

(1965) 07 MAD CK 0018

In the Madras High Court

Case No : Civil Revision Petition No. 1487 of 1962

PL. CT. PL. Palaniappa Chettiar

APPELLANT

Vs

A. RM. A. L. A. Muthu Veerappa Chettiar and Another

RESPONDENT

Date of Decision : 14-07-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 57, Order 21 Rule 57(1), 115, 73

Citation : AIR 1966 Mad 406 : (1966) ILR (Mad) 211 : (1965) 2 MLJ 499

Hon'ble Judges : Natesan, J

Bench : Single Bench

Judgement

(1) This is a revision u/s 115 of the CPC from an order dismissing the petitioner's application for rateable distribution u/s 73 of the Civil Procedure Code.

Though the petitioner can pursue his claim by way of a suit, as this revision petition has been pending in this Court from 1962, and the question for decision is a simple one, it not being disputed that the matter would otherwise come u/s 115 of the Civil Procedure Code, the faintly put forward preliminary objection is overruled.

(2) The petitioner obtained a decree against the defendants in O. S. No. 44 of 1959 on the file of the Subordinate Judge's Court, Devakottai, for execution, and filed therein, E. P. No. 25 of 1960 on 2-2-1960 for attachment and sale of certain immovable properties. Attachment was ordered on 5-2-1960, and order for sale was made on 19-7-1960, the properties to be proclaimed and sold on 5-9-1960. It is seen from the records of execution that there was no sale, and subsequently on 5-7-1961 on application the upset price was reduced, and the properties were directed to

be proclaimed and sold on 4-9-1961. There were no bidders even at this sale, and the properties were not sold; and on 7-9-1961 the execution

petition was adjourned to 14-9-1961 for steps. On 14-9-1961 with the endorsement ""petition not yet filed"" the matter was adjourned to 20-9-

1961. On 20-9-1961 the execution petition was dismissed with the following endorsement thereon: ""No petition filed. Petition dismissed.

Attachment to continue for four months"". Meanwhile, the properties were attached in execution of another decree against the same judgment-

debtors in E. P. No. 89 of 1961 in O. S. No. 31 of 1959, on the file of the Subordinate Judge's Court, Devakottai, and the properties were sold

on 18-12-1961 for Rs. 5,000, and the proceeds brought into Court. It is the claim of the petitioner by E. A. No. 66 of 1962 to share rateably with

the proceeds thus brought in, that has been rejected on the ground that there was no subsisting execution pending, when assets were realised. It

would be noted that in terms of the order dated 20-9-1961, directing continuance of the attachment for four months, the properties sold continued

under the attachment at the instance of the petitioner also, and the attachment being valid upto 20-1-1962. The sale in E. P. No. 89 of 1961,

which brought in proceeds into Court, was pending this attachment.

(3) The petitioner contended in the lower court, on the basis of a decision of this Court in N. Krishnaswamy Iyengar Vs. N. Vedavalli Ammal and

Others, , that the very fact of the attachment being continued established, that the order of dismissal of his execution petition was an order for

statistical purposes, and in fact and in law it must be deemed to be pending when proceeds were brought into Court. This contention did not find

acceptance, the lower court placing reliance on a decision of the Nagpur High Court in Gulab Chand v. Dongarmal, AIR 1936 Nag 277 . The

lower court has taken the view that the dismissal of the petitioner's E. P. was one for default on the part of the decree-holder, and that there was a

termination of the execution petition filed by him, despite the continuance of the attachment. In my view, this runs against the current of decisions of

this Court. So far as the decision of the Nagpur High Court in Gulab Chand v. Dongarmal, AIR 1936 Nag 277 is concerned, it would be apparent

from a perusal of it, that the decision rested on the wording of Order XXI Rule 57 of the Civil Procedure Code, as amended by that Court in

1930. Referring to the decisions of some other High Courts, that had been cited, Pollock J, observes thus in that case:

Several decisions of other courts have been cited, showing that such order may be an order of adjournment, but none of these decisions is

precisely in point, partly because the wording was different and partly because all these decisions were decided under Order XXI Rule 57, as it

was originally enacted"".

I do not find any reference in the judgment of Pollock J. to anything like the imperative provision found in order XXI Rule 57, as amended in this

State, providing that, when the court dismisses an application by reason of the decree-holder's default, the order shall state that the attachment do

cease. The decision of the Nagpur High Court in Gulab Chand v. Dongarmal, AIR 1936 Nag 277 cannot be of any help in the present case, as

that case was decided on the rule applicable there, and on the facts of the case.

(4) Section 73 of the CPC is intended to provide expeditious, summary and cheap remedy for the execution of money decrees held against the

same judgment debtor by several persons, the claims of rival decree-holders getting adjusted without the necessity for separate proceedings.

Section 73 provides that, where assets are held by a Court, and more persons than one have, before receipt of such assets, made application to

the Court for the execution of decrees for the payment of money passed against the same judgment-debtor, and have not obtained satisfaction

thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons.

(5) Section 73 entitles a decree-holder to rateable distribution, if the following conditions are satisfied:

(a) the applicant for rateable distribution must have obtained his decree and applied for execution of the decree to the appropriate court;

(b) the application should have been made prior to the receipt of the assets by the court;

(c) the assets of which rateable distribution is claimed must be assets held by the court;

(d) the attaching creditor as well as the decree-holder claiming to participate in the assets should be holders of decrees for the payment of money;

and

(e) the decree should have been obtained against the same judgment-debtor.

(6) Though section 73 speaks of only an application to the court for execution before the receipt of such assets, it has been held in more than one

case that the application must be a subsisting and pending one at the time of receipt of assets. In this case, the question is whether, notwithstanding

the wording of the order dismissing the petitioner's execution application, it could still be pending where the order of dismissal in effect amounts to

an order adjourning it sine die. It has been repeatedly observed by this Court that the actual words used do not govern the matter as to the

character of the disposal, and that the decision as to the nature of the disposal must eventually turn on the construction of the order passed, in the

light of the circumstances under which the order was passed, and its legal effect. What has to be determined is what is the import of the order,

what was it that was intended and what was expressed by the court, when statedly dismissing the petition, while continuing the attachment? When

construing this order one has to bear in mind Order XXI Rule 57 as it stands amended in this State. Order XXI Rule 57(1) runs thus;

Where any property has been attached in execution of a decree and the Court hearing the execution application either dismissed it or adjourns the

proceedings to a future date it shall state whether the attachment continues or ceases:

Provided that when the Court dismisses such an application by reason of the decree-holder's default the order shall state that the attachment do

cease"".

The requirement for an order terminating the attachment, when the dismissal of the application is on the decree-holder's default, is mandatory.

(7) No doubt, in the order in question it is observed, ""No petition filed. Petition dismissed"". What this petition is, it is not made clear. Already the

upset price had been reduced once. The lower court observes that it was open to the petitioner to file a petition to reduce the upset price or to

state that the properties may be proclaimed for sale on the same upset price. The upset price having been reduced once, if the decree-holder does

not choose to apply for reduction of the upset price still further for want of bidders on the reduced upset price, that cannot be said to amount to

default on the part of the decree-holder. At this stage the correctness of the

order on the E. P. is not open to challenge. This court has only to interpret to challenge. This court has only to interpret the order, and when one finds the court continuing the attachment, the proper interpretation would be the execution petition itself is not being terminated, but adjourned for the nonce. We cannot readily assume that the Court intended passing a patently illegal order. The decision of this Court in N. Krishnaswamy Iyengar Vs. N. Vedavalli Ammal and Others, placed before the lower court, in my view, directly covers the case. That was also a revision arising out of an order u/s 73 of the Civil Procedure Code. The order on the execution petition which came up for construction, ran thus: "'E. P. dismissed as not pressed. Attachment to continue for six months from today'". With reference to this endorsement on the execution petition, this Court observed that the non-prosecution of the executing application conveyed by the term "'not pressed'" would not necessarily mean a default of the kind contemplated under rule 57. Reference was made therein to the decision of Basheer Ahmed Sayeed, J. in Govinda Padayachi v. Kannammal, 1957 1 MLJ 201: AIR 1958 Mad 15 wherein it was observed at p. 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'".

In N. Krishnaswamy Iyengar Vs. N. Vedavalli Ammal and Others, Ramachandra Iyer, J. (as he then was) has observed, at p. 219:

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'".

In my view, in the light of the authorities, when the attachment is directed to be continued, it should be held that the Court saw no such default on the part of the decree-holder as warranted the termination of the execution as a penalty for default. It must therefore be held on the facts and circumstances above set out that there has been no valid final termination of the proceedings, in execution and that the execution petition must be deemed to be pending on the material date, when the assets were received by

the Court.

(8) The result would be that the petitioner will be entitled to a share in the assets realised u/s 73 of the Civil Procedure Code. The civil revision

petition is, therefore, allowed, the order dated 28th March 1962 on E. A. No. 66 of 1962 is set aside, and the application of the petitioner to

share rateably is remanded to the lower court for passing appropriate orders. No order as to costs.

JI/VSB/D.V.C.

(9) Revision allowed.