

(1935) 03 MAD CK 0057
In the Madras High Court

Modono Mahono Deo

APPELLANT

Vs

Kunja Behari Ananga Bhima Deo and Others

RESPONDENT

Date of Decision : 18-03-1935

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Limitation Act, 1963 — Section 5

Citation : AIR 1935 Mad 786 : 158 Ind. Cas. 891

Hon'ble Judges : King, J

Bench : Division Bench

Judgement

King, J.—These are appeals which arise from proceedings in execution of three connected appellate decrees passed in 1917 and are concerned with the fifth attempt at execution. The decrees were obtained by the proprietor of the Chinna Kimedi Estate against one Sri Kundana Devi Patto Mahadevi. The following is a brief history of the execution proceedings.

(i) The first applications were made in April 1919. While they were pending the judgment-debtor died. The present appellant, claiming to be the executor under her will, applied to be brought on record as her legal representative. The decree-holder who had already impleaded the judgment-debtor's daughter as her legal representative opposed this application and it was dismissed in September 1919. The properties attached were brought to sale, but there were no bidders and the execution applications were dismissed; (ii) and (iii) two more abortive applications were filed in 1920 against the daughter as legal representative; (iv) the next applications were in November 1923. By that time the decree-holder's interests were represented by a receiver appointed to be in charge of the Chinna Kimedi Estate, and as the appellant's rights as executor had been recognised in 1921 both the daughter and the appellant were impleaded. The appellant raised the plea of limitation but no other plea. There was no adjudication on the question of limitation and the applications were withdrawn; (v) the final applications were made in October 1925. Appellant raised two contentions regarding the applications of 1923; (a) that they were barred by limitation as the

decree-holder had in bad faith omitted to implead him in the applications of 1920, and (b) that they were not in accordance with law as they were filed by a vakil who had no vakalat.

2. He therefore argued that on both these grounds the applications of 1925 were barred by limitation. It was contended against him that the second ground could not be raised by virtue of the doctrine of *res judicata*. The District Munsif held that *res judicata* did not apply, but that the appellant had failed to establish either of his objections. The District Judge held that the second objection might in itself be a good one, but was barred by the doctrine of *res judicata*. He agreed with the District Munsif in his view of the first objection and dismissed the appeals. Appellant has accordingly filed these second appeals. It is obvious that appellant's first objection is a frivolous one, and it was only faintly argued before me. In view of the decision of the executing Court itself in 1919 and the fact that appellant's position as legal representative was not judicially recognized until 1921 it is impossible to impute bad faith to the decree-holder in failing to implead him in 1920. The second objection however is more serious and I must first consider whether the appellant was debarred from raising it. It is argued that it was an objection which he ought to have raised in the earlier proceedings themselves, and that as he did not do so it must be held to have been decided against him according to Expl. 4 to Section 11, Civil P.C. Now this argument would be a good one if it could be shown that the Court had passed any order in the 1923 proceedings adverse to the appellant. This has not been shown and on the face of it seems to be impossible, for the applications were withdrawn without any consideration of the plea which the appellant did raise, viz. the plea of limitation. I hold therefore that the appellant was not barred from raising this objection.

3. The last and most important question is whether this second objection is valid. There can be no doubt that the applications of 1923 were not made in accordance with law in the strict sense, for Order 3, Rule 4 requires that a vakil must be appointed to act for a party by a document in writing and must file that document in Court. In the present case admittedly no such vakalat was filed at any time during the pendency of the 1923 proceedings. Whether any such vakalat was in existence or not during that pendency is nowhere expressly found, but it may be safely held from a consideration of the probabilities and from the manner in which both the Courts below have dealt with this point (see particularly the beginning of the learned District Judge's judgment, para. 3) that the receiver had not given the vakil any vakalat. It is however contended for the respondent that the vakil was in fact engaged by the receiver and that his non-possession of a vakalat was a mere irregularity which might have been cured had the applications been further prosecuted. The applications were not therefore inherently null and void but were like those applications which are returned every day by the Courts for the remedying of this or that defect in detail. This argument stated in so broad a form seems to me unacceptable. No doubt an application which is defective in any particular is, in one sense, not in accordance

with law, but one must in practice draw a distinction between those provisions of law which are fundamental in which I would include the provisions of an order like Order 3 and those which are concerned with mere defects in the drafting of an application (Order 21, Rule 11).

4. There is of course, no initial need for appellant to produce any direct authority in favour of his contention that an application filed by a pleader without a vakalat is not in accordance with law, and it only remains to consider whether the principle of certain rulings which have been cited for the respondent can be extended far enough to overrule appellant's objection. In all the cases which he has cited, *Chhayunnessa Bibi v. Basirar Rahman* (1909) 37 Cal. 399, *Mohofoosul Huq v. Muhfoozul Huq* 1918 Cal. 482 and *Mahomed Jafar v. Sheikh Ahmed* 1926 Bom. 336, the document empowering the agent or the vakil was in existence, but was defective in some formal respect. In *Chhayunnessa Bibi v. Basirar Rahman* (1909) 37 Cal. 399 an agent presented a power of attorney with his name inadvertently omitted from it. It was held that when a correct power of attorney was subsequently filed the action of the Court in accepting it should be treated as an amendment of the original application and should date back to the day on which the defective power of attorney was filed. *Mohofoosul Huq v. Muhfoozul Huq* 1918 Cal. 482, which is also from Calcutta, is a very similar case. There a pleader filed an execution application with a vakalat in which his name did not appear.

5. It was held that in the absence of any evidence that the pleader was not in fact engaged by the party the error was a mere clerical one which could be rectified by an amendment which would have the effect of making the application valid on the day on which it was first presented. In *Mahomed Jafar v. Sheikh Ahmed* 1926 Bom. 336, the question at issue was the presentation of an appeal without a vakilpatra (which I presume is identical with a vakalat-nama). It was held that the non-filing of the vakilpatra which had already been signed would not prevent the appeal from being an appeal properly preferred ; and further that in such a case it was the duty of the appellant's vakil to file his vakilpatra in due course with an application to excuse the delay which would as a matter of course and without notice to the other side be allowed. Now if the authorities on this question were all one way and stood by themselves I might be tempted to extend their principles to cases in which there was no vakalat in "existence but there had in fact been an oral appointment of the pleader. But there is in the first place no such unanimity, for *Chhita v. Mr. Jaffo* 1931 Al. 767 is directly opposed to *Mohofoosul Huq v. Muhfoozul Huq* 1918 Cal. 482, on the same facts of the presentation of a vakalat with the vakil's name inadvertently omitted. And in the second place there is one direct authority to the contrary where no vakalat at all existed. That is a decision of the Patna High Court reported in *Palat v. Sarwan Sahu* 1920 Pat. 581. In that case an appeal was presented without a vakalat, and an application was later made u/s 5, Lim. Act, to excuse delay supported by a vakalat which was signed on a date after the period of limitation had already expired. It was held that delay could not be excused, as no appeal can be validly

presented unless a signed vakalat is in existence at the time of its presentation.

6. There is finally one other authority which deals with facts very closely allied to those here. In that case *Kallu v. Muhammad Abdul* (1885) 7 All. 564, an execution petition was filed by a vakil, who had a vakalat from the decree holder, two days after the decree-holder died. It was held that the vakalat ceased to have any validity after the decree-holder's death, and that the application was not one made in accordance with law. Here what has evidently happened is that the vakil must have had a vakalat from the zamindar, the original plaintiff, and had not got one from the receiver who in 1923 was the plaintiff's legal representative. The facts are therefore very similar, except that there was no occasion in *Kallu v. Muhammad Abdul* (1885) 7 All. 564 to discuss whether the legal representatives of the deceased decree-holder had given the vakil any kind of authority to file the application. It may no doubt be argued for the respondent that if the receiver had in fact engaged the vakil who presented the application in 1923, *Kallu v. Muhammad Abdul* (1885) 7 All. 564 would not apply, but in the absence of any direct authority in respondent's favour, and in view of the stress laid in *Palat v. Sarwan Sahu* 1920 Pat. 581 upon the existence of a vakalat, I am unable "to agree with respondent's contention "that an execution application which was obviously presented in contravention of the provisions of Order 3 can yet, by" some rule of equity to be derived from cases of formally defective vakalats, be held to be in accordance with law. These appeals accordingly must be allowed and respondent's execution applications be dismissed. Respondent must pay appellant's costs of the appeals.