
(1952) 01 MAD CK 0019
In the Madras High Court
Case No : A.A.A.O. No. 119 of 1950

Ramabadra Reddiar

APPELLANT

Vs

Ramachandra Reddiar and Others

RESPONDENT

Date of Decision : 30-01-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 11, Order 21 Rule 12, Order 21 Rule 13, Order 21 Rule 14
Limitation Act, 1908 — Article 182, 182(5)
Madras Civil Rules of Practice — Rule 141, 142, 143, 144, 145

Citation : AIR 1954 Mad 74 : (1952) 65 LW 690 : (1952) 2 MLJ 73

Hon'ble Judges : Basheer Ahmed Sayeed, J

Bench : Single Bench

Advocate : K.R. Krishnaswami Aiyar, for the Appellant; K.V. Ramachandra Aiyar, for the Respondent

Final Decision : Dismissed

Judgement

Basheer Ahmed Sayeed, J.—This is an appeal against the order of the learned Principal Subordinate Judge of Cuddalore holding that the decree-holder's remedy was not barred by time and construing that the order passed on the execution application, Ex. A. 1, on 8-7-1939 was a final order by which time was saved in favour of the decree-holder.

The final decree in this case was passed on 21-12-1936, and on 13-9-1937 the decree-holder filed an execution application. That application was returned unnumbered for filling up certain particulars and for representation within a month's time. The Court also directed that an encumbrance certificate should be filed. This application was not represented within the prescribed time. Actually it was represented on 3-7-1939 with the endorsement that the decree-holder was not pressing the petition, and that it might be rejected or dismissed. On 5-7-1939 the Court passed the order, "Not pressed, rejected". There was no separate application filed along with this petition, for excusing the delay which was nearly as much as of 18 months in the representation of the execution

application, Ex. A. 1. It does not also appear on the record as if there was any oral application for excusing the delay in representing the execution application. When the application was represented on 3-7-1939 it also transpires that the decree-holder did not comply with the requirements as to the furnishing of the encumbrance certificate. In addition to that, there is; also no order excusing the delay in representing the execution petition.

2. The petition on which the order was passed being unnumbered, the delay being as much as 18 months, there being no application for excusing the delay, the requirements themselves not having been complied with when the application was represented, and there also being no express order excusing the delay in representation, the learned counsel for the appellant contends that the order passed on 5-7-1939 cannot be construed to be a final order coming within the scope of Article 182(5), Limitation Act. He relies upon four decisions: -- G.R. Naidu and Others Vs. Yerramsetti Venkataswami Naidu, , -- T.S.P.L.P. Chidambaram Chettiar Vs. Murugesam Pillai and Others, , -- The Official Receiver of Ramnad Vs. Sivasuriya Narayanaswami Thevar and Others, and -- Syed Ghulam Khadir Sahib and Others Vs. Viswanathayyar, by his mother and next friend, Parvathi Ammal and Others, . It is the contention of the learned counsel for the appellant that the facts that arise in the present appeal are on a par with the facts that have been considered in the said four decisions, that the ruling in those decisions should apply if the facts of this case, and that therefore the learned Subordinate Judge was not justified in holding that the order passed on 5-7-1939 was a final order giving the benefit of saving of time to the decree-holder.

As against these decisions, the learned counsel for the respondents has invited my attention to the decisions in -- Muthuvenkatasubba Reddiar and Another Vs. Thangavel Chetti and Others, -- Nataraja Pillai Vs. U. Narayanaswami Iyer, , -- Ramachandra Naidu Vs. Muthu Chettiar and Others, and -- Mahalakshmi Ammal and Others Vs. Subramania Chettiar and Another, . In addition to these, he has also relied upon -- AIR 1943 98 (Privy Council) , and -- "Hara Kumar Pal Chowdhury v. Shaikh Safatullah", 9 Cal WN 844 (J). The latter two decisions of course are on points which have been argued by the learned counsel for the respondents as alternative grounds for sustaining the order of the learned Subordinate Judge. But the sheet-anchor of the learned counsel for the respondents is the decision of the Bench of this Court in -- Muthuvenkatasubba Reddiar and Another Vs. Thangavel Chetti and Others, ". There are of course various other decisions, which learned counsel have not referred to, and which could have been cited by either of them in support of their case. It seems to me that in the mass of conflicting authorities that are available for the position similar to the one that is under consideration, the most healthy and safe rule is to decide each case on its facts, while of course following by analogy the principles and the reasoning that is available in the decisions quoted.

3. Learned counsel for the appellant has sought to draw a distinction between

the decisions which are against him on the basis inter alia that the delay which has been the subject matter of consideration in those decisions has been very small not extending in any case to more than a few months, and that in the present, case the delay in the representation has been very extraordinary and excessive reaching upto 18 months. He thinks on the basis of that distinction in regard to the undue delay that has been caused in the representation of the execution petition on which the order has been passed to the effect that it was not pressed & rejected, the decisions wherein the delay has been very small ought not to apply. I must say that the length of the delay, whether it be short or long, cannot affect the real point for decision. The Character of the order is not affected by the length of the delay. I do not think therefore that there is substance in the contention of the learned counsel for the appellant that from the point of view, of undue delay, the rulings in the authorities cited against him ought not to apply to the facts of this case.

4. In the next, place the learned counsel for the appellant has laid emphasis on the fact that the unnumbered execution petition, which was returned for compliance with certain requirements not under the CPC but under the Civil Rules of Practice having been represented without complying with those requirements, cannot be considered to be a valid application within the meaning of Article 182(5), Limitation Act, and that therefore any order passed thereon can-not be construed to be a final order within the meaning of that article. I do not think I can agree with the learned counsel for the appellant even in this respect, for the trend of decisions seems" to be that even when an unnumbered application returned, for complying with certain requirements, has not been taken out of the Court and represented, and when it is left lying in the Court and if the Court passes an order on it, the order should, be construed as a final order, so that it does not make any difference when a decree-holder takes back an unnumbered petition which was returned for compliance with certain requirements & represents it without complying with them, and when an order rejecting the same has been made thereon. Such facts as are obtaining in the present case would make the case much stronger than the case where an unnumbered petition is returned, and is not taken out of Court by the decree-holders and on which when It is lying in Court even as a scrap of paper, the Court still passes an order rejecting it, thereby making It a final order.

5. A further point has been urged by the learned counsel for the appellant in that there has been no application for excusing the delay either oral or written, when the application which was unnumbered and which was returned for compliance with certain particulars was represented to the Court, and when the order rejecting it was passed. His point is that only in cases where there is an application for excusing the delay in representation of the execution petition and where there is an order either excusing the delay or refusing to excuse the delay, the order passed on the execution petition can be considered to be a final order. It is true that the decided authorities have held that when an execution petition is dismissed or rejected after an application for excusing the delay in

representation has been either ordered or dismissed, that order will be a final order within the meaning of Article 182(5) of the Act. But where no application for excusing the delay has been made and nevertheless the order has been made on the execution petition either dismissing it or rejecting it, the trend of authorities is also to the effect) that it must be presumed that the delay was excused when the execution petition was rejected or dismissed by importing a fiction of an oral application.

In this case, the execution petition has been dismissed on the invitation of the decree-holder himself by reason of the endorsement therein & that it is not pressed and the same may be dismissed and he in fact did not file any application for excusing the delay in representation. When the learned counsel for the appellant insists upon the fact that the absence of an application for excusing the delay should make a difference in the nature of the order that has been passed on the execution petition itself, it must be observed that he overlooks the very intention and object of the decree-holder inviting the Court to dismiss the application on his inability to proceed with the execution. The decree-holder in effect says that he has not been able to comply with the requirements for the sake of which the unnumbered petition has been returned, but he nevertheless wants that the important right to execute the decree should be saved from the bar of limitation, and therefore seeks the aid of the Court and requests the Court to dismiss the application, so that his right will not be affected but may be kept alive for future purposes of realisation of the decree which he has obtained against the judgment-debtors. The object of the decree-holder in inviting the Court to dismiss his application for execution would be nothing other than that he wants the Court to help him in order that he may reserve his right to proceed against the judgment-debtors by way of execution at any future time, provided he is saved from the bar of limitation.

When the Court therefore passes an order that his application be dismissed, that puts an end to that application, and it cannot therefore be construed otherwise than as being a final order, which will save limitation. There is nothing wrong in presuming that there was an oral application to excuse delay and that the delay was excused by the Court. Therefore, on the facts of this case, in my view, the principle laid down in -- Muthuvenkatasubba Reddiar and Another Vs. Thangavel Chetti and Others, , will apply with all force, and following that decision I am inclined to the view that the decision of the learned Subordinate Judge that the order passed on 5-7-1939 on Ex. A. 1 by the Court was a final order is correct and has to be upheld.

6. Even apart from this, the learned counsel for the respondents invites my attention to the fact that though the original application for execution was filed on 13-9-1937 it was represented on 3-7-1939, and it was dismissed on 5-7-1939, whereas the decree itself was dated 21-12-1936. Therefore even if there was no representation as such, and if a fresh application had been filed on the 3rd or 5th July 1939, the application for execution would be in time, because

it) would be clearly within three years from the date of the final decree. But in this case there has been no fresh application for execution, but what has been done is that the unnumbered execution application filed on 13-9-1937 has been represented on 3-7-1939 and dismissed on 5-7-1939. Learned counsel for the respondent relies upon the decision in -- "9 Cal WN 844 (J)", wherein it has been held that an application though represented long after the expiry of the time which was fixed originally for such representation, should be deemed to have been presented as on the date on which it was actually presented in Court, and if it was within time, it ought to be considered to be a fresh application in accordance with law, I think that though the facts in -- "9 Cal WN 844 (J)", apply to a different kind of action, still the principle laid down therein would apply to the facts of the present case. Therefore the original application which was represented on 3-7-1939 could still be deemed to be a fresh application in accordance with law, and an application having been presented within three years of the passing of the final "decree could still be considered to have been an application properly and validly presented, on which an order had been passed dismissing the same, notwithstanding the fact that that was an application which was returned for representation.

7. But learned counsel for the appellant, however, has taken exception to the fact that the application actually represented on 3-7-1939 could not be considered to be an application presented in accordance with law for the reason that the order of Court returning the application for fulfilling certain requirements had not been complied, and whether that order was right or wrong, it was the duty of the decree-holder to have complied with that order in order to make his application on representation a valid and proper one so as to attract Article 182(5), Limitation Act and to make the order passed thereon a final order. The point in particular which has been relied upon by the learned counsel for the appellant is that the Court directed the decree-holder to file an encumbrance certificate along with the execution petition, and when that had not been complied with by the decree-holder when he represented that execution petition, it could not be said that there was any valid compliance with the order, and in the absence of such valid compliance, it could not be claimed that the petition represented was in accordance with law.

To accept this statement of the learned counsel for the appellant, in my opinion, would be to put a very very narrow interpretation on the language of Article 182(5), Limitation Act, which requires only that an application on which an order in the nature of a final, one has to be passed should be in accordance with law. What is "in accordance with law" has been considered by the Judicial Committee in the case cited by the learned counsel for the respondents, -- AIR 1943 98 (Privy Council) Rules 141 to 145 of the Civil Rules of Practice do not require that an encumbrance certificate should be filed in order that the execution application could be considered to be a valid and proper one in accordance with law. Order 21, Rs. 11 to 14 also do not require that an encumbrance certificate should be filed along with the execution application in order to make it one to be in

accordance with law. I am therefore inclined to respectfully" agree with the principles of the decision in -- AIR 1943 98 (Privy Council) and hold that even though the encumbrance certificate called upon to be filed along with the execution petition was not filed, still it could not be considered that the execution petition which was represented on 3-7-1939 and rejected on 5-7- 1939 would be an invalid one.

8. Learned counsel for the respondents has-further invited my attention to a recent decision. Of this Court in -- "L. P. A. No. 7 of 1949 (Mad) (K), by Satyanarayana Rao and Raghava Rao-JJ. in which the Bench followed the decision in -- Muthuvenkatasubba Reddiar and Another Vs. Thangavel Chetti and Others, and has opined that the decision in -- Syed Ghulam Khadir Sahib and Others Vs. Viswanathayyar, by his mother and next friend, Parvathi Ammal and Others, (DC, should be considered as being confined to the facts of that case. I am inclined to respectfully agree with this decision, and I have no hesitation in holding that the decision in -- Muthuvenkatasubba Reddiar and Another Vs. Thangavel Chetti and Others, ", fully applies to the facts of this case.

9. In view of these decisions I think that the order passed on 5-7-1939 by the executing Court on the execution petition, Ex. A. 1 in the case, is- a final order, which saves limitation in favour of the decree-holder. The order of the learned Sub ordinate Judge is upheld, and this appeal is dis- missed with costs. No leave.