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Court : Kerala

Decided On : Jul-25-1980

Reported in : AIR1981Ker29

Judge : T. Chandrasekhara Menon, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 35, 95 and 97; Limitation Act, 1908 - Schedule - Article 129

Appeal No. : E.S.A. No. 11 of 1980

Appellant : Parameswaran and ors.

Respondent : Kumara Pillai Raghavan Pillai

Advocate for Pet/Ap. : C.K. Ravindranath and; R.D. Shenoi, Advs.

Disposition : Appeal dismissed

Judgement :

T. Chandrasekhara Menon, J.

1. I do not think that I should order notice in this appeal. According to me, the questions of law the appellants have raised are concluded by definite decisions on the matter. Though there is a view to the contrary taken obiter by a decision of Beaumont, C. J., in the Full Bench case in the Bombay High Court (Mukund Bapu

v. Tanu Sakhu, AIR 1933 Bom 457 (FB)), the majority of the decisions in the matter are agreed on the principles.

2. In execution of a decree for immovable property, the decree-holder-respondent filed an execution petition in the Munsiff's Court, Ernakulam. Pursuant to the order of delivery made in those proceedings, the Amin came to the plaint schedule properly for effecting delivery on 21-12-1976. The appellants and three others who were not parties to the decree obstructed to their dispossession. The Amin reported the matter to the court.

3. Thereafter, the respondent-decree-holder filed E. A. No. 15 of 1977 praying for removal of obstruction. He did not bring the appellants on the party array in that petition. Of the obstructors who claimed exclusive possession of separate lots of property, two persons alone had been made parties to the E. A. That petition was decided in favour of the decree-holder and delivery was ordered. The matter had been taken up in appeal and pending final adjudication, the proceedings in the execution petition had been stayed. After stay in the execution petition was vacated the E. P. was again taken up. There was no fresh application by the decree holder under Order 21, Rule 35, C. P. C. nor was there any application under Order 21, Rule 95, C. P. C. The executing court ordered delivery of the property on 3-1-1980. On that date, when the Amin came to the property the appellants obstructed their dispossession. The Amin thereupon reported the obstruction to the court and returned the warrant. The decrce-holder then preferred on 4-1-1980 an application under Order 21, Rule 97 which is numbered as E. A. 13 of 1980 in E. P. 419 of 1975. To that petition the objection raised by the appellants was the bar of limitation under Article 129 of the Limitation Act, on the ground that the petition having been filed after 30 days, of the obstruction on 21-12-1976, is barred and not maintainable. The executing court found against the appellants. An appeal was filed before the District Court, which was transferred to the Sub-Court, Ernakulam. The learned Sub-Judge also concurred with the view of the executing court. The law on the matter has been well put up by a Division Bench of the Gujarat High Court in Manektel v. Ochhavlal, (AIR 1970 Guj 49).

4. In AIR 1933 Bom 457 (FB) (Mukund Bapu v. Tanu Sakhu) Beaumont, C. J. speaking for the Bench had said (by way of obiter as he himself had pointed out) that it will be open to the party obstructing to show that his obstruction is by the same person and in the same character as the former obstruction in respect of which no proceedings were taken, and if he succeeds in proving that, Article 167 will then be a bar to the decree-holder's application. The mere fact that the application is made in respect of a fresh warrant for possession, does not, in his view, involve that the obstruction is a fresh obstruction.

5. Article 167 in the Limitation Act of 1906 corresponds to Article 129 of the Limitation Act of 1963. In expressing these on the above terms Beaumont, C. J. was dissenting from the decision of the Allahabad High Court in Narain Das v. Hazari Lal, (1896) ILR 18 All 233, where it had been held that even if the first obstruction was made by the same person in the same character as the second obstruction, in respect of the application under Order 21, Rule 97 complaining of the second obstruction, the time would begin to run from the date of the second obstruction and not from the date of the first obstruction. This view taken by the Allahabad High Court in the case referred to above had also been taken in Official Trustee v. Monmothnath, (AIR 1953 Cal 499), P. N. Pathak Sharma v. Renuka Debi, (AIR 1959 Cal 613), Narayanaswami, v. Veerappa, (AIR 1949 Mad 753), Raghunandan v. Ramcharan, (AIR 1919 Pat 425 (2) (FB)), S. Gnanappu v. T. Pillai, (AIR 1957 Trav-Co 287) and Kotumal v. Gur Ashram, (AIR 1947 Sind 118).

6. In the Travancore-Cochin decision referred to above, Joseph, J. had pointed out that the High Court of Travancore had in a number of reported decisions followed the same view. See Hariswaran Kesavan Namburi v. Kunjan Marukkam Pariathu, ((1916) 7 Trav LJ 89), Kochan v. Nilacanta Pillai, ((1928) 19 Trav LJ 649), Kasim v. Man-chunatha Pye, ((1937) 28 Trav LJ 276), D. Mathan v. Venkiteswara Iyer ((1940) 30 Trav LJ 496), D. Mathai v. Raman Para-meswaran Pillai, ((1941) 31 Trav LJ 277) and (1942) 33 Trav LJ 433. Joseph, J. said that the decree-holder in such cases has the right to make a fresh application for delivery of possession notwithstanding the obstruction in the first instance and every resistance or obstruction gives a fresh period of limitation from the time of that particular resistance or obstruction. The Gujarat High Court in the decision referred to above

deals with the questions in the following manner:

'9 (1) Making of an application under Order 21, Rule 97 complaining about the resistance or obstruction to delivery of possession is permissive and an enabling provision for the decree-holder and he is not bound to make such an application. No penalty of any nature can be imposed upon the litigant if he fails to avail himself of a merely permissive or enabling remedy.

(2) The different rules of Order 21 deals with procedure in execution of a decree. The issuance of a warrant for possession is a step in the entire procedure for helping the decree-holder to obtain the fruits of his decree. The decree holder is entitled to say to the court at any stage of the procedure that he would not like to have the help of the court any more. Merely because he does not ask the court to help him any further, it would not deprive him of his right to go to the court again at any time during which his decree is alive and enforceable.

(3) When a person resists or obstructs delivery of possession he merely intimates to the decree-holder that he would not allow him to take possession. It is open to the decree-holder not to join issue with him at that time and to allow the warrant to lapse. This conduct of the decree-holder may be the result of (a) his belief that the claim of register is correct, or (b) he may not, for some reason, be prepared to spend time and money at that particular time; or (c) he may feel that the claim of the resister or obstructor is of a temporary duration; or (d) he may think it advisable to deal with the register or obstructor out of Court. Since the making of the application under Order 21, Rule 97 is permissive and not mandatory, the resistance or the obstruction that was occasioned at the first time comes to an end with the abandonment by the decree-holder of his right to enforce the warrant for possession by making an application for the removal of resistance or obstruction. That obstruction cannot then be said to be continued when a fresh obstruction is made to delivery of possession under a fresh warrant for possession.

(4) Since the law allows the decree-holder to abandon, at his sweet will, the enforcement of warrant for possession and to apply for a fresh warrant for possession at any time so long as the decree for possession remains alive and enforceable, it is implicit in this right of the decree holder that he can make an

application under Order 21, Rule 97 every time he is obstructed or resisted.

(5) Article 167 of the Limitation Act of 1908 (corresponding to Article 129 of the Limitation Act of 1963) relates to a complaint of resistance or obstruction to delivery of possession of immovable property decreed and the period of limitation begins to run from the date of resistance or obstruction. The resistance or the obstruction mentioned in the third column of Article 167 refers to the resistance or obstruction of which the complaint is made in the application under Order 21, Rule 97.

If, therefore, the complaint is made regarding the second obstruction, time will begin to run from the date of the second obstruction and not from the date of the first obstruction.'

10. it was urged on behalf of opponent No. 2 that if the period of limitation were to run from the second obstruction it would make Article 129, a dead letter because every decree-holder finding that his application under Order 21, Rule 97 in respect of the first obstruction would be beyond time, would defeat this provision of the Limitation Act by taking out a fresh warrant for possession and thus invite a fresh resistance and then making an application within 30 days from the date of the second resistance, even though it may be more than 30 days after the first resistance. In our opinion, in view of the nature of the proceedings and the language of the Article in question, the fear expressed by Mr. Bhatt on behalf of opponent No. 2 is more imaginary than real. What Article 129 of the Limitation Act of 1963 does is to bar the making of an application about the resistance or obstruction which was made more than 30 days ago. If a second obstruction is made, the complaint is not about the first obstruction but is about the second obstruction; and since the law allows the decree-holder to make such an application, it cannot be said that the provisions of Article 129 are made nugatory.'

7. I have no doubt the decision as referred to above lays down the correct law. There is no necessity to resolve these questions again. The E. S. A. is dismissed.