
(1950) 08 MAD CK 0025
In the Madras High Court
Case No : A.A.A.O. No. 24 of 1949

Ponnuru Satyanarayana

APPELLANT

Vs

Bolisetti Nagabushanam

RESPONDENT

Date of Decision : 11-08-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, 48
Limitation Act, 1908 — Article 182

Citation : AIR 1951 Mad 429 : (1950) 2 MLJ 647

Hon'ble Judges : Panchapakesa Ayyar, J

Bench : Single Bench

Advocate : V.G. Krishnamurthy, for the Appellant; G. Venkatarama Sastry, for the Respondent

Final Decision : Dismissed

Judgement

Panchapakesa Ayyar, J.—This is civil miscellaneous second appeal filed by one Satyanarayana, respondent 4 in E. P. No. 228 of 1946,

which was merged in the revived E. P. No. 283 of 1943 in O. S. No. 173 of 1931 on the file of the District Munsif's Court, Repalle, against the

orders of both the lower Courts overruling his objections and directing the execution petition to proceed and his properties to be sold for realising

the decree amount.

2. The facts were briefly these. B. Nagabhushanam, the decree-holder, obtained a simple money decree on a promissory note for Rs. 600, dated

6-2-1930, against one B. Ramayya, the executant and his surety P. Sitaramaswami, in O. S. No. 173 of 1931. The decree amount was scaled

down, and, after several E. Ps., with which we are not now concerned, E. P. No. 283 of 1943 was filed by the decree-holder on 17-9-1943 for

recovering more than a thousand rupees due under the scaled down decree with subsequent interest and costs. That E. P. was undoubtedly filed within time u/s 48, Civil P. C., as well as under Article 181, Limitation Act. That E. P. shows Eamayya, defendant 1, as alive, and not as dead, though it is represented to me now by the learned counsel for the appellant, relying on an observation in para 2 of the judgment of the trial Court, and in para 2 of the judgment of the lower appellate Court in A. S. No. 84 of 1948, that defendant 1 was dead already by the time of the execution petition and that his legal representatives have not been brought on record till now. There is, however, no formal or legal proof that defendant 1 is really dead. Whatever that be, the decree itself is an old one dated 17-9-1931, and E. P. No. 283 of 1943 was filed on 17-9-1943, the very last day of limitation u/s 48, Civil P. C. Some immovable properties claimed to be defendant 1's were attached and proclaimed for sale on 6-11-1944. But, just before the sale, one Parachuri Subba Rao filed a claim petition, E. A. No. 529 of 1944, regarding those properties, claiming them to be his. It was dismissed as filed too late. The claimant then deposited the sale warrant amount under protest into the Court on 6-11-1944 itself and the Court ordered the stay of the sale of the properties on his application E. A. No. 525 of 1944. On 13-11-1944, the Court closed the execution petition, recording full satisfaction on account of the deposit made by Panachuri Subba Rao under protest. This order was rather curious as the deposit was made under protest by Subba Rao and a stay had been got by him regarding its payment out to the decree-holder, and the Court should have, therefore, awaited the result of the suit filed by the claimant. What is more, it, of course, kept the deposit in Court and did not allow the decree-holder to draw it out, as there was a stay. The claimant filed O. S. No. 296 of 1944 and got the order of the Court dismissing his claim set aside on 22-12-1945. On 7-2-1946, the claimant withdrew from Court the amount deposited under protest by him. He was allowed to withdraw the entire amount as the decree entitled him to do so, having recognised his claim to the attached properties. Thereupon, the decree-holder filed E. P. No. 228 of 1946 to set aside the order of full satisfaction, erroneously passed by the Court on 13-11-1944, to revive the proceedings in E. P. No. 283 of 1943, to continue the sale proceedings thereunder, and to sell the properties of the present

appellant, who was a legal representative of the surety judgment-debtor defendant 2. The District Munsif allowed that to be done despite all the

objections of this appellant. The appellant thereupon filed A. S. No. 84 of 1948 in the Sub-Court, Tenali. The learned Subordinate Judge

dismissed the appeal, overruling the contentions of the appellant; and he has preferred this C. M. S. A. against that judgment.

3. I have perused the entire records, and heard learned counsel on both sides. Mr. Y. G. Krishnamurthy, the learned counsel for the appellant,

raised five main contentions. The first was that both the lower Courts went wrong in re-opening the matter of this stale decree after full satisfaction

had been entered on 13-11-1944. The argument is unsustainable. That full satisfaction order was passed erroneously, treating a deposit under

protest, by a man claiming independently a title to the attached properties of defendant 1 judgment-debtor, in order to save his own properties

from sale, and that stranger third party established his claim in his suit and took back the money deposited by him under protest. Not a pie out of

that deposit was paid to this decree-holder. It is, therefore, quite unreasonable to call this a stale claim, simply because the decree is old and the

decree-holder had received not a pie. It is a case in which any Court of equity, justice and good conscience ought, in order to prevent "obvious

injustice", and according to the ruling of the Full Bench of this Court in Sundaramma v. Abdul Khader, 56 Mad. 490 : A. I. R. 1933 Mad. 418 , to

proceed afresh with the execution petition, after setting aside the irregular and illegal order entering full satisfaction, as there is an error patent on

the face of the records, and the dismissal was for some reason which turned out later on to be untenable and the District Munsif was not

responsible for it. Suppose, for instance, a cow has to be delivered to a decree-bolder and some cow belonging to a stranger, found in the court

premises and mistaken by the Judge to be the cow in question, is delivered, and full satisfaction entered, can it be said that the matter cannot be

reopened when the stranger establishes his right to that cow and recovers it and the cow of the decree-holder has still to be caught hold of and

delivered ? So too, if counterfeit currency notes are given in satisfaction of a decree by a judgment-debtor, and full satisfaction is entered by the

Judge taking them to be genuine notes, can it be said that the execution petition cannot be reopened when the fraud is discovered and the money

has to be paid to the decree-holder ?

4. The next contention of Mr. Krishnamurthy was that it was highly unjust and inequitable to allow an execution petition like E. p. No. 228 of 1946

to be filed 15 years after the decree, and three years after the period of limitation prescribed in Section 48, Civil P. C., and allow it to be tacked

on to an execution petition like E. p. No. 283 of 1943 filed on the very last day of limitation u/s 48, Civil P. C. I see nothing unjust or inequitable in

that. Many rulings of this Court, including the Full Bench ruling quoted above, have held that, where an execution petition has been closed

erroneously by a Court either for statistical purposes or under an error, as here, and the decree-holder is free from blame, the injured decree-

holder has got a right to have that old execution petition revived and proceeded with from the stage immediately before the error, and that a

subsequent execution petition filed by him is only to be treated as a reminder to the Court to revive the old execution petition irregularly and

erroneously closed by it. The lower appellate Court has dealt fully with this point and it is unnecessary to cite further rulings or authorities for this

elementary position which has become well established now. No question of limitation will, therefore, be involved. None of the defendants were

parties to O. S. No. 286 of 1944, only the transferee decree-holder and the claimant being parties to it.

5. The third contention of Mr. Krishnamurthy was that it was highly unjust and inequitable for the decree-holder not to bring the legal

representatives of defendant 1 on record and to proceed only against the properties of this appellant who was the legal representative of the surety.

For one thing, as already stated, it is not clear whether defendant 1 was alive or dead when E. P. No. 283 of 1943 was filed. Nobody has spoken

to the date of his death. An observation in judgments, leading to an inference that he was dead even before the-filing of E. P. no. 283 of 1943,

cannot be relied on when the execution petition itself shows the man as alive and without any legal representative, and when there is nothing in the

evidence to show when the man died, and when the counter of this appellant in E. P. No. 228 of 1946 seems to show that defendant 1 was alive

at the time when O. S. No. 286 of 1944 was filed. Under our law, a decree-holder can proceed against any one of the joint judgment-debtors he

likes, and defendant 2 (surety) had become a judgment-debtor by the decree in O. S. No. 173 of 1931. No doubt by saving one and leaving him

out and proceeding against another, towards whom he has not got the same consideration, the decree-holder may be doing what a layman may

consider to be unfair. But the use of law can never be an abuse of law, and, when the law allows it, the Court cannot disallow it. It is open to this

appellant to sue defendant 1's legal representative for contribution after the decree amount has been recovered from him in this E. P.

6. The next contention of Mr. Krishnamurthy was that Parachuri Subbarao, the third party who deposited the decree amount under protest in that

claim petition, was only a name lender for defendant 1 and had deposited only the money of defendant 1, and that this decree-holder, acting in

collusion with that defendant 1 had filed this execution petition against this appellant, in order to recover the money once more and pay it back to

defendant 1, and that the lower appellate Court failed to consider this important contention and decide it. The lower appellate Court did not

consider this contention because it was not raised before it at all. Nor has it been raised in the appeal memo here. Nor was there any evidence on

record to prove this extremely interesting, but rather incredible, story. So, this contention also must fail.

7. The last contention was that as E. P. No. 283 of 1943 was revived by filing E. P. No. 228 of 1946, the decree-holder should have asked also

for the sale of the old attached properties of defendant 1, as he was not entitled to leave out a portion of the old relief prayed for when asking for a

revival of the old execution petition. I cannot agree. Suppose, for instance, in an old E. P., 50 sheep and two cows of the judgment-debtor were

sought to be attached and were attached, but the two cows died before the execution petition, wrongly closed, was revived, how can it be said

that the decree-holder applying for the revival of the execution petition should also apply for the sale of the two cows which died and whose

carcasses themselves had disappeared ? So too, how can this decree-holder be expected to ask for the sale of the immovable properties alleged

to be defendant 1's but which were declared by a Court, in a suit, to belong to a third party and not to defendant 1 ?

8. All the contentions of the learned counsel for the appellant have failed. On a scrutiny of the entire records, I am satisfied that both the Courts

below were perfectly right in overruling all the contentions of the appellant and in directing the execution petition to proceed. This C. M. S. A.

therefore deserves to be, and is hereby, dismissed with costs.

9. Leave refused.