
(1926) 11 MAD CK 0064
In the Madras High Court

Sundararaiulu naidu

APPELLANT

Vs

Narayanaswami Naidu and Another

RESPONDENT

Date of Decision : 18-11-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 48 Rule 1

Citation : 103 Ind. Cas. 825

Hon'ble Judges : Srinivasa Iyengar, J

Bench : Single Bench

Judgement

Srinivasa Iyengar, J.—On this civil revision petition the decree-holder has applied to this Court to revise the order of the Small Cause Judge of Kumbakonam dismissing the decree-holder's petition for execution on the ground that it was barred by the law of limitation.

2. It has been argued by the learned Vakil for the petitioner that there had been an execution application before the present one namely, E.P. No. 4095 of 1924 and that thereon after service of notice on the judgment-debtors an order was made by the Court directing execution of the decree. No doubt, when an application is made for execution of the decree and notice of the application is served on the judgment debtors, they are bound to appear if for any reason they should regard themselves as entitled to contend that the decree of which execution is sought is not there or then executable. The executability of the decree being one of the matters to be considered by the Court, the judgment-debtors were bound to appear and show cause why execution should not be ordered if they had any cause to show. If they fail to appear and show cause, and if on such failure an order ex parte should be made by the Court directing execution, then the question of the executability of the decree should according to the law of constructive res judicata be regarded as, having been decided by the Court in favour of the decree holder on the general principle that an opportunity having been afforded to the judgment-debtors to show cause against it they failed to show cause and that any ground that they might have or should have

taken with regard to the executability of the decree having been failed to be taken by them should be deemed to have been decided against them. Mr. Jayarama Iyer for the respondents has attempted to raise the question whether the rule of constructive res judicata in such a case could be resorted to when the parties are not personally served. To hold that in cases where parties are not personally served, the rule would not be available would be to give a premium to parties seeking to evade service of proper processes of the Court. All that is necessary under the law is that they should be properly served, served according to the rules relating to service. Under Rule 1 of Order XLVIII, Civil Procedure Code, generally all notices and processes under the Code are required to be served in the same manner in which summonses in suits have been directed to be served, that is, by personal service, if possible, and if, that should be found not feasible, in any of the other ways indicated in the rules relating thereto. Then Order V, Rule 19 provides as follows. Where a summons is returned under Rule 17, that Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit." This order distinctly provides for the Court declaring such service as has been effected to be good if it should be of the opinion that the service was sufficient and proper. No doubt the rule further proceeds and requires that in the event of the Court holding the service insufficient it should order such service as it sees fit. It has been argued by the learned Vakil for the petitioner that the fact in this case that the Court proceeded after referring to the absence of the judgment debtors to order execution must be regarded as implied by including a declaration to the effect that the service was sufficient and proper. I am unable to accede to that contention. I am not sorry for, my being unable to accede to the contention especially having regard to the unfortunate practice that has grown up at any rate in this Presidency of not paying sufficient attention to the service of processes. When the law requires that the Court should declare the proper service of a notice of processes, the mere omission to make such a declaration is not, in my opinion, a mere irregularity. Whatever it may be in ordinary cases, I am satisfied that when the rule that is sought to be invoked is the rule of constructive res judicata, the rules relating to proper service of notices cannot be too strictly adhered to. In the present Case, on this execution application, namely, E.P. No. 4095 of 1924, all that the learned Judge has said is this "Absent. Arrest defendant No. 2 25th November 1924;" which means I take it that the person should be arrested and produced before the Court on or before that date. No doubt there is an office note before this order of the Judge as follows:--"Defendants affixed 7th November 1924 as defendant No. 1 gone out, driving out, his wife said":-- Thereia, therefore, in my view no declaration by the Court of the sufficiency of service of notice within the meaning of Rule 19 of Order V Civil Procedure Code. Mr. Jayarama Iyer in this connection referred to the case of Vellayappa Chetty v.

Veerappa Chetty 22 Ind. Cas. 498 : 1 L.W. 1 : (1914) M.W.N. 79. There the learned Judges Sadasiva Iyer and Tyabji, JJ. held that in a case in which the Subordinate Judge noted as follows:--"Defendant Nos. 1, 2, 5 and 6 absent ex parte" the Subordinate Judge was legally justified in making such a declaration taking the words written by the Subordinate Judge to amount to such a declaration. For my part it seems to me that when the law requires the Court to make a formal declaration about the propriety of the service it requires the Court pronounce upon such propriety in a judicial manner and it is obvious that the sufficiency or otherwise of the service required to be decided on by the Court should not be left merely to the office. I hold, therefore, that such a formal declaration of the propriety of service is really necessary at any rate in all cases in which on the basis of such proper service the rule of constructive res judicata is sought to be availed of There is no such declaration in this case by the learned Judge. It follows from this that the order that was made directing examination on the execution petition of the 8th October, namely, E.P. No. 4095 of 1921 was not an order with regard to which the respondents judgment-debtors had really an opportunity to show cause against the executability of the decree.

3. The decision on this point is sufficient to dispose of the petition. In that view it is not necessary to decide the further question that has been raised and argued on behalf of the petitioner that with respect to applications for execution the provisions of IX do not apply. The decisions with regard to that matter are conflicting both in this Court and elsewhere, and as a determination of that question is not necessary for the purpose of this case I" do not propose to say anything about it.

4. I may, however, before concluding observe that there is considerable force in the argument put forward by Mr. Jayarama Iyer on behalf of the respondents with regard to the probable fraud perpetrated by the petitioners for the purpose of escaping the bar by limitation. It is significant that after obtaining an order for arrest on the said execution petition they do not take any steps but that their Pleader reports to the Court that he does not require a warrant to be issued pursuant to the order for arrest. It is obvious that if the judgment-debtors had been arrested pursuant to any such order it would have been open to them to come to Court and point out to Court that they have been wrongfully arrested in execution of a decree which had become barred by the law of limitation. But if the order for arrest obtained by the decree-holders should be allowed to remain on the record and nothing more done in respect of that application, it was apparently foreseen and provided carefully that in respect of any fresh application for execution the plea of bar by limitation on the part of the judgment-debtors may be successfully avoided or met. The learned Subordinate Judge in para.8 of his judgment states as follows:--"With regard to the previous application. nor can it be said that the service by affixture of the notice was sufficient enough to estop them from questioning the plaintiff's right to execute the decree subsequently. In the affidavit filed by the plaintiff along with the above execution application, defendants have stated that the notice of execution

was not served upon them and the plaintiff had fraudulently arranged and obtained a false return of service with the object that the defendants should not become aware of the same. The plaintiff's subsequent conduct in asking the Court not to issue the arrest warrant also looks very suspicious." Though the finding is not as clear as could be wished, I certainly am inclined to regard that as a finding as near as may be by the Subordinate Judge to the effect that it was by a fraud practised by the decree-holders that the proceedings of the Court were got recorded by them with a view eventually to prevent the judgment-debtors from raising at any rate successfully the bar of limitation. I am not disposed to consider the inference arrived at by the learned Subordinate Judge as either far fetched or improbable.

5. The learned Subordinate Judge has also relied upon inherent powers of the Court for the purpose of treating as a nullity orders passed on the previous execution petition in the circumstances. Though I should myself be prepared to hold that there is always an inherent power in every Court to see that no fraud is allowed to be perpetrated and to prevent any miscarriage of justice seems to me, however, that the decision on this petition may be rested on the small and simple ground that there has been no proper declaration of service of notice of the previous application and that, therefore, the rule of constructive res judicata is not available to the petitioners. It is not contended before me that if that rule is not available the present petition for execution could in any other way be regarded as no bar by the law of limitation. I, therefore, hold that the conclusion arrived at by the lower Court was right.

6. This petition is, therefore, dismissed with costs.