
(1950) 01 KL CK 0006
In the High Court Of Kerala
Case No : A. S. No. 83 of 1124

K. Narayana Iyer Krishna Iyer

APPELLANT

Vs

Lekshmi Ammal and Another

RESPONDENT

Date of Decision : 18-01-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 21 Rule 11(2), 5

Citation : (1950) 01 KL CK 0006

Hon'ble Judges : Mathew Muricken, J;Koshi, J

Bench : Division Bench

Advocate : T.M. Mahalingom Iyer, for the Appellant; T.S. Venkiteswara Iyer, for the Respondent

Final Decision : Dismissed

Judgement

1. Judgment-debtor 2 in O. S. No. 128 of 1110 on the file of the Trichur District Court is the Appellant before us. His appeal is against an order allowing execution as per E.P. No. 51 of 1124 filed by the decree-holder. Pursuant to an earlier execution application, E. P. No. 45 of 1123, certain properties belonging to the judgment-debtors were sold in court auction on 4-3-1124. The sale was for an amount of Rs. 8372-8-8 which amount according to the sale proclamation represented the decree debt as on the date of the sale. When the sale was held the decree-holder agreed to have the same set aside without the 6 per cent solatium in case the sale amount was paid within a week. The amount "was accordingly deposited and the sale reversed. In due course the decree-holder with drew the amount from Court. This withdrawal was on 23-3-1124. On 1-4-1124 judgment-debtor 1 filed an application (M. P. No. 356 of 1124) to have a correct statement of accounts prepared to ascertain whether the sale wa9 held for the true decree debt or for more. As a result of the investigation started on that petition it was found that larger amounts than that fetched at the sale were really due to the decree-holder. Judgment-debtor 1 thereafter sought leave of the Court to withdraw his petition (M. P. No. 356 of 1124) and the Court rejected the

same. The decree-holder then filed the present execution petition for the balance decree debt found due pursuant to the enquiry on M. p. 856 of 1124. The Appellant's objection to the execution was overruled by the learned Judge in the Court below. Hence this appeal.

2. Mr. T.M. Mahalingom Iyer, the learned advocate who appeared before us on behalf of the Appellant, raised two contentions. One was that the payment of the sale price into Court within one week of the sale was in accordance with an agreement or understanding between the parties that such payment will be in full satisfaction of the decree debt. The other contention was that having omitted to make a claim for all amounts in the prior application for execution (E.P. No. 45 of 1123) the decree-holder was now precluded from claiming the amount so omitted by means of a fresh execution application. We shall deal with these contentions in their order.

3. When the sale was held on 4-3-1124 the Court had made a record as follows concerning the circumstances under which it was held: "sold for Rs. 8372-8-8 to the decree-holder's Advocate. For confirmation 5-4-1124. Decree-holder's Advocate agrees the sale can be set aside without poundage if payment is made within a week as represented by the judgment-debtor."

If the above shows anything it is only that the understanding related to the reversal of the execution sale and not to anything more. No other construction can, according to us, be given to those plain and unambiguous words quoted above. There is, therefore, no need to look into the subsequent conduct of the parties which, according to the decree-holder, would show that the judgment-debtors even denied the existence of any understanding even with regard to the setting aside of the sale. Be that as it may, according to us the record of the proceeding does not substantiate any agreement as contended before us on behalf of the Appellant. It is worthy of notice that both in his objection petition to the execution application and in his memorandum of appeal to this Court the Appellant had repudiated the existence of any agreement between the parties concerning the deposit or as to its effect. That no man can be permitted to blow hot and cold is a well-known doctrine. We merely point this out after having disposed of the contention on its merits.

4. There is no substantial variance between the parties as to whether the further amounts claimed in the present execution application are due or not. The Appellant practically concedes that the amounts claimed are truly due. The omission to include the same in the previous execution application E. P. No. 45 of 1123 was, according to the decree-holder, brought about by a mere clerical error. When that application was filed on 19-4-1123 the aggregate amount of interest due on the principal and interest decreed from the date of the decree till the date of the application was really Rs. 2933-13-0. Instead of that the amount mentioned in the execution application in lieu of such interest was only Rs. 1506-0-0. It is this difference and subsequent interest thereon that are claimed in the execution petition now filed. This is not a case where in a money decree

the decree-holder sought execution in respect of certain heads alone among the claims allowed by the decree, or consciously limited the relief then claimed to a portion of any one of the different heads allowed, but a case where through a wrong calculation the full amount of interest due was omitted to be included in the statement of claim. The decree-holder was not aware that a portion of the interest due happened to be omitted from the claim made under E. P. No. 45 of 1123. In the cases cited at the Bar from the conduct of the parties the Courts inferred a waiver by the concerned decree-holders with respect to a particular head of claim granted by the decree. A party cannot waive a right the existence of which he was not aware of at the time the demand is made. The present is a case of unconscious omission and not one belonging to the class of cases cited before us.

5. In *Subramanian Chettyar v. K. Moses* AIR 1929 Rang. 182 : (119 I. C. 223), in an application made for the execution of a decree, interest was inserted and then scored out and the deletion was accepted by the decree holder. The Court read into the conduct of the decree-holder in accepting the deletion a waiver of the claim to interest and it was held that the decree-holder was not entitled to make another application to execute the decree for interest. Be it noted that there the entire interest portion of the claim was omitted to be included in the application as placed before the Court for issue of process in execution. Brown J., who disposed of the case, was particular to observe:

It is not his (decree- holder's) claim now that he did not know interest was due at the time. What he says now merely amounts to this: I did know the interest was due, but I had not immediately before me material for calculating it and I, therefore, preferred to file an application with the interest omitted. This is an entirely unsatisfactory explanation. The calculation of interest was a simple matter, which could be done very quickly, and certainly need not have taken the month which elapsed between the filing of the first application and the second application. I am of opinion that the application to execute the decree for interest has been rightly refused.

An earlier passage in the judgment reads:

If the decree-holder wished to claim interest he clearly could have done so, in his first application. By failing to do so, he must be deemed to have waived his claim to interest.

The actual decision in *Shyama Charan De Tahbildar and Others Vs. Protap Chandra Das and Others*, , no doubt supports the Appellant's position. But all that is said in the judgment about this question is:

It is well-settled that a portion of an entire decree for which execution was not once claimed cannot form part of a subsequent claim in execution.

If we may say so with respect, the point does not appear to us as so clear as the learned Judges would seem to think nor was the learned advocate for the

Appellant himself prepared to command the proposition so broadly stated for our acceptance. When through a mistake in calculation or through any clerical error a lesser amount than that actually due happens to be claimed in an execution petition, we are not prepared to introduce any legal fiction to hold that the decree holder must be deemed to have waived his claim to the portion left out and that he cannot rectify the mistake afterwards.

6. The case most strongly relied on by Mr Mahalingom Iyer was the decision of Beaumont C.J. and Murphy J., in Panaji Girdharlal Vs. Ratanchand Hajarimal Marwadi, The decree-holder obtained a decree for principal and interest up to date of payment and costs and applied for execution and executed it in respect of the principal and costs omitting interest. The form of application followed Form 6, Appendix E to the Schedule of the CPC (CPC) (V of 1908). It stated in para 7, in accordance with the requirements of Order 21, Rule 11(2)(g) that the claim in a suit was Rs. 1359 to be paid to the Plaintiff and costs and interest at the rate of 6 percent, per annum from the date of the filing of the suit. Then in column 8 it showed what costs have been awarded and totals up those costs, with the sum of Rs. 1359, as amounting to Rs. 1615-10-8. Then in column 10 the Plaintiff prays that the total, amount of Rs. 1615-10-8 and the costs- of taking out the execution be realised by attachment and sale of Defendant's moveable property. So that what the decree-holder asked for was payment of the, principal sum and costs awarded by the decree, but he did not ask for execution in respect of interest awarded to him subsequent to the decree. When a subsequent application was filed it was held that the effect of the earlier application for portion of the amount due at the date thereof was to prevent the decree-holder from making subsequent application for the balance. When this case was read and commented upon at the Bar we pointed out that it was a case where the learned Judges had inferred a conscious waiver on the part of the decree-holder for the interest portion of the decree and not a case where they declined to set right an inadvertent omission. Though Mr. Mahalingom Iyer very strongly disagreed with our interpreting the decision that way we notice that in Mulla's Commentaries to Order 2, Rule 2, CPC (CPC), the same view of the case as we suggested is taken. That would be clear from the following comment occurring on page 557, Mulla's CPC Code, Edn. 11, (1941):

But in the case of money decrees, the Bombay High Court has held that piecemeal execution is not permissible and that if the decree holder applies for execution for less than the full amount, he must be taken to waive his right to execution for the balance.

The particulars of the contents of the execution application set out in the judgment would show that the learned Chief Justice was examining the details to see whether it was a case of an unconscious omission. He concluded that it was not. A reference to the cases relied on in the judgment namely the decision of the Calcutta High Court in Huro Sunkur v. Taruck Chunder 11 W. R. 488 : 3 Beng. L. R. A .C. 114 and that of the Court of Appeal in Forster v. Baker 1910 2 K. B.

636 : 79 L. J. K. B. 664 confirms us in our view that all that the learned Judges in the Bombay case decided was that a case of conscious omission to include a portion of the decretal amount in the execution application would be treated as a waiver of the claim for the balance so as to prevent the judgmentdebtor from making a subsequent application for it. What the two oases relied on by Beaumont O. J. decided was that a judgment-creditor cannot divide his decree and issue several executions upon it for the amounts into which he chooses to divide it, and he cannot assign to another a power which he does not himself possess. That is, he cannot assign part of a decree. No case of inadvertent omission or any clerical error arose in those oases or in the decision in Panaji Girdharlal Vs. Ratanchand Hajarimal Marwadi, . These cases are no authorities for the position that if a portion of a decree claim has been previously executed under circumstances similar to the present an application for execution of the remainder would not be sustainable. Mr. Mahalingom Iyer readily conceded no waiver could be pressed into service in this case. We are, as already explained, unable to hold that the decision in Panaji Girdharlal Vs. Ratanchand Hajarimal Marwadi, or the other cases relied on by him would support his argument unless a waiver can be inferred.

7. It was not argued that any other bar exists in the case so as to prevent further execution. There is no prior decision of the Court that the price fetched at the sale represented the full decree debt. Nor was any satisfaction entered of the decree. Admittedly the provision in Order 2 Rule 2 Code of Civil Procedure, does not apply to proceedings in execution of a decree. No plea of estoppel was urged nor could one possibly arise in all the circumstances of the case. Perhaps the position would have been different had the sale been confirmed and the decree-holder was claiming the balance as now.

8. The appeal is, therefore, without substance, it fails and will stand dismissed with costs.