
(1993) 04 KL CK 0028
In the High Court Of Kerala
Case No : C.R.P. No. 2324 of 1992

Swayamprabha

APPELLANT

Vs

Union Bank of India

RESPONDENT

Date of Decision : 05-04-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Evidence Act, 1872 — Section 103, 107, 108

Citation : (1993) 2 KLJ 488

Hon'ble Judges : P.K. Balasubramanyan, J

Bench : Single Bench

Advocate : K. Jagadisachandran Nair, for the Appellant; T.L. Ananthasivan, for the Respondent

Final Decision : Dismissed

Judgement

Balasubramanyan, J.—The Respondent-bank obtained a decree against a partnership firm which was Defendant No. 1 in the suit. The partners were impleaded as Defendants 2 to 6. Defendant No. 2 in the suit was shown as representing the first Defendant firm. Summons was served on the Defendants in the suit. It is the case of the revision Petitioners that the summons on the second Defendant was not served directly but was effected by substituted service by the trial Court. Whatever that be the suit that was filed on 14-10-1977 was decreed on 25-6-1978.

2. The Respondent bank initiated execution proceedings and it appears that some amounts were realised. On 10-7-1990 the wife and children of the second Defendant filed a petition for impleading them in the proceedings in execution on the allegation" that the second Defendant had not been heard of from 3-2-1977 and has hence to be presumed dead since 7 years have elapsed therefrom. The wife and children who are the Petitioners in this Civil Revision Petition wanted to get themselves impleaded as the legal representatives of Defendant No. 2. The executing court rejected that prayer. The wife and children of the second

Defendant filed C.R.R 2023 of 1990 before this Court. This Court set aside the order of the Court below and directed the executing court to implead the wife and children as additional Respondents in the Execution Petition. It is the additional Respondents as noted already who are the Petitioners in this Civil Revision Petition.

3. It appears that the revision Petitioners had produced certain documents in support of their application for impleading. It appears that they had also filed a list of witnesses. The Petitioners thereafter filed E.A. 641/1991 praying that they may be allowed to reserve their evidence. It appears that their case was that since they had asserted that the second Defendant was not heard of for seven years from 3-2-1977 the burden was on the decree holder to establish that the second Defendant was alive on the date of suit and that therefore they may be permitted to reserve their evidence until the decree holder had adduced evidence. This petition was rejected by the executing court by stating that the Petitioners are entitled to adduce evidence in accordance with the prescribed procedure and no question of reservation of their evidence until the decree holder's evidence is completed arises in the case. The Petitioners had come up with this revision petition.

4. As noticed the suit was filed by the Respondent bank on 14-10-1977 and it was decreed on 25-6-1978. The Petitioners herein have come up with an application on 10-7-1990 claiming that the original second Defendant was unheard of from 3-2-1977 and is hence to be presumed to be dead. Apparently the Petitioners are invoking the presumption contained in Section 108 of the Indian Evidence Act. Sections 107 and 108 deal with the burden of proving death of a person known to have been alive within thirty years and of proving that a person is alive who had not been heard of for seven years. It is the case of the Petitioners that once they have asserted that the second Defendant had not been heard of for seven years from 3-8-1977 the burden is on the decree holder to establish that the second Defendant was alive on the date of the suit namely on 14-10-1977. It is in that view that the revision Petitioners filed E.A. 641/1991 for an order that they need adduce evidence only after the decree holder had adduced evidence. The court below has not accorded to this submission made on behalf of the revision Petitioners and the question that arises for consideration is whether there is any error in the order of the executing court within the meaning of Section 115 of the CPC warranting interference with the order of the court below.

5. It is true that an executing court is entitled to enter a plea that the decree sought to be executed is a nullity. The jurisdiction of the executing court in that behalf has been laid down by the Supreme Court in *Sunder Dass Vs. Ram Prakash*, wherein it has been observed thus:

Now, the law is well settled that an executing court cannot go behind the decree nor can it question its legality or correctness. But there is one exception to this general rule and that is that where the decree sought to be executed is a nullity

for lack of inherent jurisdiction in the court passing it, its validity can be set up in an execution proceeding, Where there is lack of inherent jurisdiction, it goes to the root of the competence of the court to try the case and a decree which is a nullity is void and can be declared to be void by any court in which it is presented.

It has also been held that objection as to the validity of the decree can be looked into by the executing court if the objection appears on the face of the record. (See Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others,). It is for those who assert in the executing court that a decree sought to be executed is nullity to establish that fact. In this case, the decree does not show on its face that it is invalid. It is the claim of the Revision Petitioners that the decree is void because it was obtained against a person who was dead. Surely, it is for the Revision Petitioners to establish that fact. Unless that fact is established, the executing court cannot desist from executing the decree. The executing court is bound to execute the decree. It is therefore clear that in the executing court the burden is on the revision Petitioners to prove that the decree is a nullity and this they can do only by establishing that Defendant No. 2 was dead at the time of the institution of the suit There is no obligation on the decree holder to establish before the executing court that the decree he is seeking to execute which on the face of it is valid and is passed by a court of competent jurisdiction is not invalid. He is entitled to execute the decree as it stands.

6. This is case where a decree passed on 25-6-1978 is sought to be challenged by persons claiming to be the legal representatives of one of the judgment debtors by filing an application in the executing court for getting themselves impleaded and to raise a contention that the decree is a nullity since it was obtained against a dead person. The question is whether under such circumstances all that such persons need do is to assert that their predecessor-in-interest had not been heard of for seven years and whether that assertion by itself would impose a burden on the decree holder to establish that the Defendant against whom he sued was actually alive on the date of the suit. Even to raise this presumption u/s 108 of the Evidence Act, the revision Petitioners have to prove that Defendant No. 2 was not heard of for seven years. This is not a case where it is alleged that he had not been heard of for 7 years prior to the institution of the suit. This is a case where the revision Petitioners are asserting that Defendant No. 2 was not heard of only from a few months prior to the institution of the suit. Once they have established that fact, a presumption could be raised u/s 108 of the Evidence Act. What is the scope of that presumption?

7. The scope of the presumption u/s 108 of the Evidence Act has been pronounced upon by a Full Bench of this Court in the decision reported in Appula Vadhyar v. Venketeswara Vadhyar 1970 KLT 976 (FB) The headnote of the said decision reads:

Under Section 108 if a person has not been heard of for seven year by those who would naturally have heard of him if he had been alive the presumption is only that he is dead and there is no presumption as to the date of his death. That, like

any other fact, is a matter of proof. There is nothing in the language of Section 108 for the view that if the date of death is not proved by any of the parties the early date on which the death could be presumed is the date on which the suit was filed. The onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.

As noticed in Sarkar on Evidence, 13th Edn. page 977 "if a person is not heard of for seven years there is a presumption of the fact of death at the expiration of seven years, but the exact time of death is not a matter of presumption but of evidence and the onus of proving that death took place at any particular time within the seven years lies upon the person who claims a right to establishment of which that fact is essential. There is no presumption that death took place at the close of seven years." It is to be noted that Section 108 of the Evidence Act contemplates the case of a person not having been heard of for seven years and places the burden of proving that he is alive on the person who asserts that he is alive. In the present case what the legal representatives are attempting to do is to contend that on the date the suit was filed namely on 14-10-1977 the second Defendant was in fact dead and therefore the decree against him is a nullity. It appears to me that it is squarely for the revision Petitioners to establish that the second Defendant was dead on 14-10-1977. It is not open to the revision Petitioners to contend that the second Defendant had not been heard of from 3-2-1977 and hence he must be presumed to be dead and then seek to shift the burden on the decree validly passed by the court and if they want to establish that the said decree is a nullity by virtue of the fact that one of the Defendants was dead at the time of the suit, the burden is squarely on them to establish that as on the date of suit the second Defendant was in fact dead. Since there is no presumption as to the date of death and the necessity of proving the date of death and claiming a right on that basis is of the revision Petitioners, it appears to me that it is for them to establish that Defendant No. 2 died on a date prior to 14-10-1977 the date on which the suit was filed or on a date prior to the passing of the decree they cannot resist the execution of the decree. Of course in this case since the decree was obtained against all the partners the question would arise as to whether the decree would be a nullity even if the contention of the revision Petitioners is accepted that the second Defendant one of the partners was not alive on the date of the suit.

8. The learned Counsel for the revision Petitioners places strong reliance on a Division Bench decision of this Court reported in Mary v. Zacharia & Co. Ltd. and Ors. 1967 KLJ 304 to contend that once it is asserted that the second Defendant had not been heard of for seven years and the presumption u/s 103 of the Evidence Act is attracted, then the burden is on those who assert that the second Defendant was alive to establish that fact. Firstly so long as there is no presumption as to the date of death as noticed by the Full Bench decision referred to earlier, no presumption arises that the second Defendant was not alive on the date of suit or on the date of decree. It is the revision Petitioners

who want to rely on the fact of death to contend that the decree already passed is one obtained against a dead person. The plea is being raised by them in the executing court. I have already pointed out that the executing court is bound to execute the decree unless it is established that the decree sought to be enforced is a nullity. If it is not so established, the executing court cannot desist from executing the decree. No doubt in the decision in 1967 KLJ 304 it is stated that in a case where the presumption u/s 108 of the Evidence Act is raised, it is for the decree holder to show that he had obtained the decree against a person who was alive. The duty of the executing court to execute the decree which on the face of it is valid is not adverted to in this decision. The principle has since been clarified by the Supreme Court in the decision reported in Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, . It also appears to me that in the light of the Full Bench decision, some of the observations contained in the decision reported in 1967 KLJ 304 cannot be fully accepted. It also appears to me that unless an executing court is fully satisfied that the decree validly passed by a court is not enforceable for the reason that it is void it cannot refuse to execute the decree and it is for those who assert that prima facie valid decree is void to establish positively that such decree is void. I am not therefore persuaded to accept the arguments of the revision petitioner that the court below was in error in directing them to proceed with the evidence and in not permitting them to reserve their evidence until the decree holder has adduced his evidence.

9. Reliance placed by the learned Counsel on the decision reported in Abdur Rehman v. Narayana Pillai 1957 KLT 251 and the decision reported in Vareed v. Sukumaran 1988 (1) KLT 45 does not advance the case of the revision Petitioners. As observed by John Mathew, J. in the latter decision, 1988 (1) KLT 45 "there is no presumption as to the time of his death and if anyone seeks to establish the precise period at which such person died, he must do so by actual evidence". It is revision Petitioners who are seeking to establish the right to avoid a decree in this case by holding out that the second Defendant was dead on 14-10-1977. It is for them to establish that fact if they want to avoid the decree validly passed by a court of competent jurisdiction. The burden of proof is clearly on the revision Petitioners in this case to establish the date of death of the second Defendant if they want to rely on it to avoid the enforcement of the decree.

10. The order under challenge is really one by which the executing court has not acceded to the prayer of the revision Petitioners for permission to adduce their evidence after the decree holder leads evidence to show that the decree is valid. I do not find anything illegal or outside jurisdiction in the order now passed by the court below warranting interference u/s 115 of the Code of Civil Procedure, I find no reason to interfere with the order of the court below.

The Civil Revision Petition is dismissed.