
(2009) 05 KL CK 0050
In the High Court Of Kerala
Case No : R.P. No. 1078 of 2007 (J)

Viswambaran M.K. and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 08-05-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 105, Order 21 Rule 105(2), Order 21 Rule 106, Order 21 Rule 106(3), 114
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 5

Citation : (2009) 2 KLJ 323

Hon'ble Judges : Pius C. Kuriakose, J

Bench : Single Bench

Advocate : K. Ramakumar, for the Appellant; K.V. Jayachandran, G.P. and Raju V. Mathew, for the Respondent

Judgement

Pius C. Kuriakose, J.—Petitioners are the petitioners in the writ petition and they seek review of the judgment dated 30-07-2007 passed in the writ petition. The main relief sought for in the writ petition was to quash Ext.P12 order of the execution court. Ext.P12 was passed on an application for restoration of an execution petition in which the writ petitioner was the judgment debtor and also for condonation of the delay caused in the matter of depositing the value of improvements which had been ordered to be paid by the decree holder. Under the judgment, I upheld Ext.P12 incorporating a condition that a sum of Rs. 1501/- shall be paid by way of cost. The review petitioners seek review of the judgment on the ground that the judgment suffers from an error of law apparent on the face of the record. It is urged that the provisions of the Limitation Act do not apply to applications for restoration of execution proceedings filed under Order XXI CPC. It is pointed out that the order of the execution court dismissing the execution petition became operative on 12/08/2004 due to the failure of the decree holder to make deposit and therefore application for restoration should have been filed on 11/05/2004 which apparently was not done. It is urged that

this Court went wrong in holding that the restoration petition can be entertained as it actually related only to the deposit. According to the review petitioners, the above view of this Court is contrary to statutory provisions and the order in so far as the same is made in violation of statutory provisions and decisions of the Supreme Court is bad per se.

2. I have heard the submissions of Sri. K. Ramkurnar, learned senior counsel for the review petitioners and also those of Sri. M.K. Sucheendran, an Advocate, the second respondent who appeared in person. I have also heard Sri. K. VJayachandran, learned Counsel for the respondents. Sri. K. Ramkumar, learned senior counsel submitted that the review petitioners are the legal representatives of defendants 2 and 3 in the suit. The suit was for setting aside the sale deed executed by the fourth defendant Karthiyani Amma in favour of the first defendant Parukutty Amma and for recovery of possession of the properties from defendants 2 and 3 with damages. The suit was decreed and recovery of possession was ordered against defendants 2 and 3. Sri. Ramkumar submitted that the first execution petition was filed on 05/04/1966 which was dismissed due to the absence of the decree holders on 30-07-1996. On 25-11-1969 in A.S. No. 170/1967 the trial court's decree was affirmed by the Sub Court. E.P. was filed on 05/04/1974 which was dismissed on 21/03/1976. Thereafter fresh E.P. No. 367/1981 was filed on 20-11-1981. The legal representatives of the defendants who died in between were made parties in the execution petition. On 12/03/1984, the Commissioner appointed by the court submitted a report assessing value of improvements. On 27-09-1993, the execution petition was dismissed for failure to deposit the value of improvements before the expiry date. Against that C.R.P. No. 219/1994 was filed. C.R.P. No. 219/1994 was disposed of holding that execution petition was not time bailed. Sn. K. Ramkumar, learned senior counsel submitted that it was also held that, the judgment debtors are entitled for [evaluated cost. C.R.P. was disposed of on 17/09/1996. Sri. K. Ramkumar submitted that on 09/09/2003 execution petition was re-opened pursuant to the High Court's order in the C.R.P. for hearing. E.P. was allowed on 12/08/2004 directing the decree holders to deposit Rs. 1501.96 within seven days. In the meanwhile the first JD Parukutty Amma and the fourth JD Karthiyani Amma had passed away. Sri. K. Ramkumar submitted that till date, the legal representatives of those JDs have not been brought on record. The order of the execution court on 12/08/2004 allowing the E.P. and directing recovery was on condition that the decree holders deposit the balance amount of Rs 1501.96 and on the assumption that the amount will be deposited, delivery was posted on 18/09/2004. On 18/09/2004, when the E.P. was posted, the same was dismissed since no amount had been deposited. The learned senior counsel, submitted that on 22/09/2004, the decree holder filed an application on the ground that he had fallen ill seeking restoration of the execution petition and for receiving the amounts. The above application was accompanied by an application for condonation of delay in depositing the amount. That was E.A. No. 1027/2004. The applications were opposed on the ground that legal representatives of the

deceased judgment debtors were not impleaded and therefore the E.P. itself was defective. Sri. Ramakumar submitted that it was also contended by the judgment debtors that in terms of Rule 105 of Order XXI of CPC, an application for restoration is not maintainable but only a revision to the High Court will lie. According to Sri. K. Ramkumar, without even referring to the objections, the E.A. was allowed and it was against the order allowing the E.A. that the writ petition was filed.

3. Sri. Ramkumar, learned senior counsel argued that admittedly the order dated 18/09/2004 in E.P. No. 367/1981 was not an order by default, but it was an order dismissing the petition for not depositing the amount. No application for restoration of the execution petition could lie under Rule 105(2). It was under Rule 106(3) Order XXI that E.A. No. 1027/04 was filed. The said Rule applies not to an order for failure of deposit, but only to set aside an order made ex parte. Therefore the application was not maintainable. The only option according to the learned senior counsel, for the decree holder was to file a fresh execution petition, or seek revision of the order dated 18-09-2004 u/s 47 of the Code after 1976 amendment. According to Sri. K. Ramkumar there was no question of condoning the delay as the Execution Petition had already been dismissed and without invalidating that dismissal order there cannot be an application for restoration. The application E.A, 1027/2004 which was admittedly for restoration therefore was not maintainable at all. Sri. K. Ramkumar submitted that this Court did not notice the nature of the application filed as EA. No. 1027/2004 and interfered with the order of the court below only to the extent of ordering costs. According to the learned senior counsel E.A. 1027/04 was itself not maintainable in law since the order dated 18-09-2004 was not challenged either in revision or by way of writ petition. Since the execution court restored the petition without jurisdiction this Court should have intervened in exercise of powers under Article 227 of the Constitution. Since that has not been done, the judgment needs review. Sri. K. Ramkumar, learned senior counsel would place reliance on the judgment of the Supreme Court in *Damodaran Pillai v. South Indian Bank* 2005 (4) KLT 192.

4. Sri. M.K. Sucheendran supported all the submissions of Sri. K. Ramkumar. He took me to the facts in detail and relied on my own judgment in *Cleetus v. South Indian Bank* 2007 (3) KLT 868.

5. Sri. K.V. Jayachandran, learned Counsel for the decree holders was able to meet the submissions of Sri. K. Ramkumar, learned senior counsel, and of Sri. M.K. Sucheendrah. According to him, no ground is made out for reviewing my judgment dated 30-07-2007 within the contours of Rule 1 of Order A7 or Section 114 CPC.

6. In the instant case, it is seen that Ext.P11 restoration application is filed on 22-09-2004. This was why I found in the judgment as follows:

As for restoration of the execution petition it is to be noticed immediately that

there was no delay in filing the application since the same is filed within 30 days of the dismissal of the execution petition. As for the direction regarding the deposit of value of improvements, the court had not fixed any particular date for deposit of improvements.

7. I had also observed that on 08/09/2004 the decree holders orally applied for time for making deposit and the execution court adjourned the E.P. to 18/09/2004 and dismissed the E.P. on that day for want of deposit. I also found that since in the earlier order, the court had not fixed time for depositing the value of improvements, the power exercised by the court on 08/09/2004 was only the power for enlargement of time u/s 148 of the Code.

8. During the course of the submissions, Sri. M.K. Sucheendran, brought the B diary in the Execution proceedings to my notice. The same is produced along with the counter affidavit of LA. No. 12919/2007. I.A. No. 12919/2007 is a correction petition which was riled by the decree holder respondents for rectifying a patent mistake which had crept into the judgment while passing direction regarding payment of costs. Relying on Ext.P14 it was argued that as per the proceedings recorded in Ext.P14 on 12/08/2004, the respondents are to deposit the balance amount of Rs. 1501.96 Within seven days and if the amount is not deposited in seven days, the E.P. will stand dismissed. It is pertinent to note that Ext.P14 was not produced by the review petitioner along with the writ petition or even in the review petition. According to me, it will not be proper to rely on Ext.P14 while considering the review petition since such a course would cause prejudice to the respondents. The assertion of the decree holder is that Ext.P10 is the order which was actually pronounced by the execution court on 12/08/2004 in the open court. The above assertion cannot be legitimately disputed by the review petitioners since they only produced Ext.P10 as the order which was passed by the court on 12/08/2004. Ext.P10 is an elaborate order which runs to 13 type written pages and its operative portion is to the following effect only:

In the result, the petition is allowed as prayed for with costs on condition that the decree holder remits balance amount of Rs. 1501.96. Deliver on 08-09-2004.

9. Ext.P10 does not contain any of the stipulations as found in Ext.P14 B diary and this was Why it was observed in my judgment that the court had not stipulated any particular date for depositing the balance amount. The argument of Sri. K.V. Jayachandran that Ext.P10 being an order which was passed by the court in the open court shall prevail over the proceedings paper and A and B diaries has considerable force. A and B diaries as well as proceedings paper are prepared and maintained as per Rules 382, 383, 384 of the Civil Rules of Practice which have been framed by the High Court for regulating the procedure in the Subordinate Courts. Rule 382 deals with A diary to be maintained by the court in the proceedings setting out only the judicial work done in each case. A diary shall be signed by the Judge himself. Rule 383 provides that a B diary in loose sheets shall be maintained to be kept with the records of the case showing the dates

and nature of the proceedings in the several stages of a suit, appeal or execution petition. The B diary shall be maintained and signed by the chief ministerial officer. Rule 384 deals with the proceedings paper to be maintained furnishing the judicial steps taken in the proceedings. It is provided that the proceedings paper shall be written and signed or initialed by the Judge himself in open court. A reading of the above Rules will show that the Judge after passing orders like Ext.P10 is expected to minute it in the proceedings paper and it will in turn reflect in A and B diaries. The Judge while minuting judicial orders like Ext.P10, in the proceedings paper or in A or B diaries cannot add to or vary the order pronounced by him. Any variation or addition made in the proceedings paper or in A diary or B diary for that matter while minuting the order pronounced will be illegal and grossly irregular. Ext.P14 will certainly have to be ignored in the facts of this case where Ext.P10 is the order pronounced by the Judge and is produced by the review petitioners themselves along with the writ petition as the order so pronounced. It will also be noticed now that it is not urged as a ground in the writ petition that this Court went wrong in holding that no fixed time had been fixed by the execution court for depositing the value of improvements and that the court had the power to enlarge the time for making deposit u/s 148 of the Code of Civil Procedure. Significantly, the adjournment of the case of the E.P. from 08/09/2004 to 18/09/2004 which was obviously for the purpose of deposit of value of improvements is not impugned in the writ petition at all.

10. The contention of the review petitioner that by Ext.P10 order, the E.P. stands dismissed in the event of failure to deposit the value of improvements is unsustainable. It cannot be argued that Ext.P10 order will operate with effect from 12/08/1994. The execution court dismissed the E.P. only on 18/09/2004 noticing the default on the side of the decree holder in depositing the value of improvements within the extended period -before 18/09/2004 and therefore ExtP11 application for restoration filed within four days of 18-09-2004 was on time.

11. Sri. K. Ramkumar, learned senior counsel raised a new contention that ExtP11 is filed under Rule 106 of Order XXI CPC and that Ext.PI 1 is not maintainable under that provision. But it should be noticed that the said contention is raised against the relief which is claimed in the review petition. The ground raised in the review petition is that the restoration petition Ext.PI 1 is filed beyond the period fixed under Rule 106 Order XXI CPC. It is seen from Ext.P11 that the same is filed invoking Rule 106(3) of Order XXI CPC, Section 151 CPC and also Section 5 of the Limitation Act. It is trite, that quoting a wrong provision of law will not operate as bar in exercising jurisdiction and granting relief. It was unnecessary for the respondents to have invoked Section 5 of- the Limitation Act. The order dated 18/09/2004 is certainly an order dismissing the execution petition for default under Rule 105(2). Even though Sub Rule 2 of Rule 105 only states one of the situation or reason for dismissing for default for non appearance, the said Rule necessarily has to cover all situations leading to dismissal for default. At any rate Section 151 of the Code which saves the

inherent power of the court had also been invoked and according to me, ExtP11 was certainly maintainable. My conclusion therefore is that no ground is made out by the review petitioners for reviewing the judgment dated 30-07-2007.

12. It is now necessary to consider I.A. No. 12919/2007. While upholding Ext.P12 order passed on Ext.P11 application filed by the respondents I imposed a condition that the respondents have to pay a sum of Rs. 1501/- to the petitioners within two weeks and on default, Ext.P11 will stand dismissed. The respondents are certainly right in submitting that some confusion has been created regarding the identity of payer and payee of the said amount by the words used in the judgment. The respondents tiled I.A. No. 10680/2007 seeking permission to deposit the amount before this Court. It was also submitted that the review petitioners sent a money order to the respondents and filed a petition before the execution court seeking dismissal of the petition. I am of the view that the LA. should be allowed so that the confusion is removed. Accordingly, the LA. is allowed issuing the following directions:

The last two sentences of the judgment dated 30-07-2007 are deleted and will stand substituted by the following two sentences:

Even as I uphold Ext.P12, there will be a direction that the decision taken under Ext.P12 will be conditional on the decree holder respondents paying a sum of Rs. 1501/- to the writ petitioners by way of costs which can be paid either to the them directly or through their counsel in this Court within two weeks from today. If payment as directed above is not made within the stipulated time, Ext.P11 will stand dismissed and Ext.P12 will stand set aside and the writ petition will stand allowed.

13. The Review Petition stands dismissed and I.A. No. 12919/2007 is allowed as above. However, the execution court is directed to explore the possibilities of a settlement of the disputes between the decree holders and the judgment debtors either by referring the disputes to mediation or at that courts option by ordering attendance of the concerned parties in the court and by having discussions with them and their respective counsel over settlement, if any possible.

Considering the above directions, the execution court is directed not to enforce delivery of the decree schedule properties for a period of three more months after the first posting of the E.P. on receiving a copy of this judgment.