

Mathevan Bhargavan Vs. Dadi Bivi Halima Bivi and ors.

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Court : Kerala

Decided On : Jun-23-1964

Reported in : AIR1965Ker29

Judge : S. Velu Pillai, J.

Acts : Limitation Act, 1908 - Schedule - Article 182

Appeal No. : Second Appeal No. 769 of 1960

Appellant : Mathevan Bhargavan

Respondent : Dadi Bivi Halima Bivi and ors.

Advocate for Def. : P.K. Krishnankutty Menon and; P. Raman Menon, Advs.

Advocate for Pet/Ap. : G. Viswanatha Iyer, Adv.

Disposition : Appeal dismissed

Judgement :

S. Velu Pillai, J.

1.The sole question for decision in this second appeal by the 9th defendant, judgment-debtor, is whether the execution of the decree, which was for redemption of a mortgage, is barred by limitation or not. The decree of the first court was passed on the 8th July, 1949, and a petition for its execution was made

on the 16th August, 1950. Pending the appeal which was preferred against the decree, the proceedings in execution were stayed by the appellate court by order dated-the 13th September, 1950. That appeal was eventually dismissed with costs on the 7th March, 1952. Plaintiffs 2 to 4 who are the additional decree-holders and are respondents : to 3 in this second appeal, applied to the execution court on the 20th September, 1956, for proceeding with the execution of the decree, on the basis of the execution petition of 1950. The appellant objected contending that the execution of the decree was barred by limitation, for the reason, that the appellate decree was not executed within three years of the date thereof and that the execution petition of 1950 was no longer alive after the passing of that decree. The execution court accepted the contention, and dismissed the execution petition. In appeal, the Subordinate Judge held, that the fee having been paid for the registration of the appellate decree, though the decree itself has not been registered, the period of limitation for execution of this decree was six years, and that the application of 1956 referred to above being within this period the execution petition of 1950, which has been pending all the time, may be continued so far as the prayers in it were in conformity with the decree in appeal. In second appeal, these positions were contended to be untenable.

2. In view of the decisions of this Court in *Parameswara Bharathikal v. Pappan Padmanabhan*, 1958 Ker I.T 271 : (AIR 1958 Ker 270), *Lakshmi v. Mayitti Narayanan*, 1962 Ker LT 27 and *Mathunni Varkey v. Raghavan Pillai Parameswaran Pillai*, (1964) 1 Ker LR 81, the contention that the respondents are not entitled to claim the period of six years from the date of the appellate decree for execution has to prevail, because that decree has not been registered.

3. But there is no force in the next contention, that with the passing of the appellate decree, the execution petition of 1950 ceased to be pending. After the decisions of the Supreme Court,' reported in *Collector of Customs v. East India Commercial Co. Ltd.* AIR 1963 SC 1124 and in *Commr. of Income-tax, Bombay v. Amritlal Bhogilal and Co.*, AIR 1958 SC 868 that

'as a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is

the appellate decision alone which subsists and is operative and capable of enforcement' ,

it may be taken as settled, that the appellate-decree alone is capable of enforcement, even though it is by way of confirmation of the decree of the trial court. But I cannot agree, that with the passing of a decree on appeal, a pending petition for execution of the decree appealed against, would cease to be pending. The execution petition of 1950 has not been disposed of, whether judicially or ministerially, and has been pending at the time the application of 1956 was made for its being proceeded with. That execution petition became defective after the passing of the appellate decree, because it did not take note of that decree; but then, this is a defect curable by appropriate amendment. There is no justification for the view, that the execution petition itself ceased to exist or to be pending. The only authority relied on in support of this view, was the bench decision of the former Travancore-Cochin High Court in Padmanabhan Nadar Velayudhan Nadar v. Narayanan Nada Raman Nadar 1949 Ker LT 191, in which it was held that

'the execution petition filed on the basis of the trial court's decree ceased to have any operative force with the supersession of that decree by the appellate court decree'.

In my judgment the passing of the decree in appeal has no such effect, and with respect, I dissent from the above view. In Ekram Hussain v. Mt. Umatul Rasul AIR 1931 Pat 27 the petition for executing the decree of the court of first instance was even construed to be one to execute the mandatory part of that decree as affirmed on appeal; it is however, unnecessary to go so far. It seems to me that the proper view to take is, what I have stated already, that the petition for executing the first decree became defective on the passing of the appellate decree and stood in need of amendment. This is what was held in Ujagar Lal v. Shankar Dayal, 4 Oudh Cas 333:

'It is the appellate decree alone which can be executed even where it merely affirms the decree of the lower Court. But in such a case the alteration of the application for execution by substitution of the appellate decree for the first decree is a technical and formal amendment only, and the omission of the decree-holder

to do so in his second and subsequent applications, though a defect is not a material defect invalidating the application, and the Court executing the decree can order the amendment to be made.'

With respect, I am in entire agreement with this statement of the law.

4. In the application of 1956, there was no prayer for amendment of the execution petition; it was virtually an application to proceed with ' the execution petition. Before there was a posting of the execution petition for curing the defects, the appellant came in with his objection. In my opinion he came in too soon. In view of what has been stated above, it is now for the execution court to post the execution petition 1950 for curing the defects and to proceed with it according to law and in light of the observations made above. With these directions, the second appeal is dismissed with costs to the contesting respondents. Leave to appeal refused.

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