
(1958) 02 MAD CK 0034

In the Madras High Court

Case No : Civil Revision Petition No. 1151 of 1957

N. Krishnaswamy Iyengar

APPELLANT

Vs

N. Vedavalli Ammal and Others

RESPONDENT

Date of Decision : 28-02-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 73

Citation : AIR 1959 Mad 218 : (1959) 72 LW 19

Hon'ble Judges : Ramachandra Iyer, J

Bench : Single Bench

Advocate : A. Narasimhachariar and A.N. Rajagopalan, for the Appellant; P. Muthukumaraswami Mudaliar, P. Venkatachalapathi, V. Ramachandran, T.T. Srinivasan, A.N. Rangaswami and B.T. Seshadri, for the Respondent

Final Decision : Allowed

Judgement

Ramachandra Iyer, J.—The plaintiff in O. S. No. 2042 of 1954 on the file of the City Civil Court, Madras is the petitioner. This civil revision petition arises out of an order for rateable distribution passed amongst the various decreeholders who had obtained decrees against one Vedavalli Ammal.

The petitioner has impleaded the judgment debtors as well as the rival decreeholders in this petition. The plaintiff had obtained a decree in O. S. No. 2042 of 1954 on the basis of a promissory note executed by Vedavalli Ammal in renewal of earlier debts incurred in connection with the marriage of her daughter, Rukmani. To that suit Vedavalli and her four daughters were made parties.

In due course the plaintiff obtained a money decree and in execution of that decree he filed E. P. No. 681 of 1955 on 4-10-1955 for attaching the equity of redemption in certain properties which belonged to the judgment debtors. Attachment was ordered on 23-10-55. In the meantime the mortgagee in respect of those properties filed O. S. No. 1699 of 1954, obtained a decree and brought the properties to sale. Vedavalli Ammal and her daughters were made party

defendants to this suit.

The properties were sold in execution of the mortgage decree and after satisfying the claim of the mortgagee decree-holder there was a surplus amount of Rs. 2343-5-6 deposited into court. Various creditors of Vadavalli Ammal applied for execution against her before the properties were sold under the mortgage decree in O. S. No. 1699 of 1954. The present petitioner's application E. P. No. 661 of 1955 came up for orders on 5-12-1955 when it was dismissed as not pressed.

Rut the learned Judge directed that attachment ? should continue for six months. The petitioner then filed E. P. No. 1151 of 1956 on 31-10-1956 to attach the surplus amount in court deposit but as that application was filed after the receipt of the assets by the court it cannot avail the petitioner to a claim in the rateable distribution of the surplus amount.

The petitioner, therefore, relied upon E. P. No. 661 of 1955 which he claimed as pending alt along as it was not dismissed for any default on the part of the decree-holder. The learned Assistant Judge cum Registrar, City Civil Court, rejected the claim of the petitioner on the ground that E. P. No. 661 of 1955 was dismissed prior to the receipt of the assets by court and that, therefore, the petitioner cannot claim any share in the distribution of the assets. The petitioner has preferred the present civil revision petition against the order of the learned Assistant Judge, City Civil Court.

2. A preliminary objection was taken on behalf of the respondents that when the petitioner has got an alternative remedy by way of suit this court should not interfere in revision. I overruled this objection having regard to the fact that it would involve great hardship on the petitioner If he were directed to file a suit to decide the simple matter in dispute.

3. Mr. A. Narasimhachariar learned counsel for the petitioner contended that E. P. No. 661 of 1955 should be deemed to be pending and that, therefore, the petitioner was entitled to claim a share in the distribution of the assets of the judgment debtors. He also submitted that the decree in favour of the petitioner was on the basis of a debt binding on the estate of Vedavalli Animal's husband, that the decrees obtained by the other creditors of Vedavalli Animal would not at all be binding on the estate and that therefore the petitioner was entitled to a preferential claim.

4. As regards the first contention raised by the learned counsel I sent for the original petition, E. P. No. 661 of 1955. The order on it passed on 5-12-1955 reads thus : "E. P. dismissed as not pressed. Attachment to continue for six months from today." The argument on the side of the respondents is that the execution petition of the petitioner having been dismissed as not pressed should be taken as dismissal of the petition for default and therefore it could not be considered to be pending on the date when the" assets of the judgment debtor were received in court.

In support of it they relied on the decision in *Ram Antar v. Sitaram*, reported in AIR 1944 AH 245. On behalf of the petitioner it was stated that as the mortgagee was bringing the properties to sale it was not possible to proceed with the sale in execution of the money decree of the property subject to the mortgage and, that, therefore, the execution petition was dismissed as not pressed and that there was no default on the part of the decree holder as is clear from the fact that the learned Assistant Judge who dismissed E. P. No. 661 of 1955 stated that the attachment was to continue for six months. In support of this contention learned counsel relied on a decision in *Kunjan Marakkaran Metharu v Joseph Achamma Anthraper*, ILR 1955 Trav-Co. 1232: AIR 1956 Trav-Co. 122.

That was a case where the sale in execution of a decree was set aside and the decree-holder was Contemplating to file an appeal against the order setting aside the sale. At that stage his execution petition came up for orders and the decree-holder filed an application stating that as he was filing an appeal against the order setting aside the sale the execution petition may be struck off leaving the attachment alive and on this the court passed an order "dismissed".

A question arose whether a subsequent execution petition filed by the decree-holder was in continuation of the previous one and the learned Judges stated at page 1237, "when the court allowed that petition and dismissed the execution petition in pursuance of it, keeping alive the attachment, the substance and effect of the order on the execution petition was to adjourn the execution proceedings sine die so that the decree-holder might prosecute the appeal and obviate the necessity to continue the execution proceedings and need continue the proceedings only in case the appeal went against him."

The decision in *V.K. Murugappa Mudaliar Vs. P.M. Desappa Nayanam Varu and Others*, , was next relied on for the proposition that where there is no dismissal of the execution petition for the default of the decree-holder and the judge directs the attachment to be kept alive it cannot be inferred that the execution petition was dismissed for default. In my opinion the case near in point is the decision of *Basheer Ahmed Sayeed J. in Govinda Padayachi v. Kannammal*, 1957 1 Mad LJ 201 : AIR 1958 Mad 15, where it was held that Order 21 Rule 57, C. P. C. will come into play only when an execution petition is dismissed for default of the decree-holder and that it is only in such a case that the attachment will come to an end whether there is or there is not an order of court terminating the attachment."

In that case the execution petition was not pressed but there was a direction to continue the attachment. The learned Judge observed at page 205 (of Mad LJ) : (at p. 17 of AIR): "If the court had intended that the execution petition should be treated as dismissed for default and that the proceedings should terminate finally, it would have felt bound to order that the attachment was also to cease. But the court exercised its discretion actually the other way. It did not dismiss the application nor did it also order the ceasing of the attachment. When such an order has been made in the exercise of a discretion vested in the court it cannot

be said that the court intended a final termination of the execution application. Nor am I prepared to hold that non-prosecution of the execution application conveyed by the term "not pressed" would necessarily mean a default of the kind contemplated under Rule 57.

Non-prosecution may be due to various causes which may not be expressed by the party reporting to the court that the "application is not pressed". It is true that in that case there was no order "dismissed" after the word "not pressed" but the order was "not pressed attachment to continue". But in my opinion it makes little difference if the word "dismissed" is also used. It is well settled that the mere use of words "closed, dismissed or struck off" do not indicate default on the part of the decree-holder and that question has to be determined only on the facts and circumstances, of each case.

The fact that in the present case the attachment was ordered to continue would show that E. P. No. 661 of 1955 was not dismissed for default. In this view it is unnecessary to consider the decisions in L. Ram Autar Vs. Sita Ram and Others, and C. M. S. A. No. 31 of 1935 cited by Mr. Venkatachalapathi for the respondent as the execution petitions were held to have been dismissed for default in those cases. In the present case there was no such default and the petition should be deemed to be pending on the material date when the assets were received by the court. In that view the petitioner would be entitled to a share in the rateable distribution of the assets received by the court along with respondents 6 and 8.

5. Mr. Narasimbacharia then contended that the surplus sale proceeds in court deposit belonged to the estate of the deceased husband of Vedavalli Ammal and as the debt due to the petitioner was one binding on the estate he should be deemed to have obtained a decree against Vedavalli Ammal in her capacity as representing her husband's estate and as the respondents 6, 7 and 8 had obtained decrees against Vedavalli Ammal personally he would be entitled to preferential payment.

I cannot agree with this contention. When a widow succeeds to the estate of her deceased husband she succeeds as his heir and therefore she is herself the owner. It is true that under the law as it existed prior to coming into force of Act XXX of 1956 she had only a limited power of disposal but nevertheless she was the heir and the properties vested in her own capacity.

There is no justification for making any distinction between the decree of the petitioner and those obtained by respondents 6 and 8 and it is not as if the decree obtained by the respondents 6 and 8 is not against the same judgment debtor as the decree obtained by the present petitioner. I therefore, hold that the petitioner is entitled to rateable distribution along with respondents (6 and 8) decree-holders but that he is not entitled, to any superior or preferential claim as against them.

This civil revision petition is allowed and E.P. No. 1151 of 1956 is remanded to the lower court for passing orders as to rateable distribution in the light of the

findings given above, namely, that the petitioner is also entitled to his legitimate share in the rateable distribution of the assets along with the other decree-holders. There will be no order as to costs.