

(1969) 09 KL CK 0017
In the High Court Of Kerala
Case No : S.A. 443/66

Valli

APPELLANT

Vs

Madhavan

RESPONDENT

Date of Decision : 25-09-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 11, Order 21 Rule 11(2)(j)(ii),
Order 21 Rule 12, Order 21 Rule 13, Order 21 Rule 14
Limitation Act, 1963 — Section 31
Succession Act, 1925 — Section 214, 214(1)(b), 4, 47

Citation : (1970) KLJ 312

Hon'ble Judges : P. Subramonian Poti, J

Bench : Single Bench

Advocate : T.S. Venkiteswara Iyer and R.C. Plappilly, for the Appellant; T.V. Ramakrishnan and K. Prabhakaran, for the Respondent

Final Decision : Dismissed

Judgement

P. Subramonian Poti, J.—The question raised in this case is one of limitation for execution of the decree. The matter arises in execution and the judgment-debtor contends that the execution application pursuant to which the execution is being taken out is barred under Art. 182 of the Limitation Act, 1908; that being the Act applicable to the case. The decree was passed on 18-7-1952. E.P. 308 of 1958 was filed by the decree-holder for recovery of mesne profits and costs in a decree for partition. This petition was dismissed on 25-8-1968. The decree-holder died subsequently. His son filed E.P. No. 404 of 1961 on 15-3-1961 for executing the decree. This was dismissed on 5-1-1962 for non-production of succession certificate, for which time was granted by the Court. On 10-3-1964 the present execution petition, which is contended to be barred by limitation, was filed by the decree-holder's son along with the succession certificate, as E.P. No. 251 of 1964. It is this application which is said to be beyond the period of three years of the date of the order in E.P. No. 308 of 1958, and therefore, barred by under Art. 182 of the Limitation Act, 1908. If the execution petition

filed by the decree-holder's son as E.P. No. 404 of 1961 is taken as an application in accordance with law or as a step-in-aid of execution, then there will be no limitation for the execution of the decree, as the present execution petition (E.P. No. 251 of 1964) would be within three years of the date of the order on that petition. Therefore, the only question is whether the application for execution filed by the decree-holder's son on 15-3-1961 without a succession certificate was an application made in accordance with law within the meaning of Art. 182 (5) of the Limitation Act, 1908. Though the present execution petition is filed on 19-3-1964, i.e., after the coming into force of the Indian Limitation Act, 1963, Section 31 of that Act provides that, if the period for filing an application under the Limitation Act, 1908 expired before the commencement of the present Act, this Act would not apply and that is why the matter falls to be decided by the provisions of the Indian Limitation Act, 1908. The contention raised on behalf of the judgment-debtor found favour with the execution court, which held that execution was barred. But this was reversed in appeal and hence this second appeal at the instance of the judgment-debtor.

2. Counsel for the judgment debtor appellant relies on Section 214 of the Indian Succession Act, 1925 (Act 39 of 1925) to contend that a petition for execution, in order to be noticed by the Court, must be accompanied by a succession certificate. Counsel rests his objections to the execution on two grounds, namely, (1) that E.P. 404 of 1961 was not one in accordance with law, by reason of the failure to produce the succession certificate along with the petition for execution and (2) that the order on E.P. 404 of 1961 dated 5-1-1962 was one holding that the decree-holder cannot execute the decree without a succession certificate, and therefore, that order must be res-judicata to contend that E.P. 404 of 1961 was one in accordance with law. In answer, the respondent's counsel urges that an application for execution in order to be in accordance with law has only to satisfy the provisions of the CPC relating to execution and that E.P. No. 404 of 1961 was one which satisfied that requirement and hence for the purpose of Art. 182 (5) of the Limitation Act, 1908 it could not be said that the application was not in accordance with law. In answer to the plea of res judicata the answer of the respondent is that the order dated 5-1-1962 dismissing E.P. 404 of 1961 does not hold that the said E.P. was not in accordance with law, but is only to the effect that since the succession certificate, for the production of which time was granted, had not been produced, the court could not proceed with the execution of the decree, and therefore, such an order would not bar the contention of the decree-holder now that E.P. 404 of 1961 was one in accordance with law, if actually it was one such.

3. It appears to me that in Art. 182 (5) of the Limitation Act, 1908 the reference to "final order passed on an application made in accordance with law to the proper Court for execution", means an application which satisfies the requirements of the law relating to execution of decrees. The provisions in Order XXI rules 11, 12, 13 and 14 lay down the requirements of an application for execution, and if any application presented to Court does not satisfy these rules,

it can very well be said that it is not in accordance with law for the purpose of considering limitation under Art. 182. The requirement of a succession certificate to enable the legal representative to execute the decree is under the provisions of the Indian Succession Act, 1925, and not under any law relating to execution of decrees. Order 21 R. 17 which provides for the consequences of non-compliance with the provisions of Order 21 Rules 11 to 14 will not cover a case of non-production of Succession Certificate. There is also another argument which can effectively answer the contention that an application to be, in accordance with the law when filed by the legal representative of a deceased decree-holder, must be accompanied by a succession certificate. It is the provision in section 214 of the Indian Succession Act itself. Section 214 reads:

1. No. Court shall-

(a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, or

(b) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming of-

(i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or

(ii) a certificate granted u/s 31 or section 32 of the Administrator-General's Act, 1913, and having the debt mentioned therein, or

(iii) a succession certificate granted under part X and having the debt specified therein, or

(iv) a certificate granted under the succession certificate Act, 1889, or

(v) a certificate granted under Bombay Regulation No. VIII of 1827, and, if granted after the first day of May, 1889, having the debt specified therein.

(2) x x x x

Section 214 (1) (b) is the provision that would apply to a case of an application by the legal representative to execute a decree. That section does not prohibit the entertainment of an application for execution by a Court if a succession certificate is not produced along with such application. It only prohibits the Court from proceeding with the execution against the judgment-debtor upon an application by the legal representative of the deceased decree-holder except on the production of the succession certificate or other certificates mentioned in that section. If the prohibition were to be to the very institution of the application in a court of law for the purpose of execution, the words would have been "no court shall entertain" in the place of "no court shall proceed". Therefore, according to me, even in the Indian Succession, Act, there is no provision which would warrant the view that the failure to produce the succession certificate along with

the application for execution by the legal representative renders the application as one not in accordance with law. Hence it is apparent that the failure to produce the succession certificate along with the Execution Petition will not be a contravention of either the provisions of the CPC relating to execution of decrees or the provisions of the Indian Succession Act and therefore such failure will not operate to render the Execution Petition not one in accordance with law. As observed by me earlier even if that were a requirement under the provisions of the Indian Succession Act the position might not be different, since it is only the failure to comply with the requirements of the law relating to execution of decrees that would render the petition as one not in accordance with law. This is sufficient to dispose of the first objection raised by the judgment debtor.

4. If the legal representative of the deceased decree-holder files an application for execution without a succession certificate and the Court rightly or wrongly finds that the application so filed by him is not in accordance with law, that may be a finding which may operate as *res judicata* precluding the legal representative of the decree-holder from contending that it is an application in accordance with law when the question of limitation is raised. That is so, even in regard to an application filed by a decree-holder which is held to be not in accordance with law for some other reason. In such a case also, the decree-holder, when he subsequently seeks to execute the decree and relies upon the earlier application to have limitation under Act, 182(5), may be met by a plea of *res judicata*. But in order to constitute *res judicata*, the court should have found, on the earlier application, that it is one not in accordance with law. If, however, the finding on the earlier application cannot be read to this effect, then certainly it cannot constitute *res judicata* so as to bar placing reliance upon such an application to save limitation in execution. In this case, the order on 5-1-1962 dismissing E.P. No. 404 of 1961 does not hold that execution petition, when instituted, was not in accordance with law. On the other hand, it appears that E.P. 404 of 1961 had been entertained, as it should have been, but to enable the court to proceed with the execution, the court directed the legal representative of the decree-holder, who filed the execution petition, to file the succession certificate and granted time for that purpose. This was by its order dated 20-6-1961. The Court noticed that the petitioner had failed to comply with that order. The court did not decide the question, though raised by the judgment-debtor, that the production of the succession certificate after the filing of the execution petition would not be proper, on the ground that it did not arise for consideration. Though ultimately the Court held that the execution petition was not maintainable, what it meant is explained by the earlier statement in the order where the Court held that it cannot proceed with the execution application because of the failure to produce the succession certificate and that it was not considering the question of maintainability of the application without the production of the succession certificate on the date of filing of the execution application. It is clear that, that question was left open. Hence on the facts of this case, I am not prepared to hold that there was an adjudication between the

parties by order dated 5-1-1962 that E.P. 404 of 1961 was one not in accordance with law. Therefore no question of res judicata arises in this case.

5. Counsel for the appellant relies upon certain decisions, which according to him supports the view urged by him. The decision in Behari Lal v. Jagannath (A.I.R. 1923 Nag 236), to which my attention has been invited, is one where there was non-compliance with the provisions of Order XXI Rule 11 (2) (j) (ii). The application was rejected as not being in accordance with law. The court found that it must have been a rejection in accordance with the provisions in Rule 17 (1) of Order XXI. Though the Court found that the rejection was a wrong one, His Lordship Betton, J.C. held that when a competent court had decided, even though, wrongly, that an application was not in accordance with law, it precluded the decree-holder from contending, in subsequent proceedings, that it was one in accordance with law. Therefore on the facts of the case the decision relied upon by counsel for the appellant is distinguishable.

6. In Pitambar Jana Vs. Damodar Gachait and Others, certain columns in the execution petition were not filled up. The columns requiring the amount of interest and costs to which the decree-holder was entitled to be shown, were not filled up in the execution petition and the petition returned for representation was not represented. The question that was raised was whether the failure to represent the application made any difference and whether such an application could be treated as one in accordance with law for the purpose of Art. 182 (5) of the Limitation Act. The court felt that execution could have been proceeded with even on the application as originally presented, since the only consequence of the decree-holder's failure to fill up the columns relating to interest and costs would be to execute the decree for a sum lesser than that which was due to the decree-holder and that since this was permissible, it could not be said that the application as originally presented was not in accordance with law. It is in this context that the learned Judge Suhrawardy, J, said:-

On a consideration of the cases to which I have made reference and the other cases which have been cited at the Bar, the conclusion at which I have arrived is that the expression "in accordance with law", in Art. 182 (5) should be taken to mean that the application, though defective in some particulars, was such upon which execution could be issued.

The observations of the learned Judge in the case, which I have quoted above, have to be read in the context of the facts and circumstances of the case referred to above.

7. Reliance was also placed by counsel for the appellant on the decision in Purna Chandra Mandal v. Radha Nath Dass (T.L.R. 33 Calcutta 867). That was a case where successive applications were made u/s 90 of the Transfer of Property Act for supplementary decrees for sale (Sections 86 to 90 relating to foreclosure and sale have been later repealed by the Code of Civil Procedure, 1908). The question that arose in that case was whether the application for execution made

in 15th November 1904 was out of time. Three applications u/s 90 of the Transfer of property act made earlier by the decree-holder were relied upon to save limitation and the question that arose there was whether the applications for supplemental decrees u/s 90 of the Transfer of Property Act are applications in execution. Though the Allahabad High Court had consistently taken the view that these applications will be execution petitions, the Calcutta High Court did not follow that view. That Court found that the decrees passed under Sec. 90 of the Transfer of Property Act were supplemental decrees and were separate and distinct from the original decree. For another reason also the applications u/s 90 of the Transfer of Property Act even assuming that they were to be treated as execution petitions, were found to be not in accordance with law. This was because the sale of the mortgaged property had been set aside earlier on the 5th of June, 1897 and therefore the mortgaged property was available to be proceeded against when the applications for supplemental decrees u/s 90 of the Transfer of Property Act were filed. These applications were for sale of other properties and so long as the mortgaged property was available to be proceeded against, which was so available could not be taken against other properties and it was for this reason that the earlier applications were held to be not in accordance with law. It was held that "applying in accordance with law" means applying to the Court to do something which by law that Court was competent to do. This case also has no application to the case before me.

8. The learned counsel for the appellant brought to my notice the decision reported in *Ananda Lal Chakravarty and Others Vs. Sm. Katyani Debi and Another*, . It is true that this decision, to some extent, supports the case canvassed by the learned counsel for the appellant before me. In that case, an earlier application for execution was disposed of by order dated 27th January, 1931 and the question that arose was whether the subsequent application, which was filed more than three years beyond that date, was barred by limitation. The decree-holder relied on an application filed by the legal representatives of three of the decree-holders, who had died thereafter, and the surviving decree holders. This petition was numbered as E.C. 724 of 1931. This application was objected to on the ground that the legal representatives did not produce the succession certificate in order to enable them to execute the decree. When this application was pending, the surviving decree-holders made an application on 19th March, 1932 seeking to proceed with the execution on the basis of Order XXI, Rule 15. This was done to enable them to execute the decree for and on behalf of all the decree-holders. The 2nd application was considered to be in effect an application to amend the earlier application, which, according to the Court, was not one in accordance with law, being not accompanied by a succession certificate, and therefore, the Court held that the subsequent application dated 19th March, 1932 to proceed with the execution under Order XXI Rule 15 C.P.C. was not maintainable. This necessarily involved an adjudication that the application filed jointly by the surviving decree-holders and the legal representatives of the deceased decree-holders without succession certificate was not maintainable,

and such an application was not in accordance with law. It was therefore held by the Court that the subsequent execution petition filed by the decree-holders was barred by limitation. This case is relied on by the learned counsel for the appellant both to support his case that without a succession certificate, the legal representative of a deceased decree-holder could not make an application for execution in accordance with law, and also for the proposition that if it is held that the application, which alone would save limitation, was not in accordance with law, such a finding would be resjudicata in subsequent proceedings. I have already held in the present case that there is no such order on the earlier application E.P. 404 of 1961, which can constitute res judicata since there is no adjudication as such on the question whether E.P. 404 of 1961 was not one in accordance with law. In *Ananda Lal v. S.M. Katyani Debi* (Supra), the learned Judge said:

The original application for execution which was registered as Execution Case No. 724 of 1931, though made in the proper Court, may not be an application in accordance with law.

With great respect, I am unable to agree. There is no discussion of the question in the judgment and no reasons are stated. That apart, the finding on this question was not necessary for the adjudication of the case, there, because, ultimately the learned Judge rested his decision on the question of res judicata. He found:

That was the view taken by the Court in disposing of of Miscellaneous case No. 272 of 1931 and the view expressed therein on that application may be res judicata. It may be an erroneous decision, but it is still res judicata as Mr. Chatterji appearing for the respondents submits." As I have already pointed out, no question for res judicata arises in the present case.

9. The words "in accordance with law" in Art. 182 (5) of the limitation Act were read by the Privy Council to mean "in accordance with the law relating to the execution of the decrees" in the decision reported in AIR 1943 98 (Privy Council) . This has been followed by the Patna High Court in *Darogi Mandal and Others Vs. Kameshwar Singh Bahadur*, . If the final order on an application which is in accordance with law is the starting point for the purpose of Art. 182 of the Limitation Act and if the term "in accordance with law" means in accordance with the law relating to the execution of the decrees, it cannot be disputed that in the present case, the execution, petition, which is contended to be barred by limitation, is within time, for, it is not the case of judgment-debtor that the execution petition does not satisfy the provisions of Order XXI Rules 11 to 14 of the CPC.

10. The use of the word "Proceed" in section 214 of the Indian Succession Act in contradistinction to the word "entertain" was noticed by the Bombay High Court in *Balkishan Shiwa Bakas v. Wagarsing* (ILR XX Bombay 76). The question there was whether an application made by the legal representative of a deceased

decree-holder for execution was not in accordance with law for the reason that the succession certificate did not accompany such application. An earlier decision of the Bombay High Court in *Manohar v. Gebiappa* ILR 6 Bombay 31) was relied upon by the judgment-debtor in that case. That related to the Dekkhan Agriculturists' Relief Act, XVII of 1879. That decision was distinguished by the Bombay High Court on the basis that "the words used in Section 47 of that Act (Act XVII of 1879) read:

No application shall be entertained unless the plaintiff produces the certificate.

The words "No Court shall proceed upon an application u/s 4 of the Succession Certificate Act (VII of 1889) were considered to be of different import. The word "entertain" meant something different from "proceed" and the Court held in that case that the application would be one in accordance with law notwithstanding the non-production of the certificate as required u/s 4 of the Succession Certificate Act, VII of 1889. In *Mt. Bibi Aisha v. Mahabir Prasad* the Patna High Court said that an application for execution filed without a succession certificate is one made in accordance with law, within the meaning of Art. 182 (5) of the Limitation Act, if the particulars required by Order XXI, Rules 11 to 14 are mentioned in the application. The Patna High Court relied upon its earlier decision in *Jogendra Prasad Narayan Sinha Vs. Mangal Prasad Sahu*, and also the decision of the Calcutta High Court in *Bafizuddin Choudhury v. Abdool Aziz* (1893) 20 Cal 755). The same view was taken by the Madras High Court in *E.S. Raghavendra Rao and Others Vs. Venkammal and Others*, .

11. In view of what I have stated above, it follows that E.P. No. 251 of 1964 dated 10-3-1964 is not barred by limitation, and therefore, the decree-holder is entitled to execute the decree. In the result the second appeal fails and is dismissed. But in the circumstances of the case, the parties will suffer costs.