
(2004) 01 KL CK 0036
In the High Court Of Kerala
Case No : C.R.P. No. 1791 of 2003

Prof. Joseph Moolayil

APPELLANT

Vs

K.M. Devaki Amma and Others

RESPONDENT

Date of Decision : 21-01-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 2, Order 21 Rule 2(1), Order 21 Rule 2(2), Order 21 Rule 2(3), Order 21 Rule 37
Limitation Act, 1963 — Article 125
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2004) 01 KL CK 0036

Hon'ble Judges : K.K. Denesan, J

Bench : Single Bench

Advocate : M.K. Damodaran and V.M. Kurian, Jr, for the Appellant; Mathew John (K) and Sujesh Menon V.B., for the Respondent

Judgement

K.K. Denesan, J.—Revision Petitioner was the Defendant in O.S. 476/1994 which was tried and disposed of by the Sub Court, Palai granting a decree in favour of the Plaintiff in the suit. The Respondents are the legal heirs of the Plaintiff. The suit was filed for recovery of money on the strength of promissory note. Decree passed in terms of the plaint for an amount of Rs. 1,19,545 with future interest at the rate of 12 per cent per annum was appealed against by the Petitioner in A.S. 426/96 filed before this court. This Court dismissed the appeal with cost.

2. Respondents filed E.P. 18/96 before the Sub Court, Palai to execute the decree. The execution court attached the residential house of the revision Petitioner and the land appurtenant thereto. Petitioner had deposited a sum of Rs. 25,000 towards the decree debt during the pendency of the Appeal Suit in order to comply with the condition stipulated by this Court for granting stay of execution of the Judgment and Decree under appeal.

3. This revision petition is filed challenging the order passed by the execution court dismissing E.A. 116/2002 in E.P. 18/96 filed by the revision Petitioner. As

per the impugned order the execution court has ordered arrest of the revision Petitioner and directed to take steps for sale of immovable properties belonging to the revision Petitioner for satisfying the decree amount. The execution court rejected the plea raised by the revision Petitioner that no amount was due from him to the Respondents in terms of the Judgment and Decree in O.S. 476/ 94 in the light of the agreement entered into between the parties out of court on the basis of compromise and settlement arrived at with regard to the balance amount to be paid by the revision Petitioner to the Respondents.

4. The case of the revision Petitioner is that the Respondents and himself entered into a compromise on 17th January 1998 to settle the whole issue including the settlement of criminal case pending against him before the Magistrate's Court u/s 138 of the Negotiable Instruments Act. As per the said agreement the revision Petitioner agreed to pay an amount of Rs. 1,25,000 including a sum of Rs. 42,000 already paid till 8th December 1997. It was also agreed that the revision Petitioner should pay an amount of Rs. 25,000 on or before 25th January 1998 and the balance amount of Rs. 58,000 in monthly instalments of Rs. 2000 out of the total balance of Rs. 83,000. Revision Petitioner paid Rs. 25,000 on 24th January 1998 in terms of the compromise. Subsequently payments according to the monthly instalments agreed upon was continued and paid upto 7th July 2003. He has thus paid a total amount of Rs. 72,000 as against the sum of Rs. 58,000 due as per the agreement entered into on the basis of the compromise. Revision Petitioner has paid a total amount of Rs. 1,39,000. Hence an amount of Rs. 14,000 was paid in excess, over and above the agreed amount.

5. According to the revision Petitioner payments in terms of the agreement commenced on 24th January 1998 through the execution court and the Respondents accepted the amounts thus deposited. The contention of the revision Petitioner is that the Respondents thus having acted upon the compromise and accepted the amounts, are not entitled to execute the decree to realise any amount in excess of the amount as per the compromise.

6. It is admitted case that the agreement was reduced into writing and it was not signed by all the decree-holders. Three of the decree-holders have subscribed their signatures to the agreement. Others have not signed. Revision Petitioner would contend that the fact that some of the decree-holders have not signed the agreement is immaterial since the conduct of the parties in having accepted the amounts paid as monthly instalments in terms of the said agreement, establishes that all of them have agreed to the terms and conditions of the compromise.

7. It was in the above circumstances E.A. 116/2002 was filed by the revision Petitioner praying for dismissal of the execution petition. But, rejecting the contention the execution court ordered arrest warrant against the Petitioner and to take steps to sell his property for realising the decree debt Hence this Civil Revision Petition.

8. The contention of the revision Petitioner is that the order passed by the

execution court to issue arrest warrant against the revision Petitioner is liable to be set aside for the reason that it is in clear violation of Order 21, Rule 37 of the Civil Procedure Code. Learned Counsel for the revision Petitioner contended that the action of the court below in passing an order to issue arrest warrant against the revision Petitioner, in an application filed by the revision Petitioner himself praying for closing the execution petition in the light of the compromise and the payments made in terms of that compromise, is patently improper and illegal. It was contended that no show cause notice was issued to the revision Petitioner before ordering arrest.

9. With regard to the direction issued by the court below, as per the impugned order to take steps for sale of immovable properties or movable properties of the revision Petitioner in execution of the decree, learned Counsel for the Petitioner contended that the execution court erred seriously in not accepting the compromise petition and not finding that the Respondents had acted upon the compromise of the said agreement. According to the revision Petitioner the court below ought to have conducted an enquiry into the truth of the statements made by the revision Petitioner in the execution application. Since no such enquiry was conducted, and consequently no evidence was available before the execution court, the court below ought not have held that the plea raised on the basis of the compromise petition was liable to be rejected. According to the revision Petitioner the fact that a compromise was in fact entered into between the parties is discernible from the objection filed by the Respondents against the prayer made in E. A. 116/2002.

10. Learned Counsel appearing for the Respondents contended that the dismissal of E.A. 116/2002 was perfectly legal and valid. He further contended that the revision Petitioner was not at all justified in filing the execution application for closing the execution petition on the basis of the so called compromise petition and the payments made by him allegedly in terms of the compromise. The plea raised by the revision Petitioner before the execution court was unsustainable on merits as well as for procedural infirmities. E.A. was liable to be dismissed as barred by limitation vide Article 125 of the Limitation Act. Respondents strongly supported the view taken by the execution court to proceed against the movable and immovable properties of the revision Petitioner/Judgment-debtor. Learned Counsel for the Petitioner, however, did not make submissions in defence of the order directing issue of arrest warrant against the revision Petitioner. He submitted, fairly and in my view rightly too, that the Respondents do not want to pursue that part of the order of the execution court which directs issue of arrest warrant.

11. Learned Counsel for the revision Petitioner relying on a Bench decision of the Madhya Pradesh High Court in Mathura Prasad Phool Chand and Others Vs. Parmanand Thakur Das and Others, , submitted that a compromise petition, though not signed by all the parties, can be recorded. According to him, E.A. No. 116 of 2002 can be treated as an application for recording adjustment or

payment to satisfy the decree against him and that no objection can be taken by the Respondents on the ground that it was not an application under Order XXI, Rule 2 of CPC. It was further submitted that the contention of the Respondents that even assuming that the execution application be treated as one filed under Order XXI, Rule 2 of Code Of Civil Procedure, the same cannot be entertained being one filed beyond the time prescribed therefor under Article 125 of the Limitation Act, was devoid of merits. Learned Counsel cited the decision of the Supreme Court in *Ram Dass and Ors. v. Mathura Lal and Ors.*, (1982) 3 SCC 198, the decision of the Madras High Court in *Kailasa Padayachi Vs. Duraiappa Kachirayar and Another*, .

12. Learned Counsel for the Respondents on the other hand placed reliance on a later decision of the Supreme Court in *Lakshmi Narayanan Vs. S.S. Pandian*, , as also in *Sultana Begum v. Prem Chand Jain* (1997) 1 S.C.C. 371. In support of his contention that even assuming (without conceding) that a compromise was arrived at between the Petitioner and the Respondents settling their disputes out of court, such a compromise can be recognised by a court only if it was recorded under Order XXI, Rule 2, CPC. Learned Counsel pointed out that in this case the execution application filed by the Petitioner cannot be treated as an application for recording the same under the aforesaid provision for more than one reason. The time for filing such a petition was already over. The compromise petition admittedly not signed by all the parties has absolutely no binding effect on the Respondents. According to him, the conduct of the revision Petitioner in filing the compromise petition at a belated stage is a strong point against him. His own conduct shows that it was not intended to satisfy the decree amount. Learned Counsel for the Respondents placed strong reliance on the decision in *Joseph Vs. Kanakam*, , rendered by Pius C. Kuriakose, J. almost in an identical situation.

13. Learned Counsel for the revision Petitioner argued that the fact that some of the Respondents have subscribed their signature to the compromise petition should be taken to mean that there was substantial representation of all the decree-holders and therefore the compromise thus arrived at was binding on all of them. Judgment in *Libi Vs. Devassy*, , rendered by Lekshmikutty, J. was cited in this connection.

14. Having heard the rival submissions made by the counsel on either side, I am of the view that the execution court was right in dismissing the execution application and not acting on the compromise petition which was not signed by some of the decree-holders.

15. Annexure I which is said to be the copy of the compromise petition is dated 17th January 1998. Though there are six decree-holders entitled to execute the decree, Annexure I contains the signature of only three among them. Annexure I is signed by the revision Petitioner/Judgment-debtor and his advocate. But advocates appearing for the decree-holders have not signed Annexure I. Execution Petition was filed in the year 1996. No explanation is forthcoming from the revision Petitioner as to why Annexure I dated 17th January 1998 was not

produced before the execution court for a period of more than four years. These circumstances create strong suspicion regarding the reliability and acceptability of Annexure I as an agreement entered into with the consent of all parties to settle the civil dispute out of court, after the passing of the decree. The view taken by the execution court is that Annexure I cannot be given effect to, in the light of the objection raised by the decree-holders about the binding nature of that document. The contention of the revision Petitioner that three persons out of the six decree-holders could represent the others three persons cannot be accepted in the facts and circumstances of this case. In *Libi v. Devassy* (supra) this Court held, in a case arising under the Kerala Buildings (Lease and Rent Control) Act, that one among the legal heirs of the original tenant cannot successfully raise the plea of non-joinder of necessary parties since the other legal heirs were defending or prosecuting the matter. It was in the aforesaid circumstances the learned Judge held that there was substantial representation and that any one of the legal heirs can proceed with the case. Another decision of this Court reported in *Kumaran Nair v. Mariappan Pillai* 1967 KLT 1077, also has no application to the facts of this case. In *Kumaran Nair's* case, decree was passed against all the Defendants on the basis of compromise filed by the Plaintiff and one of the Defendants. Other Defendants did not challenge the decree in appeal. When the decree-holders wanted to execute that decree, a contention was raised by the Judgment-debtors that the compromise was not binding on them. This Court held that such a contention cannot be allowed to be raised at the execution stage.

16. Learned Counsel for the revision Petitioner laid much stress on the fact that the Petitioner was paying the amount agreed to between the parties in Annexure I as per the schedule of payment on monthly basis and that the decree-holders accepted the said amount. According to the revision Petitioner, the above conduct of the decree-holders is sufficient to prove that they had, in fact, accepted the terms of the compromise and had acted upon the agreement. Learned Counsel for the Respondents submitted that no argument can be built on the basis of the acceptance by the decree-holders of the amounts paid by the revision Petitioners because no creditor will refuse to accept amounts paid by the debtor in due discharge of the debt partially or wholly. According to the Respondents the amount was accepted not in terms of any agreement entered into by them to settle the civil dispute out of court. Annexure I, in fact, came into existence only in the background of the criminal case against the Petitioner. In my view, the mere fact that amounts paid by the revision Petitioner were accepted by the decree-holders, will not, by itself, show that the amounts paid were received in terms of Annexure I.

17. Hence I have no hesitation to repel the contention of the revision Petitioner that Annexure I compromise ought to have been accepted and acted upon by the execution court and that E.P. No. 18 of 1996 ought to have been dismissed on that ground.

18. The next aspect to be examined is whether E.A. No. 116 of 2002 can be deemed to be an application filed for recording Annexure I and for certification of the amounts said to have been paid as per Annexure I under Rule 2 of Order XXI, Code Of Civil Procedure. It is settled law that an uncertified payment of money or adjustment which is not recorded by the court under Order XXI, Rule 2 cannot be recognised by the executing court. If any money is payable under a decree and such money is paid out of court, the decree-holder has to certify such payment to the court whose duty it is to execute the decree and that court has to record the same accordingly. Similarly, if a decree is adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder has to certify such adjustment to that court which has to record the adjustment accordingly. If the payment or adjustment is not reported by the decree-holder, the judgment-debtor has been given the right to inform the court of such payment or adjustment and to apply to that court for certifying that payment or adjustment after notice to the decree-holder. Sub-rule (3) of Rule 2 of Order XXI, CPC provides that a payment or adjustment which has not been certified or recorded under Sub-rule (1) or (2) shall not be recognised by the court executing the decree. In Sultana Begum's case (supra) the Supreme Court held as follows:

The words "or the decree of any kind is otherwise adjusted" are of wide amplitude. It is open to the parties namely, the decree-holder and the judgment-debtor to enter into a contract or compromise in regard to their rights and obligations under the decree. If such contract or compromise amounts to an adjustment of the decree, it has to be recorded by the court under Rule 2 of Order 21. It may be pointed out that an agreement, contract or compromise which has the effect of extinguishing the decree in whole or in part on account of decree being satisfied to that extent will amount to an adjustment of the decree within the meaning of this Rule and the court, if approached, will issue the certificate of adjustment. An uncertified payment of money or adjustment which is not recorded by the court under Order 21, Rule 2 cannot be recognised by the executing court. In a situation like this, the only enquiry that the executing court can do is to find out whether the plea taken on its face value, amounts to adjustment or satisfaction of decree, wholly or in part, and whether such adjustment or satisfaction had the effect of extinguishing the decree to that extent. If the executing court comes to the conclusion that the decree was adjusted wholly or in part but the compromise or adjustment or satisfaction was not recorded and/or certified by the court, the executing court would not recognise them and will proceed to execute the decree.

Later in Lakshmi Narayanan's case (supra) Supreme Court followed Sultana Begum's case (supra) and held that though the parties are not precluded from settling their disputes outside the court even after the passing of a decree by a competent court, to have the compromise recognised by a court, it has to be recorded under Rule 2 of Order XXI, Code of Civil Procedure. According to the Supreme Court, the consequence of not having it so recorded is contained in Rule 2(3) of Order 21 which prohibits every court executing the decree, from

recognising a payment or adjustment which has not been certified or recorded by the court. In the light of the aforesaid authoritative pronouncements by the apex court I uphold the contention of the learned Counsel for the Respondents that the decree-holders are entitled to proceed with the execution petition by ignoring Annexure I, in the absence of certification as per Sub-rule (2) of Rule 2, Order XXI, Code Of Civil Procedure.

19. According to the learned Counsel for the revision Petitioner, E.A. No. 116 of 2002 filed by the Petitioner could be treated as an application filed under Rule 2 of Order XXI, Code of Civil Procedure. Against the above contention, counsel for the Respondents argued that the question of recording an adjustment or payment to the satisfaction of a decree does not arise after the expiry of a period of 30 days from the date the payment or adjustment was so made. The submission thus made by the counsel for the Respondents is fortified by the view taken by a learned Single Judge of this Court in *Joseph v. Kanakam* (supra). This Court in *Joseph's* case held as follows:

But then Order XXI, Rule 2A contains a complete interdict against giving recognition to any payment or adjustment which has not been certified or recorded in the manner provided under that provision within the time allowed by law which under Article 125 of the Limitation Act is 30 days from the date when the payment or adjustment is made.

Learned Counsel for the revision Petitioner submitted that the view taken in *Joseph's* case is not correct and requires reconsideration. I find that the learned Judge has considered the contentions raised on behalf of the judgment-debtor who was placed in similar circumstances and has repelled all those contentions. I respectfully concur with the view taken by the learned judge in *Joseph's* case. It is true that in *Ram Dass v. Mathura Lai* (supra) it was held by the Supreme Court that there cannot be a bar against a claim made by the judgment-debtor regarding adjustment or payment under a consent decree on the ground that the said adjustment was an uncertified or delayed one. It is evident from the aforesaid decision that the above observations were made in the facts and circumstances of that case whereas the decisions of the Supreme Court in *Sultana Begum's* case (supra) and *Lakshmi Narayanan's* case (supra) have dealt with the provisions contained in Rule 2 of Order XXI, CPC elaborately. I have already found that in the light of the said authoritative pronouncements made by the apex court, the plea raised by the revision Petitioner cannot be sustained. Learned Counsel for the Respondents submitted that his clients do not want to take any steps to arrest and detain the judgment-debtor (revision Petitioner) though as per the impugned order a direction for arrest and detention has been issued. I find that the execution court was not justified in issuing such a direction while disposing of E.A. No. 116 of 2002 filed by the revision Petitioner before that court. Accordingly that part of the impugned order is set aside. In all other respects the order dated 23rd August 2003 in E.A. No. 116 of 2002 in E.P. No. 18 of 1996 in O.S. No. 476 of 1994 passed by the Sub Judge, Palai is upheld.

C.R.P. is disposed of as above. No costs.