

(1965) 03 KL CK 0011
In the High Court Of Kerala
Case No : A. S. No. 685 of 1963

State of Kerala

APPELLANT

Vs

Lalithamba Bhai

RESPONDENT

Date of Decision : 03-03-1965

Acts Referred:

Bar Councils Act, 1926 — Section 16
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 23, 82
Contract Act, 1872 — Section 30

Citation : (1965) KLJ 524

Hon'ble Judges : T. K. Joseph, J; T. C. Raghavan, J

Bench : Division Bench

Advocate : Mani J. Meenathoor Govt. Pleader, for the Appellant; S. Narayana Patti and N. K. Varkey, for the Respondent

Final Decision : Allowed

Judgement

Joseph, J.—This appeal arises from an order in execution of the decree in a reference under the Land Acquisition Act. The decree awarded a sum of Rs. 7,94,925.80p. as value of the land acquired, besides interest till 28th March 1963 amounting in the aggregate to Rs. 11,56,067.23p. The State deposited in court the sum of Rs. 11,39,771.26p. on 26th March 1963. The decree-holder filed E. P. No. 227 of 1963 claiming the balance, viz., Rs. 16,295.97p. with interest amounting to Rs. 205,61. Another sum claimed in this execution petition was Rs. 22,795.42p. due as Advocate's fee in execution. The claim in respect of Advocate's fee was resisted by the State. The execution court allowed by order, dated 23rd August 1963 the entire sum claimed as advocate's fee. The State has therefore preferred this appeal. The decree under execution was passed on 12th June 1962. The first execution petition (No. 660 of 1962) was filed by the attorney of decree-holders 1 and 2 on 12th December 1962. One of the prayers was for recovery of execution costs including advocate's fee. The power of attorney in favour of the applicants was not produced along with the execution petition, and on 13th December 1962 the court ordered that the right of decree-

holders 1 and 2 to execute the decree should be proved and that the power of attorney should be produced. On 20th December 1962 the decree-holders produced the power of attorney as well as a statement of consent by the third decree-holder to the others executing the decree. They also applied for advancing the date of hearing. Thereupon the court ordered notice to the judgment-debtor--the State. The notice was accepted by the State on 25th March 1963. The court passed an order on 25th March 1963 to report whether the decree amount has been deposited. The office reported on 26th March 1963 that no amount was deposited till that date. On 26th March 1963, the State had deposited Rs. 11,39,771.26 p. and when the execution petition came on for hearing on 2nd April 1963 the decree-holders' counsel stated that the execution petition was not pressed. On the strength of this statement, the execution petition was dismissed the same day. The order of dismissal did not make any provision for costs. According to counsel for the decree-holders-respondents, the execution petition was not pressed as it was understood that the State had deposited the decree amount.

2. The question for decision is whether the decree-holders can recover the sum claimed as advocate's fee. This has to be answered in the light of the rules framed by the Travancore-Cochin High Court u/s 16 of the Indian Bar Councils Act, XXXVIII of 1926 and the provisions of the Code of Civil Procedure. Rule 10 is the relevant rule and it provides:

10. The fee payable in execution petitions shall be either:-

(a) two per cent of the amount realised by way of execution under such petitions; or

(b) if the relief claimed is

(i) against the person of the judgment-debtor, a minimum of Rs. 2 and a maximum of Rs. 5, in a Munsiff's Court, and a minimum of Rs. 5 and a maximum of Rs. 25 in a District Court, allowed at the discretion of such court; or

(ii) against the property of the judgment-debtor, a minimum of Rs. 2 and a maximum of Rs. 25, in a Munsiff's Court and a minimum of Rs. 10 and maximum of Rs. 50, in a District Court, allowed at the discretion of such court;

or, the higher of the two scales mentioned in clause (a) or (b).

3. According to the decree-holders, they are entitled to 2 per cent of the amount claimed in the execution petition and it is on this basis that the right to the sum of Rs. 22,795.42 p. is based. In our opinion a decree-holder will become entitled to this fee only in a case in which the execution court allows costs in the execution petition. As stated earlier the execution petition was dismissed as it was not pressed by the decree-holders and there was no order for costs. The question arises whether in the absence of an order for costs a claim for advocate's fee is sustainable. It is argued on behalf of the respondents that while Section 30 enables a court to determine as to by whom or out of what

property and to what extent costs of suit are payable there is no similar provision for execution proceedings and that the omission to make such a provision is due to the fact that the decree-holder is entitled in all cases to costs and that a separate order in that behalf is not necessary to enable the decree-holder to get his costs. We are unable to agree. There may be several defendants in the decree, some of whom may be proforma parties, and without a specific order for costs, the liability for the same cannot be fixed. There may be cases in which the prayer in the execution petition is one which the court cannot grant. Does it mean that even in such cases the decree holder is entitled to costs including advocate's fee? In our opinion there should be an order allowing costs or at least an order under Order XXI, rule 23 "ordering the decree to be executed" to enable the decree-holder to claim advocate's fee in execution.

4. So far as this case is concerned there is no order for execution of the decree. We may point out that the court could not order execution without complying with the requirements of law, contained in Section 82 of the Code of Civil Procedure, which provides as follows:

82. (1) Where in a suit by or against the Government, or by or against a public officer in respect of any such act as aforesaid, a decree is passed against the Union of India or a State or, as the case may be, the public officer, a time shall be specified in the decree within which it shall be satisfied; and if the decree is not satisfied within the time so specified, or within three months from the date of the decree, where no time is so specified, The Court shall report the case for orders of the State Government.

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

(3) The provisions of sub-sections (1) and (2) shall apply in relation to an order or award as they apply in relation to a decree, if the order or award -

(a) is passed or made against the Union of India or a State or a public officer in respect of any such act as aforesaid, whether by a court or by any other authority, and

(IV) is capable of being executed under the provisions of this Code or of any other law for the time being in force as if it were a decree.

5. It must have been to find out whether the decree had been satisfied that the court ordered on 25th March 1963 to ascertain whether the amount under the decree had been deposited. The court could not execute the decree until after the expiry of three months from the date of report to the State Government for orders. That stage was not reached here because the execution petition was not pressed. Thus there was no occasion for the court to pass an order for execution under Order XXI, rule 23, Code of Civil Procedure, or to make a direction for costs. Under these circumstances we feel that the execution court was not justified in holding that the decree-holders were entitled to advocate's fee in

respect of the sum claimed. The order of the court below must therefore be set aside. We therefore allow the appeal, set aside the order dated 23rd August 1963 and dismiss the prayer of the decree-holders for recovery "of advocate"s fee. We make it clear that what we have stated above applies only to the fee in respect of the sum deposited by the State on 26th March 1963. In the circumstances we do not make any order for costs in this appeal.