

(1949) 02 MAD CK 0048
In the Madras High Court

Narayanaswami Reddi and Others

APPELLANT

Vs

AL. VR. ST. Veerappa Chettiar and Another

RESPONDENT

Date of Decision : 23-02-1949

Acts Referred:

Citation : (1949) 62 LW 368 : (1949) 1 MLJ 656

Hon'ble Judges : Mack, J

Bench : Division Bench

Judgement

Mack, J.—The petitioners were respondents I to 4 in an application filed by the decree-holder under Order 21, Rule 97, Civil Procedure Code, impleading them as obstructors to his taking delivery. They put forward the position that it was barred by a previous application under the same provision of law E.A. No. 59 of 1946 filed in a previous execution petition E.P.R. No. 158 of 1945 which was dismissed as "not pressed" on 17th March, 1947, and that the decree-holder's remedy was only by a suit within one year under Order 21, Rule 103, Civil Procedure Code. The District Munsiff negated this contention and held that a fresh application for removal of obstruction, was maintainable.

2. The short relevant facts are these. The obstruction the decree-holder encountered took place on 26th December, 1945. He filed E.A. No. 159 of 1946 against the present petitioners under Order 21, Rule 97 on 26th January, 1946. This execution application after several adjournments was dismissed as "not pressed" on 17th March, 1947, as there was one day's delay in presentation, the limitation period being 30 days from the date of the obstruction under Article 167 of the Limitation Act. The decree-holder filed a fresh execution petition without undue delay on 12th April, 1947, accompanied by this fresh execution application under Order 21, Rule 97. It is quite clear that had it not been for this technical bar of limitation, the decree-holder would have prosecuted his original application for removal of obstruction.

3. Mr. Ramachandra Aiyar for the petitioners has argued that the order dismissing the application as not pressed was an order passed against the

decree-holder under Order 21, Rule 103, Civil Procedure Code. But this provision requires an order being passed under Order 21, Rule 98, 99 or 101. Order 21, rule 98 requires the Court to be satisfied that resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation. Order 21, Rule 99 requires it to be satisfied that the resistance or obstruction was occasioned by any person other than the judgment-debtor claiming possession on his own account in good faith. In the present case the Court had no opportunity to direct its judicial mind to an order under Order 21, Rule 98 or 99, Civil Procedure Code, for the simple technical reason that the application under Order 21, Rule 97 was time-barred. Had the application been dismissed as "not pressed" by the decree-holder who had filed it in time under Order 21, Rule 97, the position might have been different; and the argument that the order dismissing the petition should be construed as one under Order 21, Rule 99 in view of the decree-holder's non-prosecution which was tantamount to a prima facie recognition of the obstructor's rights may perhaps have been tenable. Learned Counsel for the petitioners concedes that Order 21, Rule 103, Civil Procedure Code, comes into play or operation only in the event of an application being filed under Order 21, Rule 97, Civil Procedure Code. It is unnecessary for me to consider here the position of a decree-holder who withdraws an application under Order 21, Rule 97, CPC after he has filed it in time, in which" case the Court has had the opportunity to direct its attention to passing an order within the scope of Order 21, Rule 98 or 99, Civil Procedure Code. There appears to be no specific provision in the Code under which any matter can be "dismissed" as " not pressed " though such an order is frequently passed on execution petitions which at the option of the decree-holder he does not press further for the time being. The more correct order on such an execution petition should be " not pressed--Struck off." The present E.A. No. 59 of 1946 was rightly " dismissed " however as it was time-barred. Order 23, Civil Procedure Code, which provides for the withdrawal of suits and other matters specifically excludes execution petitions by virtue of Rule 4 of that Order.

4. My attention has been drawn to two decisions to reinforce the argument for the petitioners. The first is The Cannanore Bank, Limited Vs. Pattarkandy Arayanveetil Madhavi and Others, , a Full Bench decision which deals with an order on a claim petition under Rule 58, and an order dismissing such a petition as " not pressed " which was held to be an adverse order against the claimant within the meaning of Order 21, Rule 63 of the Civil Procedure Code. It was held that it was open to the claimant to file a suit within one year from the date of such an order, although he did not choose to press his claim before the executing Court then. But Order 21, Rule 58 relates to a third party to execution proceedings whereas here we are concerned with the rights of a decree-holder to execute his decree. That decision does not help us very much in view of the application under Order 21, Rule 97, Civil Procedure Code, having been filed out of time. Another decision The Kaleswarar Mills, Ltd. by agent, A.L.A.R. Kalai Raja Chettiar Vs. A.P. Govindaswami Naicker and Others, , is relied on, but there was

in that case a clear order of dismissal of the application for removal of the obstruction on the ground that the obstructors were entitled to do so in their own right and were not in possession on behalf of the judgment-debtors.

5. I have no hesitation, on the facts of the present case, in agreeing with the learned District Munsiff that the second application under Order 21, Rule 97, Civil Procedure Code, arising out of a subsequent execution petition is in the circumstances maintainable and not barred by any law in view of the dismissal of the earlier application which was filed under Order 21, Rule 97 of the Civil Procedure Code, one day late, and on which no order under Order 21, Rule 98 or Rule 99 was in fact passed.

6. The petition is dismissed with costs.