

**(1925) 02 MAD CK 0085**  
**In the Madras High Court**

Parakkat Devaswom Trustees of K.P. Veeraraghava Iyer and  
Others

APPELLANT

Vs

Venkatachalam Vadhayar and Others

RESPONDENT

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**Date of Decision :** 27-02-1925

**Acts Referred:**

**Citation :** 92 Ind. Cas. 709

**Hon'ble Judges :** Wallace, J

**Bench :** Single Bench

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**Judgement**

Wallace, J.—The question in this appeal is whether the execution petition is barred by time. The decree sought to be executed is the final decree in O.S. No. 36 of 1912 on a hypothecation bond executed by certain persons. The bond was executed by them, as trustees or owners of a certain Devasium. At the time that suit was pending another suit, O.S. No. 12 of 1912, to declare that the trust was a public trust and to remove the above persons was going on. On 20th July 1914 a decree to remove them was passed. The final decree in O.S. No. 36 of 1912, the hypothecation decree against the property was passed on 30th September 1914. Three execution petitions were put in to execute this final decree. The first was put in on 20th July 1915 and was dismissed, because batta was not paid. The second was put in on 26th June 1918 and was rejected for the same reason. The third was put in on 20th June 1921 and is the execution petition now under appeal.

2. The appellants are the present trustees who were put into office in the place of the original judgment-debtors by force of the, decree in O.S. No. 12 of 1912 at sometime which is not known. They contend in limine that the decree in O.S. No. 36 of 1912 now under execution was not against the trust property at all; but I am not prepared to accept this contention, for the decree clearly is in the first instance, against the trust property. It is further contended that the decree is a nullity, it being pointed out that the decree removing the original trustees was passed some two months before the final decree against them. But it is clear that

this contention cannot arise unless the respondents show that the judgment-debtors in O.S. No. 36 of 1912 had been, as a matter of fact, removed, in consequence of the decree in O.S. No. 12 of 1912, sometime prior to the final decree in O.S. No. 36 of 1912 and that some other trustees or Receiver had been-appointed in their place who could have been brought on the record as the legal representatives of the original trustees before the final decree was passed. This fact the appellants have not attempted to show. It is a question of fact which ought to have been heard and decided by the first Court; and in the absence of any evidence to prove that fact it cannot be reasonably contended that the decree in O.S. No. 36 of 1912 is a nullity.

3. The next contention is based on very much the same argument. Appellants contend that the execution petition dated 20th July 1915 was not in accordance with law, because the proper judgment-debtors were not on record in that petition, as that petition was put in against the judgment-debtors named in the decree a year or so after the decree for their removal had been passed. It is said that a Receiver was appointed in O. Section No. 12 of 1912 on 16th February 1915 some five months before the date of the first execution petition; but again, the appellants have not attempted to show that this Receiver took charge or that the trustees, who were the original judgment-debtors, were actually ousted by him from the property prior to the date of this first execution petition.

3. The lower Appellate Court accepts the, view that the original judgment-debtors were not the proper party respondents to the execution petition because they had been dismissed by the decree in O.S. No. 12 of 1912 on 9th July 1912 but it nevertheless held that the execution petition was in accordance, with law. 1 do not agree with the lower Appellate Court in its view that the removal of the original trustees came into operation from the date of the decree and not from the date, whatever date it be, on which the trustees were removed from actual possession. So long as they were not removed and they remained in control of the property cannot be contended that they were not the proper judgment debtors to be on record in the execution petition. Suppose for example that no Receiver or new trustee was appointed for some months after the passing of the decree in O. Section No. 12 of 1912. It could not be held that there was no judgment-debtor at all against whom any execution petition could be brought during that period. The crucial date on which the trustees cease to be actual judgment-debtors is that on which they were, ousted from the control of the trust property. What that date is does not appear. It is clear that the duty of the appellants was to establish that date and they have not chosen to do so. It cannot, therefore, be concluded that on the date of the execution petition of 1915 the original trustees were not the proper judgment-debtors. Therefore there is no proof that this execution petition was not against the proper judgment-debtors.

4. Even if it were against the wrong judgment-debtors it would not be invalid as a step-in-aid so long as the executing decree-holder bona fide believed that they

were still the proper judgment-debtors. According to law, so far as laid down in this Presidency, a bona fide application to execute a decree against a particular judgment-debtor is in accordance with law even though it is subsequently discovered that the judgment-debtor was dead at the time of the application; see *Samia Pillai v. Ckockalingi Chettiar* 4 M.L.J. 8 . An unreported case of this Court, C. M. A. No. 185 of 1902, has been brought to my notice which takes an opposite view...but in such cases the proper course is to follow the reported decision. The same principle has been laid down in *Balkishen Das v. Bedamati Koer* 10 Ind. Dec. . 263 where it was held that an application made against persons who were not the legal representatives of the deceased judgment debtor was valid if the decree-holder bona fide believed that they were the legal representatives: see also *Ramasawmi Chettiar v. Oppilamani Chetti* 19 M.L.J. 671. The High Court of Allahabad takes a different view which this High Court so far has not accepted : see *Jnanendra Nath Basu v. Nihalo Bibi* 7 A.L.J. 512 but compare this with *Mahomed Hussain v. Enyat Hussain* 12 A.L.J. 830.

5. Now as the application of 1915 was put in against the judgment-debtors named in the decree the Executing Court in the absence of evidence to the contrary could not but decide that the execution petition was in accordance with law. It is not its business to go outside the decree and enquire whether the judgment-debtors named in that decree were still the proper judgment-debtors in 1915. The presumption is that the execution petition was in accordance with law, and it was admitted as such by the Court and notice issued therein. The parties who now wish to contend that it was not, were bound to prove it, and for that purpose they must first establish that the judgment-debtors named in the decree were no longer the real judgment-debtors. That, as noted, they have not attempted to do. Unless and until they proved that fact, it was not the business of the decree-holders to prove that they nevertheless bona fide believed that the judgment-debtors named in the decree were still really the judgment-debtors. It is not, therefore, open to the appellants who have not established the fact necessary to throw on the decree-holders the onus of proving their bona fides, to put forward now any contention that the execution petition of 1915 was not bona fide.

6. A further contention has been put forward that the decree under execution was a fraudulent decree come to by collusion between the mortgagee and the original trustees. But, obviously that objection cannot be taken in execution. The real judgment-debtor is the trust; and the representatives of the trust cannot attack it in execution proceedings. If they want to set aside the decree they must institute appropriate proceedings.

7. I am, therefore, of the opinion that the order of the District Judge is right and dismiss this appeal with costs of respondents Nos. 1 and 2.