

(1970) 09 KAR CK 0010

In the Karnataka High Court

Case No : Ex. First Appeal No. 9 of 1967

The State Bank of Travancore

APPELLANT

Vs

M. Ramu Maheshwariah

RESPONDENT

Date of Decision : 21-09-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 48
Limitation Act, 1963 — Section 136

Citation : AIR 1971 Kar 113 : (1971) 1 MysLJ 4

Hon'ble Judges : E.S. Venkataramiah, J;C. Honniah, J

Bench : Division Bench

Advocate : R.V. Ravindra, for S.G. Sundaraswamy, for the Appellant; B. Gopalaiah, for the Respondent

Final Decision : Dismissed

Judgement

Honniah, J.—The question in this appeal is whether a decree obtained by the Decree-holder (Appellant) the State Bank of Travancore, has become barred by limitation.

2. For the purpose of resolving this question between the parties some facts relevant may be stated. The State Bank of Travancore obtained a decree against M. Ramu, the Respondent, in O. S. 96 of 1951 before the District Court, Trichur, for Rs. 37,077/50, with costs and current interest the date of the decree being 18-1-1952. The Decree-holder filed several execution petitions from 1953 upto 1963 and all of them were dismissed for one reason or the other. The last of the Execution Petitions was filed on 1-6-1964 for recovery of the decretal amount together with costs and current interest. This application was beyond 12 years from the date of the decree. The Judgment-debtor inter alia contended that the said petition was not maintainable and was barred by time. The previous execution petition, viz., Ex. 49 of 1962 before the District Judge, Bangalore was dismissed on 22-6-1963.

3. It was contended before the executing Court, on behalf of the Decree-holder

that the previous execution petition was dismissed for statistical purposes and the subsequent execution petition No. 43/1964 filed on 1-8-1964 was to revise the earlier execution petition, viz., Execution No. 49/1962. On behalf of the Respondent-judgment-debtor, it was contended that the execution petition No. 49/1962 was dismissed for default on the part of the Decree-holder and that being a judicial order and not a ministerial one it became a final order and the present execution petition, Ex. 43/1964 filed beyond 12 years after the date of the decree is hit by the provisions of Section 48 of the Code of Civil Procedure. The executing Court came to the conclusion that the execution petition 43/ 1964 was barred by time inasmuch as the earlier execution petition was not dismissed for statistical purposes. Aggrieved by this order the decree-holder has preferred this appeal.

4. The same contentions that were advanced before the executing Court are taken up in this appeal as well by both the parties. To appreciate the respective contentions of the parties it is necessary to extract the material portion of the order sheet in Ex. 49/ 1962 which is as follows:

" ** ** *

5-1-63: D. Hr. by Sri S. G. S. Fresh notice to J. Dr. issued for hearing 22-12-62 being absent served on house, (sworn). Service on house is sufficient and the third time J. Dr. has not appeared. Attach moveables 16-2-63.

Id/- 5/1

16-2 63: D. Hr. by Sri S. G. S., J. Dr. absent. Fee for attachment of moveables not paid. Issue if paid. 23/3.

Id/-. 16/2.

23-3-63: D. Hr. By Sri S. G. S., J. Dr. absent. Fee for attachment not paid. Call on 30/2.

Id/-. 23/3.

30-3-63: D. Hr. by Sri S. G. S., J. Dr. absent. Fee for attachment issue, if P. F. paid.

Id/-. 22/6 30/3

22-6-63: D. Hr. by Sri S. G. S., Fee for attachment not paid. Dismissed.

Id/-. 22/6."

5. Under Article 136 of the Limitation Act, 1963 which came into force on 1-1-1964, the time for execution of any decree is prescribed as follows :

"Description of application:

136. For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.

Period of limitation:

Twelve years.

Time from which period begins to run:

Where the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought takes place:

Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation."

6. Under this Article it is clear that the present execution petition filed on 1-6-1964 was beyond the period of twelve years from the date of the decree. The position would be the same, so far as this case is concerned, even u/s 48 of the Code of Civil Procedure, which is now repealed and was not in force on the date of the present execution petition.

7. Sri Ravindra the learned counsel for the Decree-holder contended that the previous execution petition No. 49/ 62 was dismissed on 22-6-1963 for statistical purposes and the present execution petition having been filed within three years from that date is in time and that it is one to revive the execution petition No. 49/1962.

8. In Ex. 49/1962, the Decree-holder sought the assistance of the Court to recover the amount by:

"(1) Attachment and sale of moveables of J. Dr. to be shown by D. Hr or his agent.

(2) Arrest of J. Dr. by detention in Civil prison.

(3) Attachment and sale of schedule moveable property of J. Dr.

(4) Attachment by issue of prohibitory notice.

(5) Decree-holder prays for attachment and sale of moveables of J. Dr. in the 1st instance."

Though the Decree-holder has asked for these reliefs, in fact, from the execution petition, it could be gathered that the decree-holder asked for attachment and sale of moveables of 3rd judgment-debtor in the first instance. This prayer is in the manuscript. In respect of the other prayers mentioned above, which are printed in the execution application no prayer was made before the Court for the issue of any process. It is, therefore, obvious that the decree-holder sought to recover the amount mentioned in that execution petition by attachment and sale of moveables of the 3rd Judgment-debtor. It is submitted by Sri Ravindra that there was only one Judgment-debtor, viz., the present Respondent. If that be so, reference to Judgment-debtor as 3rd Judgment-debtor and the reliefs sought for

appears to be a mistake; because, there is only one judgment-debtor and his name has been mentioned in the relevant column in the execution application.

9. In the present execution petition the decree-holder sought the assistance of the Court to execute the decree by:

"(1) Attachment and sale of moveables of J. Dr. to be shown by D. Hr. or his agent.

(2) Arrest of J. Dr. by detention in Civil Prison,

(3) Sale of schedule Immovable property of J. Dr. and:

(4) For sale of the properties attached in O. S. 81/51, list of which will be furnished in due course (Schedule has been furnished later on 20-7-65)."

In the end the decree-holder has stated in that application "This Application may be treated as one in continuation to the last execution application and as a revival thereof."

10. Sri Ravindra, admitted rightly that in respect of the new prayer, viz., the sale of the properties attached in O. S. 81/51, it was beyond time; because that relief had not been asked for in the previous execution petition. He also admitted that the property given in the list had not been attached in O. S. 81/51. He, however, submits that the properties detailed in the list furnished in the case had been attached in O. S. 96/ 1951. But from the list furnished by the decree-holder it cannot be made out whether these properties were attached in O. S. 96/51. Whatever that may be Sri Ravindra's contention is that the common prayer both in the previous and present execution petitions being for attachment and sale of moveables of the judgment-debtor-Respondent, the Court at any rate should hold that the present execution petition in respect of this prayer as one in continuation of Ex. 49/62 and therefore, the present execution petition is in time.

11. He relied upon Section 48 of the CPC which provides that where an application to execute a decree, not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application after the expiration of twelve years. Assuming that the present execution petition is a continuation of the suit and Section 48 was applicable the question that arises for consideration is whether the present execution petition is a fresh one or a continuation of the previous execution petition.

12. Before referring to the decisions cited at the Bar we may observe that the practice of dismissing execution petitions for statistical purposes is no doubt a bad practice and has to be deprecated. In other words such acts are not in the direction or in the interests of justice. We, therefore, are of the opinion that the executing Courts should not adopt this method for purposes of showing disposal. The aim must be to see that justice is done according to law.

13. In Vadlamanneti Damodara Rao Vs. The Official Receiver, Kistna and Another,

a Bench of the Madras High Court was of the view that where an execution petition was ordered by the Court to be closed for statistical purposes, such order was not a final order and a fresh application filed as the result of the former petition having been closed for statistical purposes should not be regarded in law as being a fresh application but an application to revive or continue the former application. In that case on 21st of Sept., 1932 the respondent obtained a decree against the appellant and thereupon for payment of certain amount with interest and costs. On 22nd of January, 1935 the respondent filed an application for execution in the Court of the District Judge, Kistna. This was numbered as Execution Petition No. 26 of 1935.

Another creditor of the defendant had obtained a decree against him in O. S. 5/31 and had already applied for execution by attachment and sale of the properties of the judgment-debtor. This application was numbered as Execution Petition 172 of 1932. The object of the respondent in filing Execution petition 26/1935 was to obtain rateable distribution of the properties already attached by the decree-holder in O. S. 5/31. He asked for an order for attachment, but added a prayer for rateable distribution. Some of the attached properties were sold in Execution Petition No. 172/32 and the respondent obtained his share of the proceeds. The attachment continued in respect of the unsold properties. On 5th of November, 1936 the District Judge passed an order in both the execution petitions, closing them, the order being merely the word "closed". That was held to be for statistical purposes. The same view was taken in Kaibala Padhan Vs. Sanyasi Sasamala and Another, , in similar circumstances.

14. In Thimmiah v. Rangiah AIR 1952 Mys 67, the facts were that in the earlier execution petition following order was passed by the executing court:

"Steps not taken. Decree-holder absent. No witnesses. The objections of the judgment-debtors are left open to be agitated later. Execution petition dismissed."

In that case the Court was moved by considerations of Sub-section (2) of Section 48 of the Code of Civil Procedure. In connection with this aspect of the matter the Court observed:

"There is little doubt that the conduct of the first judgment-debtor has throughout been systematically fraudulent. The records establish that most of the objections now advanced are by no means fresh but have been reiterated at every stage ignoring the orders by which these were negated.

***** Though the applicability of Section 48, Civil Procedure Code, may be open to argument the application may well be treated as a continuation of the previous one which was obviously filed within twelve years. The prior application was disposed of with the statement that the objections are left open to be agitated later implying pendency and not termination of the case. The objections were such as had to be made out by the judgment-debtor and the presence of the decree-holder was not required for consideration of the objections. There is abundant authority to hold that in such circumstances the later application has to

be construed as revival or continuation of the previous one."

The present case is not one such.

15. For the Respondent-judgment-debtor Sri Gopalaiah the learned counsel relied upon four decisions. The first one is that decided by a Full Bench of the Madras High Court in Vadlamannati Bala Tripura Sundaramma alias Suiadaramma Vs. Abdul Khadar, In that case the facts were that in E. P. No. 12 of 1928, the appellant applied to sell the mortgage security. He cited a previous application dated 2nd October, 1922 and claimed to be in time because:

"the plaintiff was restrained by an injunction from executing the mortgage decree, and the injunction was dissolved only on 16th August, 1927."

The Court accordingly ordered sale on 5th April, 1928, but stayed it upon the respondent-judgment-debtors' objection that the execution application was time-barred and finally by its order dated 14th August 1928 dismissed the application as barred by limitation. Actually the Court found that the case did not come u/s 15 of the Limitation Act as the prior petition had been dismissed for non-payment of batta by the decree-holder. On those facts, the Court observed that such an application for execution which had been finally and properly dismissed could not be revived.

The Court further observed that the test to be applied for the principle of revival was that the interruption to the execution proceedings was due to an intermediate order which was afterwards set aside or the execution proceedings must have been rendered infructuous by some such obstacle and the interruption to the execution should not have been occasioned by any fault or laches of the applicant decree-holder; because the decree-holder was found to be in default and that being the reason for the dismissal of the previous execution application, they held that such an application could not be revived.

16 The next decision relied upon by Sri Gopalaiah is of the High Court of Andhra Pradesh in Varanasi Padmanabham and Another Vs. Inaturi Joga Rao, in which Subba Rao, C. J., as he then was, observed as follows:

"We cannot say that when a Court dismisses it on a particular date it did not dismiss it on that date. In our view, the order made on 14-3-1947 was the "final order" within the meaning of Article 182 (5) of the Limitation Act. If so, E. P. No. 116 of 1950, having been filed more than three years from the date of the final order on the previous execution petition, was clearly barred by limitation."

We may mention here that the earlier petition had been dismissed for non-payment of batta by the decree-holder. The same question arose in Pingle Venkata Rama Reddy Vs. Kakarla Buchanna and Another, That was a case u/s 48 of the Code of Civil Procedure. It was pointed out that once an execution petition was dismissed for default of the decree-holder, it terminates the execution proceedings and a subsequent application for the same purpose would constitute a fresh application within the meaning of Section 48. There was no question of

continuing or reviving a petition which had been finally and properly dismissed.

17. The last case on which reliance was placed by Sri Gopalaiah is Chaithu Mohammed v. Abdur Rahiman AIR 1955 Trav. Co 230. In that case the Court pointed out that the question whether the order dismissing the execution petition was a judicial one did not depend on whether the order, the non-compliance of which caused such dismissal was correct or not. If it was wrong, it was open to the decree-holder to point out that fact before the dismissal of the execution petition. Where the order for taking further steps was passed on a date on which the execution petition was posted, the decree-holder must be presumed to have knowledge of such orders. If the execution was dismissed upon failure of the decree-holder to take further steps, and the decree-holder took no step to get the dismissal set aside and allowed the order to become final, he could not complain that the order was wrong. In such a case it could not be contended that the dismissal was a ministerial act and the later execution application was a continuation of the earlier one.

18. From what has been stated earlier and the circumstances under which the earlier execution petition came to be dismissed in this case, it is clear that the decree-holder was in default. Although the executing Court had given four adjournments to the decree-holder to pay fee for attachment of moveables, the judgment-debtor being absent throughout, even on 22-6-1963 the decree-holder did not pay the fee. From the order sheet of that date, it is clear that the counsel for the decree-holder was present when the execution petition was dismissed for non-payment of fee for attachment. The decree-holder did not move the court to grant time or for any other relief on that day with a view to see that the execution petition was saved. He did not file any appeal to get the order of dismissal set aside. Therefore, the order dismissing the execution petition became final and that in our opinion was a proper judicial order; the Court was competent to make by which the execution proceedings stood validly terminated.

19. None of the decisions, cited by Sri Ravindra referred to above could be of any assistance to justify the appellant's contention pressed for acceptance in this particular case. The execution, petition No. 49/62 having been finally and properly dismissed by a judicial order it could not be revived by the present execution petition. This being a fresh application for execution it must be deemed to be barred by limitation as it is filed beyond 12 years from the date of the decree.

20. For the reasons stated above, the appeal fails and it is dismissed with costs.