

(1954) 10 KL CK 0002
In the High Court Of Kerala
Case No : A.S. No. 64 of 1951

Narayani Amma Karthiyani Amma	APPELLANT
Vs	
Narayanan Neelakantan and others	RESPONDENT

Date of Decision : 28-10-1954

Acts Referred:

Travancore Limitation Act, 1100 — Article 166

Citation : AIR 1954 Ker 150

Hon'ble Judges : Koshi, C.J;Subramonia Iyer, J;Kumara Pillai, J

Bench : Full Bench

Advocate : N. Varadaraja Iyengar, for the Appellant; N.K. Narayana Pillai and M. Ramanatha Pillai, for the Respondent

Final Decision : Allowed

Judgement

Subramonia Iyer, J.—The only question in this appeal by plaintiff 2 decree-holder in O.S. No. 811 of 1110 on the file of the court below is whether execution of the decree is barred by limitation.

2. The decree was dated 27-4-1114 and was passed on foot of a deed of hypothecation given by defendant 1. It directed recovery of money by sale of the hypotheca which were scheduled to the plaint as also from the assets of defendant 1 who died pending suit. The decree was registered and the period of limitation for execution was under Art. 166 , Travancore Limitation Act six years.

The first application for execution was E.P. 682 of 1117 dated 7-6-1117. Simultaneous execution against the hypotheca as also against the other assets of the deceased defendant 1 being available the decree-holder sought the latter by applying for the attachment of a decree in O.S. 261 of 1094 obtained by the deceased defendant 1.

His legal representatives who were executing that decree and who were respondents in the application for execution appeared and prayed that the proposed attachment of the decree may not be levied because they apprehended

that should that decree be attached the sale of properties in execution thereof which was due to be held within a few days would be stayed and proceedings would have to be started afresh to bring the properties to sale. To secure the interests of the decree-holder they undertook not to alienate the decree or their interests therein and should they happen themselves to purchase the property at the auction not to alienate those properties. That is to say, their undertaking secured to the decree-holder the decree sought to be attached as well as its proceeds should it be realised, whatever be the mode of realisation. This undertaking was accepted and the application for attachment of the decree not pressed.

The next application for, execution was on 8-7-1117 numbered as E.P. 853 of 1117. By that time the court sale in O.S. 261 of 1094 had been conducted whereat the decree-holders therein were themselves the purchasers. The property purchased thus constituted an asset available to be proceeded against in execution in this case. Its proclamation and sale were the prayers in the E.P. The court ordered production of the draft proclamation of sale. The pendency of an application to set aside the sale in O.S. 261 rendered it unsafe to proclaim and sell the properties because should the sale in O.S. 261 be set aside ultimately the sale here would be infructuous.

After taking a few adjournments to produce the proclamation the decree-holder on 12-12-1117 presented C.M.P. 20168/17 stating the aforesaid facts in regard to the properties sought to be proclaimed and praying that the execution petition may either be stayed until after the final order in the petition to set aside the sale in O.S. 261 of 1094 or the execution petition may be struck off keeping the attachment levied on these properties alive. On 13-12-1117 the court passed the order "Recorded" on C.M.P. 20168/1117 and the following consequential order on E.P. 823 of 1117:

Struck off. Costs allowed. Attachment will subsist.

The original execution petition which is on the record contains the words of the above order with date 13-12-1117 underneath and the (Sd.) within brackets also beneath them. The writing does not purport to be a copy of an original nor is it authenticated by anybody. The Travancore Civil Courts Guide which came into force on 1-1-1120 provides in R. 517 as follows:

All orders passed by Presiding Officers from time to time in respect of petitions for execution (Execution Forms) should be made by them on the petitions themselves. Lengthy orders may if necessary be recorded by them separately on loose sheets of paper to be incorporated with the records of the case. The substance of all orders should be noted in the register of Execution Petitions and the same attested by the Head Ministerial Officer; such orders as are made on the petitions shall be copied in the register by the Chief Execution Clerk, and attested of the Head Ministerial Officer. The results obtained by the execution of the successive orders should be noted in detail, in chronological order

immediately below the orders passed on the petitions and in the register from time to time.

The provisions in the earlier Civil Courts Guide which came into force on 1-4-1099 are different. Rule 676 therein provides:

All order passed by presiding officers from time to time in respect of petitions for execution (execution forms) excepting lengthy orders which the register will not hold, will be made by them in the register itself. Lengthy orders may be recorded by them on the back of the petitions themselves or on loose sheets of paper to be incorporated with the records of the case. The substance of such lengthy order should, however, be entered in this register by the clerk concerned and attested by the Head Ministerial Officer. Such orders as are made in the register shall be copied on the back of the petitions by the execution clerk and attested by the Head Ministerial Officer. The results obtained by the execution of the successive orders should be noted in detail in the register in chronological order immediately below the orders passed from time to time.

The applicatory provision at the relevant time, i.e., 13-12-1117, being the said R. 676 the record of the copy of the order on the execution petition should have been attested by the Head Ministerial Officer. In the absence of that attestation on the record it became necessary to ascertain whether such an order was passed at all. The register in which the original order should have been made was, therefore, called for from the Quilon Munsiff's Court and it contained the aforesaid order made in the hand of the Munsiff.

What is material is the passing of the order and the defect in the copy thereof made on the execution petition except occasioning some delay in the disposal of this appeal as a reference to register becomes necessary has no further consequence.

The third execution petition was E.P. 129 of 1124 dated 4-3-1124. It stated that the execution was stayed by the court by order dated 13-12-1117 and that the same may be proceeded with because the final order on proceedings to set aside the sale in O.S. 261 of 1094 had been made by confirming the sale. Notice to defendant 3 was returned stating that he was dead. His legal representatives were directed to be impleaded and that not having been done the execution petition was struck off on 13-7-1124.

The last execution petition the order on which has led to this appeal was dated 9-4-1125 numbered E.P. 293 of 1125. It contains the same prayers as in the next earlier one. The court below held that the order dated 13-12-1117 is a final order and the execution petition next presented which was on 4-3-1124 being beyond six years therefrom was barred by limitation. If that was barred, the defect attaches equally, if not more, to the next.

3. The question is what in law is the effect of the courts order dated 13-12-1117. It is clear from the context that the decree-holder did not pray for the

termination of the execution proceedings. That he put forward as a main prayer and as an alternative in C.M.P. 20168/17 are not in fact different. His main prayer was to stay the execution and keep it pending on the paper. The alternative was to strike the petition off the record temporarily keeping the attachment alive to be taken up for enforcement in the very same execution proceedings later. It was this latter prayer that was accepted by the court. There was no default on the part of the decree-holder in the matter of the prosecution of the execution petition. Though he had not produced the draft proclamation he had taken time in that regard and the prayer in C.M.P. 20168 of 1117 was made well within the time allowed. The question is what is the true interpretation to be put upon the order of the court passed under these circumstances. In the words of the Privy Council:

Reported cases sufficiently show that in India the striking of execution proceeding off the file is an act which may admit of different interpretations according to circumstances under which it is done ("Puddomonee Dossee v. Ray Muthooranath Chowdhry", 20 Suth WR 133 at p. 136 (PC) (A)).

There can be no doubt that under the circumstances and in the context the order striking off of the execution petition was merely meant to shelve it temporarily to the record for being taken up later to be proceeded with after the final disposal of the proceedings to set aside the sale in O.S. 261 of 1094. If so, E.P. 853 of 1117 was still pending and available to be proceeded with on 4-3-1124 when E.P. 129 of 1124 was filed. Its disposal for default on 13-7-1124 was taken to be a final order.

The next E.P. 293 of 1125 was presented on 9-4-1125, i.e., within 6 years of the last order and 12 years from the date of the decree and no question of its being barred by time either under the Limitation Act or under the CPC arises. Execution should, therefore, have been allowed on E.P. 293 of 1125.

4. This being our view the other question debated at the bar regarding the legal effect of the order to keep the attachment alive, whether that by itself would keep the execution of the decree immune from limitation, does not fall to be discussed or decided.

5. In the result, the appeal is allowed and the case remitted to the court below for proceeding with the execution. The respondents will pay the costs of the appellant.