

(1955) 12 KL CK 0004
In the High Court Of Kerala
Case No : C. R. P. No. 91 of 1955

Mohammed Mastan Kunju Mohammed Abdul Khadar	APPELLANT
Vs	
Mytheen Kunju Pakiru Mohammed	RESPONDENT

Date of Decision : 16-12-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 7
Provincial Small Cause Courts Act, 1887 — Section 9

Citation : AIR 1955 Ker 43

Hon'ble Judges : Koshi, C.J; T.K. Joseph, J

Bench : Division Bench

Advocate : S. Eswara Iyer, for the Appellant; R. Mrithunjayan, for the Respondent

Judgement

T.K. Joseph, J.—A plot of land belonging to the judgment-debtor was sold in execution of the decree in a Small Cause suit. He applied for setting aside the sale under Order 21 Rule 90 of the Code of Civil Procedure, on the ground that the sale was vitiated by illegal and material irregularity. The application was dismissed and the sale was confirmed. This Civil Revision Petition is directed against the order confirming the sale.

2. The only ground urged in revision is that the sale was conducted by a Small Cause Court which had no jurisdiction to sell immovable property in execution and that the sale was therefore illegal. Reliance was placed on Section 7 of the CPC which is extracted below:

The following provisions shall not extend to courts constituted under the Provincial Small Cause Courts Act, 1887, or under Berar Small Cause Courts Law, 1905, or to Courts exercising the jurisdiction of a Court of Small Causes under the said Act or Law, or to Courts in Part B States exercising a corresponding jurisdiction, that is to say,-

(a) so much of the body of the Code as relates to

(i) suits excepted from the cognizance of a Court of Small Causes;

(ii) the execution of decrees in such suits;

(iii) the execution of decrees against immovable property and

(b) the following sections, that is to say:

Section 9, Sections 91 and 92, Sections 94 and 95 so far as they authorise or relate to:

(i) orders for the attachment of immoveable property,

(ii) injunctions,

(iii) the appointment of a receiver of immoveable property, or

(iv) the interlocutory orders referred to in clause (e) of Section 94 and Sections 96 to 112 and 115.

3. u/s 15 of the Travancore-Cochin Civil Courts Act 20 of 1951, a Court invested with the jurisdiction of a Court of Small Causes with respect to the exercise of that jurisdiction and the same court with respect to the exercise of its jurisdiction in suits of a civil nature which are not cognisable by a Court of Small Causes should for the purposes of the said Act and the CPC be deemed to be different Courts.

It was, therefore, argued that the Munsiff in the exercise of small cause jurisdiction had to transfer the decree for execution to himself under Order 21 Rule 6 of the Civil Procedure before attaching and selling the property and that such a transfer not having been made in this case the sale should be deemed to have been conducted by the Small Cause Court and, was one held without jurisdiction.

Although this was the main point urged before us, reference was made to a decision of the Peshawar Court in "Sital Ram Kalicharan v. Thakur Das", 1938 Pesh 70 (AIR V 25) (A). It was held in that case that a Small Cause decree could not be executed at all against immoveable property and that this could not be circumvented by transferring the decree to a court having regular civil jurisdiction.

The Lahore High Court dissented from this view in "Jalla Mall v. Motia", 1941 Lah. 109 (AIR V 28) (B), and held that when a decree was transferred from a Small Cause Court to Court exercising regular civil jurisdiction the latter court could attach and sell immovable property in execution of such decree.

Two earlier decisions of the Lahore Court viz., "Sir Ram v. Tulsi Ram", 1929 Lah. 398 (AIR V 16) (C) & "Sukha Mal v. Mahr Din", 132 IC 208 (Lah) (D)) were relied on in "Jalla Mall v. Motia", (B). It was also pointed out that the High Courts

of Allahabad, Calcutta and Madras had not doubted the proposition that a Small Cause Court was competent to transfer a case to itself on the regular, side or to the Court of another regular Judge in order to get its decree executed against immovable property.

All the reported decisions on the point have been considered in the judgment of Blacker, J., in "Jalla Mall v. Motia", (B). We do not, therefore, consider it necessary to cover the same ground. We are in full agreement with the conclusion reached in "Jalla Mall v. Motia", (B), that where the same Judge holds the office both as the Judge of Small Causes and as Judge on the regular side, he can on the application of the decree-holder or otherwise, transfer a Small Cause decree to the regular side for the purpose of obtaining attachment and sale of immoveable property.

4. The District Munsiff who was exercising Small Cause jurisdiction in this case was one who had jurisdiction to try suits of a civil nature and to execute decrees by attachment and sale of immoveable property. Section 17(a) of Act 20 of 1952 provides that when in the exercise of its jurisdiction of a Court of Small Causes a court invested with that jurisdiction sends a decree for execution to itself as a Court having jurisdiction in suits of regular civil nature, the documents mentioned in O. 21 Rule 6 of the Code need not be sent with the decree, unless in any case the Court by its order in writing requires them to be sent.

The question which therefore arises for decision is whether the decree in this case was transferred for execution to the same court exercising regular civil jurisdiction and whether the sale was conducted by that court in the exercise of such jurisdiction.

5. There is no specific order in this case transferring the decree from the Small Cause side to the regular civil Bide. It is necessary here to state a few facts relating to the execution of the decree in this case. The execution petition was one filed on 14-11-1953 and it was prayed therein that the property described in the schedule filed along with the execution petition was to be attached and sold for recovery of the decree amount.

The decree-holder filed an affidavit also along with the petition stating that unless the decree was executed against immoveable property it was not possible to realise the amount. This in effect was a submission to the court that the decree could not be executed on the small cause side of the court and that execution could be had only in the exercise of ordinary civil jurisdiction.

On 16-11-1953 the Court allowed attachment of the property which shows that the court treated the case as having been transferred from its Small Cause side for the purpose of execution against immoveable property. The judgment-debtor filed an application on 9-1-1954 praying for permission to pay the decree amount in instalments. No question of absence of jurisdiction was taken in the application filed on 9-1-1954. He was allowed to pay the amount in six equal instalments, the first instalment being payable on the 1st April 1954. This was not paid and

the court proceeded to proclaim the property for sale.

The judgment-debtor accepted notice of proclamation but he did not raise any objection. When the property came up for sale on 25-8-1954, he applied for stopping the sale on the ground that he was unable to pay the whole amount and that he was willing to pay Rs. 15 on that day. The court adjourned the sale to 3-9-1954 directing that the whole amount should be paid on that day. On 3-9-1954 he again applied for postponement of the sale offering to pay Rs. 25 towards the decree debt.

It was ordered that if he would deposit Rs. 50 forthwith the sale would be adjourned to 1-10-1950. The deposit was not made and the property was sold, the decree-holder becoming the purchaser. The judgment debtor applied on 4-9-1954 to set aside the sale under Order 21 Rule 89 of the Code. While this was pending, he made another application on 1-10-1955 for cancellation of the sale under Order 21, Rule 90. The former application was not pressed thereafter.

After enquiry the petition under Order 21 Rule 90 was dismissed. The judgment-debtor did not raise the question of jurisdiction either in the several applications filed by him before the sale or after. This omission shows that he himself did not treat the sale as one conducted in the exercise of the small cause jurisdiction.

In these circumstances it must be held that the prayer in the execution petition was one in effect for transferring the decree from the Small Cause Court and that it was only after such transfer that the property was attached and sold. The sale must therefore be held to have been validly conducted.

6. Though we are confirming the sale on the facts of this case it has to be pointed out that when decrees in Small Cause suits are sought to be executed by attachment and sale of immovable property, the proper procedure is to apply for transfer of the case from the Small Cause Court to the Court exercising jurisdiction in civil suits, even though the same officer may be in charge of the two Courts.

7. In the result, we confirm the order confirming the sale and dismiss the Civil Revision Petition- Both sides will bear their costs.