
(1956) 02 MAD CK 0019
In the Madras High Court

Kaliappa Reddiar

APPELLANT

Vs

Thangamuthu alias Thangaswami Reddiar and Others

RESPONDENT

Date of Decision : 15-02-1956

Acts Referred:

Citation : (1956) 69 LW 522 : (1956) 2 MLJ 301

Hon'ble Judges : Basheer Ahmed Sayeed, J

Bench : Division Bench

Judgement

Basheer Ahmed Sayeed, J.—The point that arises in this Civil Miscellaneous Second Appeal is whether the order of dismissal passed on

31st October, 1944, in E.P. No. 250 of 1944, is a final order so as to attract the bar of limitation or whether it was only an order for statistical or

administrative purposes. Both the Courts below have been of the opinion that it was a final order and that the subsequent execution petition,

namely, E.P. No. 229 of 1952, filed on 17th April, 1952, was out of time, having been filed nearly eight years after the earlier order of 1944.

2. After E.P. No. 250 of 1944 was filed, there was an order for proclamation and batta on 10th August, 1944. Batta was paid and proclamation

was also settled. The sale was fixed for 2nd October, 1944. This order was passed on 14th August, 1944. In the meanwhile a petition which was

subsequently numbered as I.A. No. 622 of 1944, was filed u/s 47 by defendants 4 and 5. It was returned on 18th August, 1944. In that petition

defendants 4 and 5 Uaimed a paramount right in themselves over the hypotheca in respect of which the decree-holder obtained a decree and was

executing the same. That application was posted to the 1st, October, 1944. The sale under E.P. No. 250 of 1944, was thereafter adjourned to

23rd October, 1944, and the petition was posted for hearing to the 26th October, 1944. This order was made on 4th October, 1944. The claim

petition in I.A. No. 622 of 1944, was dismissed on 23rd October, 1944. The sale that was adjourned to 23rd October, 1944, also could not take

place for want of bidders on that day. Then the Court posted the execution petition to be called on 30th October, 1944. This order was made on

the 26th October, 1944. On the 30th, the Judge was on casual leave. The matter stood adjourned to 31st October, 1944. On that date the Judge

passed an order ""Not pressed. Dismissed."" Below that order an endorsement was also obtained from the advocate for the decree-holder that the

petition" was not pressed. Thereafter it transpires that defendants 4 and 5 filed O.S. No. 127 of 1045 and that suit was ultimately disposed of on

30th November, 1951, after having seen several vicissitudes and suffering a chequered career. The present execution petition, which has been

dismissed as being out of time, namely E.P. No. 229 of 1952, was filed as already stated on 17th April, 1952.

3. This delay of 8 years is explained by the learned Counsel for the appellant as having been due to the pendency of the suit O.S. No. 127 of

1945. There was of course no stay obtained in that suit of the execution of the present decree. Whether the appellant is entitled to the benefit of the

time taken by the pendency of the suit O.S. No. 127 of 1945, for purpose of saving limitation or not does not seem to be material and that

appears to be also the reason why this aspect of the case was not pressed before the learned Subordinate Judge. The decision in this appeal

actually rests upon the construction to be placed on the order passed by the learned District Munsif on 31st October, 1944.

4. As could be seen from the decisions in *Ramanathan Chettiar v. Alagannan Chettiar* (1935) 70 M.L.J. 683, *Somasundaram Chettiar v. Alawelu*

Achi 1937 M.W.N. 480, *Kdrapolu Shedthi v. Gangayya Shetty* (1950) 1 M.L.J. 204, and *Singana Sathiraju Vs. Merla Sathamma*, , the trend of

the rulings seems to be that in order to find out whether an order has been a final order or only an order passed for statistical or administrative

purposes the surrounding circumstances should be taken into consideration. It also appears to be the further trend of these rulings that, whether an

order is made by the Court itself on its own initiative or at the invitation of the decree-holder, the circumstances under which the order happens to

be made should still be the guiding factor in coming to the conclusion whether the order was a final order or was one passed merely for statistical purposes.

5. In this case, it has to be noted that when the sale was fixed for 23rd October, 1944, the sale could not take place for want of bidders. It was at that stage open to the decree-holder to ask for further time and request the Court to adjourn the sale to another date to enable him to take further steps to see that there were bidders. The decree-holder did not do so, apparently for the reason that the claim petition had just then been dismissed. It was the claim petition which must have scared away the prospective bidders and after the claim petition had been dismissed, there was also a suit impending. Though it had not been actually filed, still defendants 4 and 5 who had suffered reverse in respect of their claim petition were entitled to proceed within a year's period to set aside the order in that claim petition. The decree-holder must have therefore thought that it would not be possible for him in view of these factors to take any steps to get on with the sale. The mind of the Judge must have also been affected by these factors, namely, that the claim petition having been dismissed, there was going to be a suit against the order, and actually the suit came in 1945. Therefore the decree-holder must have thought of postponing the execution petition to a more auspicious time, when he could hope to secure bidders for the property. Being the end of the month, the learned Judge also must have thought of disposing of this petition. Though it was not the end of the quarter, still the anxiety to dispose of a certain amount of work each month always weighs with the subordinate judiciary. Further, the order that "the petition is not pressed and is dismissed" seems to have taken place in point of time earlier than the endorsement to that effect made by the advocate for the decree-holder. This, to a certain extent, would go to show the anxiety of the Court to push off the petition from its file.

6. Therefore, taking all these circumstances into consideration, I am of the opinion that the reasonable and just view of the order passed on 31st October, 1944, would be not that it was a final order but was only an order for purposes of statistics. It will not be wrong to assume in this case, judging from the sequence of the endorsements made, that the anxiety of the

Court to dispose of the petition it was, that brought about the endorsement also by the advocate for the decree-holder, to a similar effect, it is also in the interests of justice I believe, and equity also demands, that in a matter where the stake is heavy, the construction should be liberal rather than too very restricted and technical. The decree-holder in this is still within time so far as the decree is concerned, the 12 year period has not yet elapsed and he is only hit by the rule of filing an execution petition within three years from the last order which should be final. If the last order is not final, then he is still in time to file an execution petition and realise the profits of his decree.

7. I am on the whole satisfied that the order of 31st October, 1944, in the circumstances of this case, cannot be said to be a final order disentitling the decree-holder to file a. fresh application for execution of the decree under which he is still to realise the mortgage debt due to him. This appeal is therefore allowed but in the circumstances of this case there will be no order as to costs.

8. Leave refused.