

(1941) 10 MAD CK 0038
In the Madras High Court

Sundarabalakadiresa Thevar and Others

APPELLANT

Vs

Avudai Ammal and Others

RESPONDENT

Date of Decision : 02-10-1941

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 11

Citation : AIR 1942 Mad 495 : (1942) 1 MLJ 542

Hon'ble Judges : Somayya, J

Bench : Division Bench

Judgement

Somayya, J.—The question for decision in this appeal is whether execution of the decree is barred by limitation. The execution application under consideration is E.P. No. 307 of 1938 filed on 30th July, 1938. The decree sought to be executed is a mortgage decree passed on the 31st July, 1926, in O.S. No. 55 of 1924, on the file of the District Munsif's Court, Sattur. There were several execution applications in between and the question is whether the present execution application is not saved by the previous applications.

2. The first application for execution was filed on the 1st of July, 1927, and it was returned for production of sale papers. This application was not re-presented with the sale papers within the time given but it was presented along with the next execution application filed on the 23rd June, 1930. This time also the sale papers were not filed with the execution petition but on the undertaking that they will be filed later, the execution application was numbered as E.P. No. 362 of 1930. There were a number of defendants, some were reported to be dead, the twelfth defendant was reported to have died two years-prior, the twenty-first defendant was also dead and some other defendants were not served including the ninth defendant who was away at Rangoon. Evidently owing to the trouble in service, the petition was not pressed and it was accordingly dismissed on the 22nd July, 1930. There was also a decision of the Madras High Court which held the field at that time that where some of the parties die after an execution petition is filed, that petition could not be proceeded with and that a fresh

execution petition should be filed, *M.P.P.S.T. Palaniappa Chettiar and Others Vs. Valliammai Achi*, Though the case related to the death of the decree-holder, the body of the judgment shows that the decision applies to the case of a judgment - debtor as well.

3. The next application was filed on the 6th of June, 1933, without the sale papers; and on that ground the E.P. was returned on the 28th June, 1933. This execution petition was not re-presented within the time fixed but was presented along with the next application filed on the 22nd June, 1936. This application was taken on file and numbered as E.P. No. 1 of 1937. The petitioner (decree-holder) died about 23rd November, 1937, and then it was adjourned on the 27th of November to the 4th December, 1937 on the ground that the decree-holder had died. On the 4th December, the order was:

Petitioner's pleader states that the petition is not pressed. Dismissed.

It must be noticed that the petitioner was already dead; that fact had been brought to the notice of the Court and the petitioner's pleader had no locus standi to make any representation particularly that the petition was not then pressed. The obvious duty of the Court was to wait and see whether any one would come on record to continue the E.P. as the legal representative. By this time the decision of the Full Bench of the Madras High Court had held in *Venkatachalam Chetti v. Bamaswami Servai* (1931) 62 M.L.J. 1: ILR Mad. 352 that where a party dies pending an execution application the same might be continued by or against the legal representative and the earlier decision was overruled. The E.P. No. 1 of 1937, was dismissed as not pressed on the 4th December, 1937. The present execution application (E.P. No. 306 of 1938) was thereafter filed by the legal representative of the decree-holder and it has been held by the lower Courts to be barred by limitation on the ground that an order returning an execution petition is not a final order within Article 182, Clause (5) of Schedule II of the Limitation Act. The third column of Article 182, Clause (5), as amended in 1928, runs thus:

(Where the application next hereinafter mentioned has been made), the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree or order.

The lower appellate Court held following the decision in *R.T. Kesavuloo Vs. The Official Receiver and Another*, that the expression "final order" used in the amended Article did not include an order returning an execution petition, that the petitions of 1927 and 1933, were not available for saving limitation and that the later execution petitions are therefore barred by limitation.

4. Mr. Ramabhadra Aiyar, the learned advocate for the appellant urges that the decision in *R.T. Kesavuloo Vs. The Official Receiver and Another*, and those following it do not apply to cases where the execution petitions complied with all the requirements of Order 21, Rules 11 to 14, Civil Procedure Code. He urges

that the sale papers need not be filed with the execution petition, that the orders returning the execution petition on the ground that the sale papers were not filed are illegal and that in such cases the execution petitions improperly returned must be deemed to be still pending or at any rate that they were dismissed when the next execution petitions along with which they were re-presented were dismissed. He also says that the expression "final order" means the last order in point of time and that the order of return saves limitation even under the amended Article. Prior to the amendment, Article 182, Clause (4), which corresponds to the present Clause (5) ran thus:

(Where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of "execution of the decree or order.

In some cases the execution petition was dismissed after being kept pending for several years. In such cases the starting point being the date of the previous application, great hardship was being caused. In *Abdul Kader Rowther v. Krishnan Malaval Nair* (1913) 26 M.L.J. 433 : ILR Mad. 695 Sadasiva Aiyar and Spencer, JJ., pointed out the hardship caused to the decree-holders in fixing the date of applying as the starting point. * The amendment was made in 1927 and the expression "the date of the final order passed on an application" was substituted for the expression, "the date of applying in accordance with law". This has given rise to a fresh controversy whether the expression "final order" means "the last order in point of time" or "the order putting an end to the execution petition". There is a conflict of opinion in this Court on this question. Before proceeding to this point, it is better to advert to the facts of this case.

5. It is common ground that all the execution applications gave all the particulars that are required by Order 21, Rules 11 to 14, Civil Procedure Code. The defect in the first execution application was that the sale papers were not filed. As pointed out by the decision of this Court in *Natesa Pillai v. Ganapathia Pillai* (1916) 32 M.L.J. 621: ILR Mad 949 the Code does not make it incumbent upon a decree-holder to furnish the sale papers along with the execution application itself. The duty of the Court is to see whether all the requirements of Order 21, Rules 11 to 14, are complied with. If they are complied with then the execution application ought to be taken on file and the sale papers should then be called for as also any other information that the Court may think it necessary in order to enable it to proceed with the execution. The order of the District Munsif returning the first execution application is clearly illegal and was not justified by the facts. The execution application ought to have been given a number, kept on file as was done with later applications and then the application should have been dismissed on the ground that the necessary papers called for were not produced.

6. The second application was filed on the 23rd of June, 1930 without the sale papers as was the case with the first execution application. But this time either the office or the pleader seems to have lighted upon the decision of this Court in

Natesa Pillai V. Ganapathia Pillai (1916) 32 M.L.J. 621 : ILR Mad. 949 just referred to as there is a note "40 Mad. 949", in pencil on the execution application. This application was taken on file and numbered as E.P. No. 362 of 1930. As I said before, there were a number of defendants; one had gone to Rangoon, two were dead and others were not served as they were away in different villages and after several adjournments, it was not pressed and it was therefore dismissed on the 22nd July, 1930. The third application was filed on the 6th of June, 1933. There was no defect in this application so far as the particulars required under Order 21, Rules 11 to 14 go; but, as before, the sale papers were not filed. The Court which on the occasion of the second application took it on file gave a number and retained it on the authority of Natesa Pillai v. Ganapathia Pillai (1916) 32 M.L.J. 621 : ILR Mad. 949 this time overlooked that decision and did not perform its duty of taking it on file but returned it for sale papers. The only ground upon which it was returned is "sale papers not produced. Returned. Time two weeks". Again, "Returned. Time two weeks". The remarks that I made with respect to the first E. P. apply to this; more so as the proper procedure was followed at the time of the second execution petition; why the same procedure was not followed at the time of the third application is not clear. It only shows the loose practice prevailing in the mofussil Courts as regards the execution applications a practice which has often been condemned by this Court. Execution applications are as important as the suits themselves and irreparable harm may often be done by the Courts not bestowing that amount of care and caution which they are bound to bring to bear on the disposal of the execution applications. This case is a very good illustration of the harm that is done by the Courts not doing their duty in the case of execution applications. If the first and the third execution applications had been taken on file, numbered and retained on file as they ought to have been, the only order that could have been passed was one dismissing them for non-compliance with this or that requisite of the Court. If that had been done, there would have been no room for argument. Instead of that they were returned and returned without any justification and in spite of the fact that time and again this Court has pointed out that in the case of non-production of sale papers, the execution application ought not to be returned but kept on file. The fourth application which was made on the 22nd of June, 1936 was, as I said, ultimately taken on file as E.P. No. 1 of 1937. Between the date of the presentation on the 22nd of June and January, 1937, when it was given a number, the matter underwent a number of adjournments. The Court asked the pleader how it was not barred. Then the matter was argued and reliance was placed upon certain decisions of this Court and ultimately after hearing the advocate!, the Court ordered it to be filed subject to the question of limitation being raised by the respondents. As said already, the decree-holder died in November, 1937, and thereafter the pleader whose authority had ceased with the death of his client seems to have mentioned that the petition was not then pressed. This again shows that proper care is not taken in the disposal of execution petitions. The Court had no jurisdiction to pass any order on the 4th of December, dismissing the execution application. The

petitioner was dead and the application ought to have been kept on file awaiting for any legal representative to continue it. The next application is the present one.

7. Taking E.P. No. 1 of 1937, filed on the 22nd June, 1936, the decree-holder has to show how it is within time. He relies upon the previous application which was filed on the 6th June, 1933, but which was returned on the 28th June, for no other reason than that the sale papers were not filed. This is an illegal order which ought never to have been passed. There was no defect in that execution application. It ought to have been taken on file and then dismissed if the sale papers were not filed after a sufficient time was given to the decree-holder. It is surprising that the Court returned the execution applications for want of sale papers in spite of the fact that in the Civil Rules of Practice there is a long note bringing it to the notice of the executing Courts that it is their duty to take the execution applications which are otherwise in order on file and give sufficient time having regard to the distance of the registration offices and other circumstances to enable the decree-holder to produce the encumbrance certificate and other sale papers. Chapter IX, Part VI applies to sale of attached property. Then Part VII gives general rules about sale of property under order of Court. The decree in this case being a mortgage decree, the sale of property is directed by the decree itself. In such cases, Rule 195, provides that where the immovable property exceeds Rs. 100, in value, an encumbrance certificate should be filed. There is a note to this rule setting out in extenso the High Court's Dis. No. 1247 of 1922:

There is nothing in the rules which requires the production of the encumbrance certificate along with the execution application. The sale proclamation is settled some days after the application and it was also open to the party to file it before the date fixed for settling the proclamation. The Subordinate Courts are, therefore, requested to fix the date for settling the sale proclamation with due regard to the time which will be required to produce the encumbrance certificate, the distance of the registration office and other circumstances... The Subordinate Courts are, therefore, requested to see to the strict observance) of the instructions issued above with regard to the fixing of the date of the sale proclamation.

8. The difficulties that confront a decree-holder by the Court's not following these instructions are best illustrated in this case. I do not see why the parties should be penalised for the Court not doing its duty and I must take it that the third execution application must be treated as either pending even now or that with the disposal of the next application, this was also disposed of. Similarly, with respect to the first execution application, the papers ought not to have been returned. The execution application ought to have been taken on file and retained on file and appropriate orders passed. Later on I am, therefore, of opinion that in this case the execution petitions filed on the 1st July, 1927 and on 6th June, 1933, must be taken to have been illegally dismissed and therefore

treated either as pending or as disposed of along with the next application with which they were re-presented. In this view, the first application must have been treated as having been disposed of by the order of Court on the 22nd July, 1930, when the next application was dismissed and that the third application should be taken to have been dismissed when the next application was dismissed on 4th December, 1937. In this view, the present execution application is within time and not barred.

9. In *Chidambaram v. Murugesam* ILR (1940) Mad. 60 Stodart, J., observed thus:

There are in my opinion only three ways of dealing with an application for the execution of a decree, and these are unambiguously denned in Order 21, Rule 17, of the Civil Procedure Code. If the application conforms to the requirements of Rules 11 to 14, it must be admitted which means that it receives a serial number in the execution petition register and comes on in the usual course in open .Court for the orders of the Judge. In such a case there will be a final order which will effectively dispose of the matters raised in the application. Secondly, if the application does not comply with the requirements of Rules 11 to 14, it may be forthwith rejected. Thirdly, and this is the case now under consideration, if the application does not comply with the provisions of Rules 11 to 14, the Judge, instead of rejecting it forthwith, may allow the defect to be remedied and if necessary may grant time to enable the applicant to do this.

10. The present case falls within the first of the three alternatives. In all cases where the requirements of Order 21, Rules 11 to 14 were fulfilled, the obvious course pointed out by Stodart, J., ought to be followed and if it was not followed and an order of return was made, then it must be taken that it is an absolutely illegal order and that when the papers were later on put back into Court, it must be taken that it was still pending without a proper disposal as held by Abdur Rahman, J., in *Krishnamachari Vs. Chengalraya Naidu*, The learned Judge held that where an execution application which complied with the necessary requirements of law is: improperly returned, the order of return is illegal and the execution application should be taken to be pending even though it had been returned to the party and was not physically in the records of the Courts. The matter there arose in restitution proceedings and applications for restitution are treated by the Madras High Court as applications for execution so that successive restitution applications are governed by the rules which relate to execution applications. The order for restitution which was being executed was one passed in 1924. The first application was on 13th November, 1925. It was returned to the party on 18th November, 1925. This application was later on re-presented as an annexure with the next execution application; Dealing with this question, the learned Judge says this on page 473:

This brings me to the main question whether the application of the 13th November, 1925, should still be deemed to be pending as no final orders required by Article 182(5) of the Indian. Limitation Act were passed on that application. This would depend on. the effect of the order passed by the Court returning the

application to the defendant-appellant in consequence of the interim stay being then in force. This was clearly a wrong order and it "is therefore contended that the application should still be deemed to be undisposed of and thus held to be pending. The learned Counsel for the appellant has relied on a number of cases which lay down that in order to entitle a petitioner to treat an application as in continuation or one for revival of a previous application it should be found that the order dismissing the first application, was wrong or that the first application was not properly disposed of...The principle on which these cases were decided is beyond controversy; but they have been attempted to be distinguished by the learned Counsel for the respondent on the ground that the orders passed on the applications were not only illegal but the applications were physically in Court. He contends that when the applications had been returned to the appellant either improperly in 1925 or when the application returned for compliance with certain requirements in 1928 was not re-presented by him within a reasonable time it must be considered to be non est in the eye of the law and cannot be taken advantage of by the appellant after the lapse of about 9 years. The contention is undoubtedly plausible but is there any warrant in law for me to give effect to it when I find that the Court was not justified in returning the application to appellant on the ground that an interim order for stay had been passed by it two days before? The application should have been retained in Court and any legal order that the executing Court might have considered to be proper and which it was competent to give should have been passed thereon In the absence of any legal, or proper order I am constrained to come to the conclusion that the application although not physically in Court must be yet treated to be pending and undisposed of.

This decision applies word for word to the present case. In the case before me the first and third execution applications should not have been returned. There was no defect which entitled the Court to return the papers. They ought to have been kept on file and numbered as execution applications and then further orders should have been passed dismissing them if the requirements of the Court were not complied with. In the words of this judgment, as it is, no final order was passed on the two execution applications just mentioned. In the case before the learned Judge, nine years elapsed between the date of the return and the application that came up before him which was filed in 1934. Being pressed with this long delay, the learned Judge held that that did not make any difference. Dealing with this contention the learned Judge says this on page 475:

Moreover, the objection as to laches or delay, based as it is on the equitable doctrine of English Courts cannot be allowed to prevail when the legal rights of a party to a proceeding come up before the Court for determination. It might have been different if the appellant were asking for an equitable relief. He is asking for a legal relief in this case and the only question is whether this is barred by the statute of limitation. There is thus no room in such cases for the application of any equitable defence such as suggested by the learned Counsel for the respondent. In the circumstances the application made by the appellant in 1925

must be held not to have been disposed of and the application made in 1934 may be regarded either in the nature of a reminder or as one for continuance there of.

The view that in such cases, the execution application which was returned and later on re-presented must be taken to be still on file and not disposed of was laid down by Madhavan Nair, J., in *Muhammad Abu Bakkar Maracair v. Ramakrishna Chettiar* (1932) 64 M.L.J. 401.

11. It is urged by the respondents' learned advocate that the matter is concluded in his favour by certain decisions of this Court. Before making a detailed reference to these cases, it may be mentioned that in all these cases, the execution applications did not fulfil the requirements of Order 21, Rules 11 to 14. Therefore, they were rightly returned, and the Court could not have taken them on file and entered them in the execution register. When these applications which were directed to be re-presented within a particular time were not re-presented within that time and were . re-presented only with the next application filed some years after, it was held that these applications would not save limitation. Under the Limitation Act as amended in the year 1928, the starting point is not the date of the filing of the Last E.P., but the final order on that execution application. The question considered in the decisions relied on for the respondents was whether an order returning an execution application was a final order within the meaning of Article 182(5) of Schedule II of the Limitation Act. There again, there is a sharp difference of opinion, one view being that the expression "final order" means the last order as opposed to a previous order and the other view being that the expression "final order" means an order putting an end to the execution application and not one merely returning it. That the expression "final" refers merely to the last in point of time is the view propounded by Pandrang Row, J., in *Mottaya Padayachi v. Rajagopalan* (1936) M.W.N. 547. He adhered to that view when the same question came before him sitting with Venkataramana Rao, J., in *P.P.P. Chidambara Nadar Vs. C.P.A. Rama Nadar (deceased) Pichaimani alias Arunachalam by guardian Thillai Ammal as L.R. of the deceased and Others*,

12. Execution applications in some cases were kept pending for a long time and then dismissed; the next application for execution would be barred if time is reckoned from the date of the filing of the previous execution application and not from the date of the order on that execution application. To remedy this defect, the Legislature amended the Article by introducing the expression "the final order". This gave rise to the present trouble, one set of Judges holding that the term "final order " means the last order on the previous execution petition and the other view being that it must be an order, disposing of the E.P., finally and that it does not include a mere order of return. The chief reason that prevailed with the Judges who took the second view was that if the expression "final order" is taken to be the last order in point of time, it would enable decree-holders merely to prolong the execution by filing frivolous applications and that

therefore-"when the applications were returned, the order returning the E. P., ought not to be taken to be a final order within the meaning of Clause (5) of Article 182. If only the decree-holder re-presents the execution application and asks that the Court should dismiss it in view of the defects noticed by it, the Court is bound to dismiss it and, undoubtedly, even according to these decisions, the next execution application will be within time and the order will be the final order. This was the ground on which Venkataramana Rao, J., sitting with Pandrang Row, J. distinguished the case before them. In that case, there was a reference to a Full Bench on another point and after the Full Bench expressed its opinion that a civil revision petition is also an appeal within the meaning of Article 182(2), the case came on before Pandrang Row and Venkataramana Rao, JJ. There the High Court dismissed the civil revision petition on 3rd November, 1927, and the application which came for consideration before the High Court was one presented on the 16th November, 1932. In between there was an application filed on the 24th June, 1929. That application did not give certain particulars but it was held that the omission to give those particulars did not make the execution application one not in accordance with law. Treating it as an application in accordance with law the question to be considered was whether it saved time under Article 182(5) as amended. In that case, the executing Court had dismissed the application on the ground that certain requirements were not complied with. Therefore Venkataramana Rao, J., held that where the Court actually rejected the application for the reason that the requirements were not complied with, there was a final order even if we take it that the expression "final order" meant an order terminating the proceeding and not merely the one last in point of time. Pandrang Row, J., expressed the view that he adhered to the opinion that he had expressed in the earlier case, *Mottaya Padayachi v. Rajagopalan* (1936) M.W.N. 547. With respect I may point out that if only the execution application had been re-presented without complying with the requisitions and the Court dismissed it as it would be bound to, the execution could be kept alive by frivolous applications. In fact in *Venkateswara Rao v. Subba Rao* C.M.A. No. 435 of 1939 (unreported), the execution application was ordered to be returned but the decree-holder never took a return of the papers. At the end of the year, the application was dismissed as the papers had not been taken return of. It was held that that order would be a final order as one terminating the execution proceedings. In *Kandasami Chettiar and Another Vs. Gokuldas Madanji and Co. and Bombay care of Mathridas Gokuldas (deceased) and Others*, a decree had been transferred for execution to the Bombay High Court and while the papers were still in that Court another execution petition was filed in the original Court. That Court passed the following order

Copy of the decree has not been received from the High Court, Bombay,-- returned.

Within three years after this order, a fresh execution application was filed and the question was whether the order just set out was a final order within the meaning of Article 182(5). King, J., who delivered the leading judgment held that it was a

final order and said this on page 839:

No doubt in most cases when an application of this kind is returned to the applicant, it is returned for the definite purpose of remedying some defect and of being re-presented within a brief interval of time. In the present case, the Court has not stated that it required any action to be done by the applicant. It has merely used the word "returned" after explaining the reason why the application was returned. We think the only interpretation that can reasonably be given to this language is that the Court had decided that it would have nothing further to do with the application, and if that interpretation is correct, the order of the 27th of February cannot be other than a final order within the meaning of any of the rulings of the Madras High Court which deal with the interpretation of that expression

This only shows that even on the view that the expression "final order" means an order terminating the execution application, frivolous applications can be filed if the decree-holder chooses to insist upon the Court dismissing them. He has only to re-present the papers without complying with the requirements and the Court would then be bound to dismiss the applications. Why if in such a case the execution is kept alive by an order of dismissal passed when the requirements were not complied with, the same result should not follow when the execution application was taken return of and not re-presented I fail to see. There is no difference in substance. It is only a difference in form. The whole difficulty arises because successive execution applications are allowed by the Legislature prescribing a starting point for each successive application and giving a period of twelve years for the execution of mofussil decrees and prescribing no limit at all for re-execution of decrees of the Chartered High Courts. The remedy does not therefore consist in treating the expression "final order" as one terminating the execution application and not one passed last in point of time.

13. Another reason given is that the term "final order" used by the Legislature in Clause (2) of Article 182, has been held to exclude orders passed for default of prosecution and that therefore the term "final order" in Article 182(5) must be similarly construed. Reference is made to the decisions of the Judicial Committee in AIR 1914 65 (Privy Council) *Abdul Majid v. Jawahir Lal* (1914) 27 M.L.J. 17 : ILR 36 All. 350 (PC). *Venkatasubba Rao, J., in R.T. Kesavuloo Vs. The Official Receiver and Another, and Burn, J., in Chidambaram v. Murugesam* ILR (1940) Mad. 60 rely on these decisions of the Judicial Committee. If this is so, the matter of the suit must be judicially dealt with and a mere order of dismissal for non-prosecution is not a "final order". That means that the order must be one on the merits of the case.

14. But an order dismissing an execution petition for non-prosecution is undoubtedly held to be a final order for purposes of Article 182(5). This is recognised to be so by *Venkatasubba Rao and Cornish, JJ., in R.T. Kesavuloo Vs. The Official Receiver and Another*, where reference is made to the decision in *Kadiresan v. Mating San*. Ya AIR 1933 Bang. 87 which held that an order merely

" "closing the execution"" was a final order. Venkataramana Rao J., points out in P.P.P. Chidambara Nadar Vs. C.P.A. Rama Nadar (deceased) Pichaimani alias Arunachalam by guardian Thillai Ammal as L.R. of the deceased and Others, that an order dismissing an execution petition would be a final order even though the order did not deal with the merits. On pages 632 and 633, he says:

In my opinion an order would be a final order within the meaning- of the clause if it terminates the execution proceeding so far as the Court passing it is concerned. The order, need not be one on the merits.

Pandrang Row, J., says on page 636:

In innumerable cases execution petitions are dismissed or struck off either for default or for failure to take steps, and it has never been contended that there is in such cases no final order which alone will provide a fresh starting point for limitation.

Reference to and reliance placed upon the decisions dealing with the expression "final order" as used in Article 182(2) would prove too much and this aspect has apparently escaped the attention of the learned Judges who have taken the contrary view. That the same word may be used by the Legislature in different parts of the same Act in different senses is recognised by the Full Bench in P.P.P. Chidambara Nadar Vs. C.P.A. Rama Nadar (deceased) Pichaimani alias Arunachalam by guardian Thillai Ammal as L.R. of the deceased and Others, . This is what they say:

The only serious objection urged against this view is, that in one and the same Act the same word ought not to be construed in two different senses and that, as the word "appeal" has a narrower meaning in Articles 150 to 157, it would be wrong to give it an extended sense in Article 182. But as a canon of construction, though ordinarily the same meaning should be given to the same words occurring in different parts of the same Act, it is recognised that if sufficient reasons exist, a word can be construed in one part of an Act in a different sense from that it bears in another part.

In the cases before the Judicial Committee, the appeal was dismissed for want of prosecution and it was held that that order would not be a final order within the meaning of Article 182(2). If we apply the same reasoning to an execution application, it will lead to this result that where an execution application which is dismissed--say for non-payment of batta which is non-prosecution--the order will not be a final order but undoubtedly orders of dismissal for non-prosecution are final orders. If we construe the expression "final order" as one dealing with the merits of the case, the decision of Pandrang Row and Venkataramana Rao, JJ., in P.P.P. Chidambara Nadar Vs. C.P.A. Rama Nadar (deceased) Pichaimani alias Arunachalam by guardian Thillai Ammal as L.R. of the deceased and Others, the decision of Pandrang Row and King, JJ., in Kandasami Chettiar and Another Vs. Gokuldas Madanji and Co. and Bombay case of Mathridas Gokuldas (deceased) and Others, and the decision in Venkateswara Rao v. Subba Rao C.M.A. No. 435

of 1939 (unreported) would all be wrongly decided.

15. All these considerations will have to be borne in mind and the whole question considered when the question directly arises for decision. In the present case, as the execution application fulfilled all the requirements of law as laid-down under Order 21, Rules 11 to 14, the order returning the execution application was wholly illegal and this case is therefore distinguishable from the decisions in *R.T. Kesavuloo Vs. The Official Receiver and Another*, and *Chidambaram v. Murugesam* ILR (1940) Mad. 60 I hold, therefore, that the execution application is not barred. It does not matter whether I direct the first application of 1927 to be taken on file as undisposed of and further orders passed on it or whether further execution is proceeded with on the application of 1938.

16. The appeal is allowed with costs throughout and the execution petition remanded to the first Court to proceed with further execution.

17. No leave.