
(1956) 03 KL CK 0004

In the High Court Of Kerala

Case No : Second Appeal No. 672 of 1954

Krishna Pillai Narayana Pillai

APPELLANT

Vs

Neelakanta Pillai Velayudhan

RESPONDENT

Date of Decision : 06-03-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 41, 48
Limitation Act, 1963 — Article 166

Citation : (1956) 03 KL CK 0004

Hon'ble Judges : Nandana Menon, J

Bench : Single Bench

Advocate : P. Kochukrishna Pillai, for the Appellant; K.N. Narayanan Nair, for the Respondent

Judgement

Nandana Menon, J.—This second appeal is by the first Defendant in the suit and is directed against an order rejecting his objections to the-execution of the decree. The only question that arises for consideration here is whether the decree is barred. The decree was passed on 8th Chingam. 1113. Several, execution petitions were hide but we are concerned only with that" dated 8th Chingam 1125. This was the last petition filed within 12 years of the decree. It was struck oil from the file on 5th October 1950 because of an order of stay from the appellate court.

Clearly that was a ministerial disposal and the next petition filed on 11th November 1950 must be deemed to be a continuation of the prior one. This petition was posted for effecting delivery of properties on IO Ui February 1951 and for report of the Amin to 12th February 1051. The next day the Amin relumed the warrant of delivery stating that he was unable to execute it as crops were standing and necessary, deposit for seed and labour had not been made. The court then adjourned the petition to 21st February 1951 for the necessary deposit. On that day as the deposit was not made the petition was struck off.

The execution petition, the order in which is the subject-matter of the appeal,

namely, E. P. 237 of 1051, was filed on 16th March 1951. The first Defendant contended that it was barred. Both the lower courts rejected the objection. According to the learned District Munsiff as there were several prayers in the petition filed on 11th November 1950 and there was posting for further steps regarding the prayers other than that for delivery the disposal of the said petition cannot be considered a judicial one. In the appeal preferred the learned Additional Judge also held that there was no bar.

According to the learned Judge, the Amin's report was wrong, there was no necessity to make a deposit as ordered, hence the dismissal for default was due to a mistake and so the execution petition must be deemed to be still pending. It was also held that as the decree was corrected regarding; material portions by an amendment on 24th April 1952 the decree-holder got extension of time. On behalf of the Appellant it is urged that even if the order dismissing the petition on 16th March 1951 was a mistaken one yet it was a judicial disposal and that the amendment relied upon by the learned Additional Judge was of no avail when it is a question whether the execution petition is barred u/s 48 of the Indian Code of CPC (corresponding to Section 41 of the Travancore Code).

2. I will first of all deal with the question whether an amendment extends the period of limitation for the purpose of Section 48. The learned Additional District Judge has relied upon "Subramanian Pillai v. Kali Pillai, I.L. R. 1946 Ker 956 (A). In support of his position that an amendment as the one here extended the period of limitation. The said decision deals with the question of limitation under Article 166 of the Travancore Limitation Act corresponding to Article 182 of the Indian Act and holds that a further period of 3 years is obtained by the decree-holder from the date of the amendment. It does not say that such an amendment will save limitation as far as Section 41 of the Travancore CPC is concerned. On the other hand, the following observations at page 961 show that an amendment cannot save limitation under the said section.

Article 168 provides the clause of limitation only subject to Section 41 of the CPC Code. Beyond the period fixed by Section 41 of the Code of Civil Procedure, no amendment could avail. As has been held by a Full Bench of the Madras High Court in Ramachandra Rao v. Parasuramayya AIR 1940 Mad 127 (B) Subject to the limitation of Section 41 it is always open to a party to take an amendment of a decree if one is duly called for and to seek to execute the amended decree under Clause (4) of Article 166 of the Limitation Act.

The Madras case referred to namely Paladugu Veera Ramachandra Rao Vs. Paladugu Parasuramayya and Another, is a Full Bench decision and is clear authority to show that an amendment will be of no avail when the decree is sought to be executed after 12 years. The following observations at page 128 may be pointed out.

Order 20 Rule 7 provides that the decree shall bear the date of the judgment. Sub-section (2) of Section 48 says:

"Nothing in this section shall be deemed (a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of 12 years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within 12 years immediately before the date of the application; or (b) to limit or otherwise affect the operation of Article 180 of Sch. 2, Limitation Act. 1877.

The corresponding Article in the present Limitation Act is Article 182. Now turning to Clause (4) of that Article we find that the period of limitation where a decree has been amended is three years from the date of the amendment," but the Article is expressly limited to applications for execution not provided for by Article 183 or by Section 48, Code of CPC Article 183 refers to -applications to enforce judgments of the High Courts and it has no bearing here. In as much as Article 182 clearly leaves the provisions of Section 48 untouched there can be no execution of a decree governed by Section 48 when 12 years have passed from the date of the decree, amendment or no amendment.

So it is clear that here the decree-holder cannot claim that he had 12 years time from 24th May 1952, the date of the amendment of the decree. Hence the amendment cannot be availed of to get over the statutory bar u/s 48 of the Code Civil Procedure.

3. In view of the conclusion arrived at above what is to be next considered is whether the execution petition filed on 16th March 1951 can be deemed to be continuation of the petition filed on 11th November 1950. The learned Additional Judge's argument that the order passed on 12th February 1951 to depose cost of seed and labour was a mistaken order the dismissal on 21st February 1951 must be deemed to be a ministerial one cannot be supported. Even if the order was wrong it is a judicial one. The party ought to have followed appropriate remedies to get the mistake rectified. *Krishna Panicker v. Kunchu* I.L. R. 1953 Ker 858 : AIR 1954 Ker 1 (FB) (C) is clear authority in support of this position. There when a similar argument was raised it was held that even a mistaken order has the effect of a judicial determination. At page 865 (of TLR : (at p. 3 of AIR) it is observed as follows:

In order that a later application for execution may be regarded as one for the continuation of the pending proceedings the previous application for " execution must be treated as one still pending in the eye of law and it cannot be so treated if it was finally dismissed and disposed of (*Sivllariharo Git v. IV It. Dul-hin* AIR 1940 432 (D)). We have said that the dismissal of the execution petition of 24th Edavam 1121 was by a judicial. Order. It was hence final. When the ground of the decision was wrong the Appellant's duty was to apply -for a review of the order of dismissal or to take that order in appeal. Having allowed the order to become final we cannot now listen to the argument that the order was destitute of legal effect.

So in view of the order of 21st February 1951 the present execution petition

cannot be considered as a continuation of the prior one -as per as the prayer for delivery is concerned. As far as the relief of delivery is concerned the execution of the decree is clearly barred. But as pointed out by the lower court there! were other prayers in the execution petition of 11th November 1950 which were not disposed of. The prayers in the present petition are for delivery, warrant to first Defendant for costs and mesne profits and attachment of properties. The first relief is barred. In the- execution petition filed on 8th Chingam 1125 there was no prayer for issue of warrant against the first Defendant for realisation of mesne profits but only for costs.

So warrant can be issued only as far as .costs are concerned in the present petition. Regarding attachment, in the petition filed on 8th Chingam 1125 there was a clear prayer for attachment of properties of the Defendants for mesne profits and costs and also in the petition filed on 11th November 1950. So the relief of attachment. and sale of the attached properties of the first Defendant is not barred as far as the items included in the schedule filed in the proceedings in the petition of 8th Chingam 1125 are concerned. No attachment of fresh properties can be allowed. Hence it is held that the decree-holder is entitled to proceed with the present execution petition subject to the limitations pointed out above.

4. In the result, the appeal is allowed to the said extent. The parties are directed. to bear their own costs in this Court.