in the way of achieving the purposes of justice. The courts should not succumb to the procedural niceties and mystic maybes. It is duty of the courts to see and ascertain that the decrees/judgments/orders are executed without delay and should not allow unscrupulous litigant to default the decrees, judgments and orders.

21. In the given circumstances it can be safely held that it is purely a bonafide mistake and irregularity and by allowing the decree holder to rectify the error it could not be said that execution petition is a fresh one.

22. Keeping in view the ratio of the judgments referred hereinabove and discussion made, I am of the considered view that executing court has not committed any error while passing the impugned order. Even otherwise, the executing court was not powerless to rectify the error while exercising inherent powers if there would not have been any enabling provision contained in the Code. If the trial court would not have granted the amendment it would have, caused great injustice because that would have amounted to deny the usufructs of the litigation to the decree holder which he had achieved after going through all procedural wrangles and tangles and after making him to run from pillar to post and post to pillar for a period more than two decades.

23. Viewed thus, the petition is dismissed along with all connected CMP(s). Send down the record to the executing along with a copy of this order.