

(1951) 08 MAD CK 0005
In the Madras High Court
Case No : A.A.O. No. 106 of 1949

Koypathodi Moidin Kutty (died) and Others APPELLANT
Vs
A.K. Doraiswami Aiyar RESPONDENT

Date of Decision : 10-08-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, 146, 48

Citation : AIR 1952 Mad 51 : (1952) ILR (Mad) 622 : (1952) 65 LW 434 : (1951) 2 MLJ 506

Hon'ble Judges : Rajamannar, C.J;Venkatarama Ayyar, J

Bench : Division Bench

Advocate : N.R. Sessa Iyer, for the Appellant; V.R. Narayana Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Venkatarama Ayyar, J.—This appeal arises out of proceedings in execution of the decree in O. S. NO. 6 Of 1936 on the file of the Court

of the Subordinate Judge of Kozhikode. That was a suit instituted by one Appunni Nayar against the appellant for recovery of amounts due under

three promissory notes and it was decreed on 30th March 1936. There were various proceedings in execution of that decree but we are

concerned only with the last of them, B. P. No. 71 of 1943. In this execution application the Immovable properties of the judgment debtor were

attached but before they could be brought to sale the decree-holder died on 20th May 1945. Thereafter on 6th June 1945 the following order was

passed in E. P. No. 11 of 1943:

The decree-holder is reported dead. No sale taken place. Petition closed. No L.R. impleaded".

Meantime a suit had been instituted for partition of the properties belonging to the tarwad of the decree-holder, O. S. No. 32 of 1941, on the file

of the Sub Court, Kozhikode. In that suit a receiver was appointed on 27th March 1945 for the tarwad properties and it is common ground that

the decree in O. S. No. 6 of 1936 is one of the properties covered by the receivership order. On 16th June 1948 the receiver filed E. P. No. 192

of 1948 out of which the present appeal has arisen and in that he prayed for attachment and sale of the immovable properties of the judgment-

debtor. It may be mentioned that the properties sought to be sold under this execution application are the very properties which were attached in

E. P. No. 71 of 1943.

2. The judgment-debtor resisted the application on the ground that on the date on which it was filed more than 12 years had elapsed from the date

of the decree and that it ,was consequently barred u/s 48, C. P. C. The, Subordinate Judge overruled this objection. He held that no final order

had been passed in E. P. No. 71 of 1943 and that, therefore, it must be deemed to be pending and that the present application was in substance

one to continue those proceedings and that, therefore, it was not barred u/s 48, C. P. C. In this view he directed the execution to proceed. It is

against this order that the present appeal has been brought by the judgment-debtor.

3. Mr. N.R. Sessa Iyer, the learned advocate for the appellant has raised two contentions. Firstly he urged that the order in E. P. No. 71 of 1943

and dated 6th June 1945 is a final one and that it really amounts to one of dismissal and that, therefore, the present application dated 16th June

1948 could not be treated as its continuation. Now it is well settled that when an execution application is closed or struck off such an order does

not terminate the proceedings. The decree-holder having died and the legal representatives not having come on record, the order closing the

petition must be construed not as one of dismissal but as one of disposal for statistical purposes. In "Damodara v. Official Receiver, Krishna" ILR

(1946) Mad 527 an execution application was closed and it was held that the subsequent application for execution of the decree was one really to

continue the previous petition and not a fresh application. The present case is directly governed by this decision. The order dated 6th June 1945

cannot be construed as one of dismissal for any default on the part of the decree-holder because he was dead. The following passages from the

judgment of the Privy Council in "Debi Baksh Singh v. Habis Shah", 35 All 331 are in point:

It requires no words of their Lordships to show the inapplicability of the rules or orders dealing with cases of the non-appearance of a suitor to the

situation which arises when a suitor is dead. The principle of forfeiture of rights in consequence of a default in procedure by a party to the cause is

a principle of punishment in respect of such default, but the punishment of the dead or the ranking of death under the category of default, does not

seem to be very stateable.

The order dated 6th June 1945 refers expressly to the death of the decree-holder and closes the petition and does not dismiss it. We must

accordingly hold that the order dated 6th June 1945 is not a final order amounting to the dismissal of the E. P.I No. 71 of 1943 and that the

petition must be deemed to be pending and the present E. p. No. 192 of 1948 has rightly been held by the lower Court to be one in continuation

of E. P. No. 71 of 1943. We accordingly reject this contention of the appellant.

4. The second and the more substantial contention of the appellant is that treated as an application for continuation of the prior execution the

present application is not maintainable as u/s 146, C. P. C. a receiver is not a person competent to maintain such an application, Section 146, C.

P. Code runs as follows:

Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or the 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.

The argument on behalf of the appellant is that the words "any person claiming under him" are inappropriate to an application by the receiver who

does not claim under any of the parties and that those words can taken in (sic) only heirs and other legal representatives. If this contention is

correct it will follow that E. P. No. 192 of 1948 will be Incompetent as one to continue E. P. No. 71 of 1943 and as a fresh application it will be

barred u/s 48, C. P. C. As the question does not appear in this form to be covered by authority this has to be determined on a consideration of the

principles applicable to the case.

5. What is the legal status of a receiver appointed" by Court and what are his powers? The object of appointing a receiver in an action is the

preservation of the properties which are the subject-matter of the suit for the benefit of the parties who might be declared entitled to the same in the

action. For this purpose the Court takes the properties into its own custody and assumes management thereof through Its officer, the receiver.

Under Order 40, Rule 1(d) the Court can confer upon the receiver all such powers as to bringing and defending suits and for the realisation and

management of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits and the like as the

owner himself has. The result of appointing a receiver under Order XL, Rule 1, C. P. C. is that the parties to the action are removed from the

possession of the properties which pass into "custodia legis" and that thereafter the only person who can realise the income and conduct

proceedings in Court is the receiver:

The appointment of a, receiver operates as an injunction restraining the parties to the action from receiving any part of the property affected by the

appointment"" (Halsbury Laws, Volume 28, page 48, para. 87).

6. The exact legal relationship in which the receiver stands to the persons entitled to the estate has been the subject of considerable judicial

consideration. The appointment of a receiver has no effect whatever on the title of the real owner. The order appointing the receiver does not

operate to divest them of their ownership and vest it in the receiver. The title continues in the owners even after the order of appointment of the

receiver precisely as it did prior to such appointment. Nor is the receiver an agent of the parties to the action or the real owner. He does not derive

his authority from them but from the Court. He is not liable to be removed by them, nor is he subject to their control.

7. If a receiver has no title and if he is not an agent of the parties by what right is he entitled to maintain actions in court? It is now well settled that

where a Court confers authority on the receiver under Q. XL, Rule 1, C. P. C. he becomes the representative of the true owners and as such

representative he is entitled to conduct all proceedings which the owner can. The leading case on the subject is "Jagat Taranl Debi v. Nabia Gopal"

34 Cal 305. There the question arose as to whether a receiver can file a suit in his own name. The question was elaborately considered by

Mookerjee and Holmwood JJ. with reference to the principles and authorities applicable to the case. At page 318 they observe, ""Although the

receiver has not title to the property, and although he is as custodian to take charge and hold the property during or pending litigation, it does not

necessarily follow, that if he is authorised to sue, he cannot sue in his own name though he is in one sense custodian of the property of the person,

whom in some respects he is made to supplant. There seems to be no reason why his power should not be held to be coextensive with his

functions. It is clear that he cannot conveniently perform those functions, unless upon the theory that he has sufficient interest in the subject-matter

committed to him, to enable him to sue in respect thereof by virtue of his office, in his own name"", and again at page 317 their Lordships observe:

On the whole, we are disposed to take the view that, although the receiver is not an assignee or beneficial owner of the property entrusted to his

care, it is an incomplete and inaccurate statement of his relations to the property to say that he is merely its custodian. A Receiver is appointed for

the benefit of all concerned. Title of the property for the time being, and for purposes of the administration, may, in a sense, be said to be in the

Court. The receiver is appointed for the benefit of all concerned and he is the "representative of the Court, and of all the parties interested in the

litigation", wherein he is appointed"". In Achut Sitaram Patwardhan Vs. Shivajirao Krishnarao Gaikwad, the following passage occurs at page 261:

The objects for which a receiver is appointed are preservation and realisation of the subject-matter of the litigation pending determination of the

rights of the parties. He is appointed for the benefit of all the parties concerned in the litigation and is the "representative of the Court and parties

interested in the litigation.

8. In Alderson on ""Receivers"" the law is stated in these terms:

There is no satisfactory reason why a receiver should not in every instance and under all conditions be permitted to sue in his own name as

receiver. In his "representative capacity" he is indeed the real party in interest and as he conducts and controls the suit it is more reasonable and

consistent that it should be in his name. Any other doctrine borders on the

eccentric and absurd."" (Section 562 p. 766)

9. We are, therefore, of opinion that the true position of the receiver in law is that though he is not the owner or agent of the owner he is never-

theless his representative and as such representative he is entitled to take all such proceedings in Court as are open to the owner and he can do so

in his own name.

10. The learned advocate for the appellant is willing to concede that the receiver has a right to institute proceedings as representative of the person

entitled to the property but he contends that he has no power to continue proceedings started by the owner because It is procedural right which

must be found within the four corners of the Code. Let us examine the position of the receiver in a pending action. Now what is to happen when a

receiver applies to continue a suit instituted by a party or where a party applies to continue a suit instituted by the receiver after the latter has been

discharged. The authorities establish that such applications fall under Order XXII, Rule 10, C. P. C. Mr. Mullah observes that whenever a suit is

brought by or against a person in a representative character it can be continued by the persons entitled, under this provision of law (vide Mulla's

C. P. C. 14th Edn. page 946). The case In "Macleod v Kisen" 30 Bom 250 is directly in point. In that case a suit had been Instituted by the

receiver and while that was pending the rights of the owner, Bank of Bombay, had been declared and one Dwa-rakadoss an assignee of the bank

and who was already on record wanted to continue the suit. That was resisted by the defendant on the ground that no right of the receiver

devolved upon the Bank of Bombay or pwarakadoss and that he was not entitled to continue the suit. But it was held by Chandavarkar J. that as

the receiver filed the suit as representing the owner the latter could come on record and continue the action and that Section 372, C.P.C., now

Order XXII Rule 10 was applicable. The learned Judge observed,

The industry of Counsel on either side has not enabled them to find any decided case as direct authority on the point thus raised and I am left to

decide It by the light of first principles.

The learned Judge then points out that the receiver is acting as the representative of the party who may ultimately be found to be entitled to the

property; that a decree obtained by the receiver will enure for the benefit of that

party, that any adjudication against the receiver as representing the estate will operate as "res judicata" as against that party and that on principle, therefore when the receiver is discharged the party should have the right to step into the receiver's place.

11. Then occurs the following passage at page 257:

But asked Mr. Kirk Patrick, under what law could the party so ascertained step into the shoes of the receiver in this suit? There is answer to that.

u/s 372, C.P.C.

Reference is then made to "Sourindramohun v. Siro-moni Devi" 28 Cal 171 where the manager of a Chota "Nagpur encumbered estate

commenced an action but was discharged when the action was pending and the owners applied to come on record and continue the suit and it was

held by the learned Judges that the language of Section 372, C.P.C. was wide enough to cover such an application.

12. In both the above cases suits instituted by receiver or manager were sought to be continued by the owner and in the present case the receiver

seeks to continue proceedings started by the owner but in principle that cannot make any difference. If owners can continue actions commenced

by receivers under Order XXII, B. 10, C.P.C. it must follow that the receivers also must have the right to continue actions instituted by the owners

under that provision of law and that indeed is in consonance with everyday practice.

13. We can now consider the question as to whether a receiver has a right to continue execution proceedings u/s 146 of the Code. If the language

of the section is to be strictly and narrowly interpreted the receiver may not be entitled to apply under that section because he is not a person

claiming under the decree-holder. In "Sitaramasami v. Lakshminarasimham" 41 Mad 510 Seshagiri Aiyar and Napier JJ. make the following

observations: "The expression "claiming under" is wide enough to cover cases of devolution mentioned in Order XXII, B. 10, C. P. C. As the

receiver has been held entitled to apply under Order XXII, Rule 10 it will follow that he can apply u/s 146. Moreover, there is ample authority for

the view that Section 146 should receive a liberal construction and that if a person is entitled to relief under the law he can apply under this section

if there is no prohibition anywhere in the Code against such an application." In

"Mahanandi Beddi v. Venkatappa" 1941 2 M. L.J. 631 there was

an assignment of the decree before it had been passed. The assignee applied to execute the same under Order XXI, Rule 16 and Section 146, C.

P. C. It was held that the applicant was not entitled to apply under Order XXI, Rule 16 but it was observed that a liberal construction ought to be

put upon Section 146 and that the rights of the assignee recognised (sic) under that section. At page 635 the learned Judges observe:

According to the learned advocate for respondent (1) where the transferee of a decree desires to execute it definite provisions are laid down by

Rule 16 and he can do so only if his case conforms to those provisions. The learned advocate for the appellant interprets the phrase more liberally

as permitting applications u/s 146, C.P.C. which do not conflict with the provisions of the Code. Of these two diverse views we prefer to choose

the latter".

14. Then the learned Judges follow the decision in "Muthiah Chettiar v. Lodd Govindas Krishnadas", 44 Mad 919 where it was held that the

assignment of a portion of a decree was valid under Order XXI. Rule 16 C. P. C. and that even if it was not valid, the assignee was entitled to

proceed under B. 146 there being nothing in the Code prohibiting it. As there is no prohibition in the Code against the receiver continuing any

proceeding in execution he must be declared entitled to apply u/s 146, C. P. C. The learned advocate for the appellant strongly relies on the

decision reported in Hanmant Narayan Kulkarni Vs. B.R. Jainapur, . With respect, we are unable to follow the observations in that case. The

learned Judges state that a receiver is not the legal representative or assignee of the decree-holder. That is so. But that does not conclude the

matter. The right of the receiver to continue proceedings as representative in interest of the decree-holder is not considered. No reference is made

to Section 146, C. P. C. and the view that the receivers might continue execution proceedings in the name of the decree-holder reduces them to

the position of agents of the decree-holder having no effective control over them. We are unable to agree that the receivers cannot in their own

name continue execution proceedings.

15. To sum up we are of opinion that a receiver acting under the authority of the Court is a statutory representative of the real owner. He is entitled

to commence proceedings in his own name so as to bind the true owner and he should be entitled to continue all proceedings initiated by him. If it

is a suit the application will fall under Order XXII Rule 10 and if it is an execution proceeding it will fall u/s 146, C. P. C. We accordingly hold that

the present execution application by the receiver can validly be treated as one to continue E. P. No. 71 of 1943 filed by the decree-holder and that

it is, therefore, not barred by Section 48 C. P. C.

16. In the result the appeal falls and is dismissed with costs.