

(1927) 09 MAD CK 0049
In the Madras High Court

Tadinada Abdul Kharim Saheb

APPELLANT

Vs

Pulavarti Lakshmanaswami

RESPONDENT

Date of Decision : 01-09-1927

Acts Referred:

Citation : AIR 1928 Mad 440 : (1928) 27 LW 475

Hon'ble Judges : Wallace, J;Thiruvenkatachariar, J

Bench : Full Bench

Judgement

Wallace, J.—The question for disposal in this appeal is whether the execution petition dated 14th April 1923, was in accordance with law. When it was presented to the executing Court, the Court acting under Order 21, Rule 17(1) returned it for amendment, as various particulars required by Rule 11 had not been furnished. The petition was not returned amended within the time given, and when it was re-presented after the expiry of the time it was rejected as out of time. The lower Courts have held that, even though it was so rejected, nevertheless it was a petition in accordance with law, because the particulars which were omitted were not material such as would justify the executing Court in holding that the petition was not in accordance with law. The appellant contends that such a view is in direct contradiction of Sub-rule 2, Rule 17. He contends that the sub-rule must mean that, when the petition is returned, for want of particulars under R.11, and is not returned or is rejected as out of time, it was not originally in accordance with law, because it would be superfluous for the Code to say that after amendment within time it shall be deemed to have been an application in accordance with law, if even before it was returned it was in accordance with law, To my mind there is considerable force in this argument. Commentators on this Sub-rule 2, which was newly inserted by the Code of 1908, however, seem to agree that the one object of it was to give the amendment, a retrospective effect so as to make the petition in accordance with law, not from the date of the amendment but from its original date, having regard to the decision of the Calcutta High Court in Gopal Sah v. Janaki Koer [1896] 23 Cal. 217. But that view itself would support the appellant's

contention, since it implies that until it is amended the petition is not in accordance with law, so as to -enable that compliance with the law to be given retrospective effect.

2. It may be noted that the sub-rule by the use of the word "and" between " law " and " presented," is dealing with two different points; first it is declaring that the amendment has the effect" of making the original application one in accordance with law; and secondly it is declaring that the amendment shall have a retrospective effect as regards the date on which it has resulted in making the application one in accordance with law. All this seems to me to indicate that the legislature meant to convey that an application which is returned by the executing Court because of failure to comply with Rules 11 to 14 was, when it was first put in, not in accordance with law, and that it only becomes in accordance with law when it has been amended and returned in time. No doubt under the old Code, which contained Sub-rule 1, but not Sub-rule 2, it has been held that the applications were in accordance with law although they had been returned for amendment under Sub-rule 1. But the enactment of Sub-rule 2 appears to me to have been designed to alter that view and tighten up the procedure.

3. Authoritative rulings directly in point are few. One directly in point is Bhagwat Prashad Singh Vs. Dwarka Prashad Singh and Others, in which the view put forward by the appellant, is somewhat cautiously supported in some obiter remarks. As I have said, I am personally in favour of that view, since it is difficult to hold that an application which is regularized, and brought into accordance with law by an amendment was nevertheless in accordance with law before that amendment; nor does there seem to be any point in saying that after the amendment it shall be deemed to have been in accordance with law if before the amendment it was already in accordance with law. There is, however, one Bench ruling of this Court in Kamaskhi Ammal v. Pichu Ayyar [1916] 4 M.L.W. 103. The head-note is misleading, but the Bench does say with reference to Sub-rule 2 that they do not consider it was intended to affect the construction put upon the words "applying in accordance with law" in the Limitation Act by this Court, and by other High Courts in dealing with defects in form occurring in execution applications and they say the rule is merely an enabling one. I have perused the printed papers in this Law Weekly case A.A.A.O. 39 of 1915, and find that the Subordinate Judge in his judgment put forward substantially the view argued here by the appellant. So that view was before the Bench when it pronounced its judgment. This view has been followed by a single Judge in Lahore Lekhram v. Gurdial AIR 1925 Lah. 535. A case in Pitambar Jana Vs. Damodar Gachait and Others, is under the new Code, but the question now raised here was not discussed. On the whole, I think that, although my view is in favour of the appellant, it is better in these matters of procedure that the principle of stare decisis should prevail, and I would therefore follow the decision in Kamakshi Ammal v. Pichu Ayyar [1916] 4 M.L.W. 103."

4. The question will then be whether the defect was a material one. The ruling in *Raghunatha Thathachariar v. Venkatesa Tawker* [1903] 26 Mad. 101 deals with a defect which was considered material; but that is not the defect in the present case. The authorities in *Rama v. Varada* [1893] 16 Mad. 142 and *Ramayyan v. Kadir Bacha Saheb* [1908] 31 Mad. 68 are directly in point, and it must be held that the defects in this case were not material, and therefore do not avail to make the "application even in its original state one not in accordance with law.

5. It is hardly necessary to discuss the respondent's second argument, namely, that the application, even if not in accordance with law, is still a step-in-aid of execution, but I should not be prepared to uphold that view. An execution petition cannot be a step-in-aid of itself, and there was in this case no other execution matter pending on 14th April 1923 to which it could be a step-in-aid. However on the first point I would not be prepared to interfere with the decision of the lower Court and dismiss this appeal with costs.

Thiruvengkatachariar, J.

6. This appeal arises out of an application for the execution of the decree in O.S. 811 of 1918, on the file of the District Munsif's Court, Bhimavaram. The appellant is the defendant and judgment-debtor; and the respondent is the plaintiff and decree-holder. The question we have to determine is whether the Execution Petition 652 of 1923 which was presented on 4th September 1923, is barred by limitation under Article 182, Limitation Act. The decision of this question turns upon whether a prior application for execution of the decree which was presented to the Court on 14th April 1923, was an application in accordance with law within the meaning of Article 182. The judgment-debtor contended that the application last mentioned was not in accordance with law because it did not comply with the requirements of Order 21, Rule 11 (2). It was, therefore, returned by the Court for the defects pointed out being remedied. The decree-holder failed to remedy the defects within the time allowed by the Court and it was therefore rejected by the Court on 30th June 1923. The main contention on behalf of the appellant is that an application which is rejected by the Court for noncompliance with its order directing amendment of the application in order to remedy the defects found therein cannot be regarded as an application in accordance with law. In support of this contention reliance is placed on Rule 17 and Sub-rules 1 and 2 of Order 21. Sub-rule 1 says:

On receiving an application for the execution of a decree as provided by Rule 11, Sub-rule (2), the Court shall ascertain whether such of the requirements of Rules 11 to 14 as may be applicable to the case have been complied with.

7. If they have not been complied with the Court may reject the application or allow the defect to be remedied then and there or within a time fixed by it.

8. In the present case the application was returned on account of the following defects, namely, (1):

the dates of the previous execution petitions not noted; (2) execution costs not noted (3) date and place of verification not noted and (4) decree copy not filed.

9. The defects pointed out by the Court were remedied but the application was not re-presented to the Court within the time allowed by it. The Court declined to excuse the delay and rejected the application. Sub-rule 2 of Rule 17 says:

Where an application is amended under the provisions of Sub-rule (1) it shall be deemed to be an application in accordance with law and presented on the day when it was first presented.

10. It is argued from this as a necessary-inference that an application which is returned for amendment, but which is not amended within the time allowed by the Court and is therefore rejected, cannot be deemed to be an application in accordance with law. Sub-rule 2, Rule 17, is a new provision which was for the first time enacted in the present Civil Procedure. Code, Act 5 of 1908.

11. Prior to the enactment of this sub-rule the state of the law on the point was this: an application for the execution of a decree was held to be one in accordance with law where it substantially fulfilled the requirements of Section 235 of the old Code, which corresponds to Rule 11, Order 21, of the present Code. If the defect in the application related only to trivial or unimportant particulars, the application was nevertheless held to be one in accordance with law. But if the defect was in respect of any material particular and calculated to prejudice the Court or the judgment-debtor, the application was held to be not in accordance with law. A defective application may be returned for amendment and the Court may admit it if it is amended as directed by it and represented within the time allowed by it. (See Section 245 of the old Civil P.C.) If the defect in the application as presented was in a material particular and the application therefore was not a substantial compliance with the requirements of Section 235, the amendment no doubt cured the defect but the application was held to be in accordance with law only from the date of the amendment and had not the effect of validating the application from the date of its presentation. If the defect was trivial and such as could not mislead either the Court or the judgment-debtor the application was notwithstanding such defect, held to be one in accordance with law from the date of its presentation. The important change in the law introduced by Sub-rule (2), Rule 17 is to render an application for execution which is amended, as required by the Court and thereafter admitted, an application in accordance with law from the date of its original presentation even though it was then substantially defective and could not be treated as one in accordance with law. The effect of this provision so far as such an application is concerned is to preclude the judgment-debtor from raising any objection to it on the ground that it is not in accordance with law; it will not be open to him to contend that the application as amended is still defective in material particulars and is therefore not an application in accordance with law.

12. The expression "application in accordance with law" is borrowed from Article

182, Lim. Act. of 1877, and according to the settled principles of construction it should in the Code be interpreted in the same sense as it had been interpreted with reference to Article 182, Lira. Act. Under that article, the question will have to be considered with reference to each application for execution of the decree by the Court to which the same is presented. An order admitting an application for execution, without issuing notice to the judgment-debtor, being an ex-parte order will not preclude the judgment-debtor from contending that though admitted by the Court it was not in accordance with law; and very often the question has to be decided not in that application itself which for some reason or other may not have been proceeded with but in a later application when it is relied on as saving limitation. It seems to me that the object of the legislature in enacting in Sub-rule (2) of Rule 17 an application amended as required by the Court shall be deemed to be one in accordance with law is to preclude any question being raised by the judgment-debtor as to its validity at a later stage of the execution proceedings in the same case. Except to that extent, I do not think Sub-rule 2 was intended to or has the effect of altering the law as it stood at the time when it was enacted. In this view when an application for execution of the decree is returned for amendment on the ground that it does not comply with the requirement of Rule 11, Order 21, but the application is not amended and re-presented to the Court within "the time fixed by it, the question whether it was in accordance with law will depend upon whether, the defects were material or only trivial and such as could not mislead either the Court or the judgment-debtor. A mere noncompliance with the order of the Court directing amendment cannot in my opinion have the effect contended for on behalf of the appellant, as resulting by implication from Sub-rule 2, Rule 17, viz., that such application must be deemed to be not in accordance with law-

13. The question is also covered by authority. In *Kamakshi Ammal v. Pitchu Ayyar* [1916] 4 M.L.W. 103 the very same question was raised as to the effect of Sub-rule 2, Rule 17. The Subordinate Judge from whose order the appeal to this Court was preferred construed Sub-rule 2, Rule 17 in the same way as the appellant before us wants us to construe, and acting on that view he dismissed the application on the ground that the prior application which was relied on to save limitation was not in accordance with law. In overruling that view the learned Judges say as follows:

We do not consider that Order 21, Rule 17, Civil P.C. of 1908 was ? intended to affect the construction put upon the words "applying in accordance with law" in the Limitation Act by this Court and by other High Courts in dealing with defects in form occurring in execution applications. This rule is an enabling one which allows certain defective applications subsequently amended to be deemed applications in accordance with law with effect from the date of their first presentation.

14. The same view was taken by a Full Bench of the Calcutta High Court in *Gopal Chander Manna v. Gosain Das Kalay* [1898] 25 Cal. 594 and also by the Lahore

High Court in *Lekham v. Gurdial* AIR 1925 Lah. 535.

15. The appellant's contention, however,, receives some support from the case in *Bhagwat Prashad Singh Vs. Dwarka Prashad Singh and Others*, . In that case the application was found to be in conformity with Rules 11 to 14 of Order 21, but it was returned for some other reason, namely, for paying: additional Court-fees and supplying copy of the record-of-rights which the Court considered to be necessary and the order was not complied with. The learned: Chief Justice Sir Dawson Miller held that Rule 17 had no application to the case because the defects to be remedied were not in respect of any particulars required by Rules 11 to 14 but related to other matters. The learned Judge, however, proceeded to express his opinion as to the effect of an application not being amended as required by the Court under Rule 17, Sub-rule 1. He says:

It (sub-R. 2) further provides that where an application is amended under the provisions mentioned it shall be deemed to be an application in accordance with law and presented on the day when it was first presented. It may perhaps be inferred from this that where the application is returned on the ground that the requirements of the rule have not been complied with and is not amended within the time fixed it cannot be regarded as having been presented in accordance with law.

16. It will be seen that the observations of the learned Chief Justice as to the effect of Sub-rule 2 were not only obiter but they are also expressed in guarded language as he merely says: " It may perhaps be inferred." Following the decision of *Kamakshi Ammal v. Pitahu Ayyar* [1916] 4 M.L.W. 103 with which I respectfully agree, I am of opinion that the question whether the prior application for execution presented on 14th April 1923 was in accordance with law is not concluded by the order of the Court rejecting that application.

17. The next question, therefore, is whether the application of 14th April 1923, was defective in material respects or whether the defects therein were only trivial and such as were not calculated to mislead the Court or the opposite party. Of the four defects mentioned in the Subordinate Judge's order only one is pressed before us, viz. " previous execution petitions not noted." This is not an accurate statement of the endorsement made on the application by the District Munsif in returning the application. The endorsement is "the dates of the previous execution petitions are not noted." In that respect also the present case is similar to the case in *Kamakshi Ammal v. Pitchu Ayyar* [1916] 4 M.L.W. 103 where also the dates of the previous applications had not been correctly stated. The learned Judges overruling the Subordinate Judge held that those defects were not serious as regarded by the Sub-Judge and they were not calculated nor intended to mislead the Court, for, if the dates of the applications in 1907 and 1908 had been stated, the application would be within three years of the preceding and succeeding applications and therefore the defects would not be material.

18. In *Rama v. Varada* [1893] 16 Mad. 142 the previous application was

defective in omitting altogether to state the earlier of the two applications and its result, but the omission was not considered to be material. The same view was taken in *Srimati Saudamini Ghose Vs. The Jessore Registered Loan Company Limited*, . The defect in this case, which consists of the dates of the previous applications not being given, cannot be considered to be material or serious defect. If the application of 14th April 1923 was in accordance with law, it would furnish a fresh starting point for limitation even though it had been returned for amendment and subsequently either rejected or not represented at all: see *Kamakshi Ammal v. Pitchu Ayyar* [1916] 4 M.L.W. 103 and the cases cited therein.

19. The only other question argued before us is whether, even if the application of 14th April 1923 was not an application in accordance with law it was nevertheless an application in accordance with law to take a Step-in-aid of execution of the decree. This was the alternative ground on which the learned Subordinate Judge rested his decision and the respondents' vakil supports the order on that ground also. I am unable to accept this contention as correct. An application for the execution of a decree and an application to take a step-in aid of execution are both mentioned in the same clause, namely Clause 5 in Col. 3, Article 182, Lim. Act. If then an application for execution of the decree which is the initial step in the execution proceedings is not in accordance with law it is difficult to understand how the same application can nevertheless be held to be a valid application in accordance with law to take a step in aid of execution merely because in the prayer column the applicant prays for the issue of notice to the respondent under Order 21, Rule 22. Apart from a few exceptions, none of which touches the present case an application to take a step-in-aid of execution necessarily presupposes a pending application for execution and no application for execution of a decree can be held to be pending if the application is not admitted but rejected on the ground of non-compliance with the requirements of Rule 11: see *Kuppuswami Chetti v. Rajagopala Ayyar* AIR 1922 Mad. 79. If the application of 14th April 1923 was not an application for execution of the decree in accordance with law, I do not think it can be held to be an application in accordance with law to take a step-in-aid of execution of the decree. In the result this appeal fails and is dismissed with costs.