

Moossa Haji and ors. Vs. Bee Pathu and ors.

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Court : Kerala

Decided On : Feb-08-1962

Reported in : AIR1963Ker53

Judge : M.S. Menon, C.J.,; T.K. Joseph and; P. Govindan Nair, JJ.

Acts : Limitation Act, 1908 - Schedule - Article 182

Appeal No. : A.S. No. 307 of 1957

Appellant : Moossa Haji and ors.

Respondent : Bee Pathu and ors.

Advocate for Def. : V.P. Gopalan Nambiar and; V. Bhaskaran Nambiar, Advs. for Respondents Nos. 1 to 13

Advocate for Pet/Ap. : K.V. Suriyanarayana Iyer and; N.N. Venkitachalam, Advs.

Disposition : Appeal allowed

Judgement :

1. This is an appeal from the order of the Subordinate Judge of Tellicherry in E. P. No. 169 of 1956 in O. S. No. 91 of 1946. The only question for decision is whether the execution petition, is barred by limitation.

2. It is common ground that it is within time, If E. P. No. 54 of 1950 can be considered as a step-in-aid or execution, and that, it is not, if that petition cannot be so considered.(3) The decree in O. S. No. 91 of 1946 directed that: 'The 1st defendant as Karavan of the tarwad and out of the tarwad properties do pay plaintiffs Rs. 6,955-0-0 with interest thereon at six per cent, per annum from the date of suit, viz., 15-10-1946, to the date of realisation'; and that:

'The 1st defendant personally do pay plaintiffs Rs. 901-14-0 being costs of suit with interest thereon at six per cent. per annum from this date (10-3-1949) to the date of realization'.

E. P. No. 54 of 1950 was only for the realization of the costs decreed personally against the 1st defendant.

4. The prayer in. that petition was worded as follows:

(Original in regional language omitted.)

The present petition, E. P. No. 169 of 1956, is for the realisation of the arrears of maintenance decreed. The contention of the appellants is that E. P. No. 54 of 1950 which was only for the recovery of the costs decreed against the 1st defendant personally will not save limitation as far as the present petition is concerned.

5. The second paragraph of Explanation 1 to Article 182 of the Indian Limitation Act, 1908, provides:

'Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But, where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them or against his or their representatives, shall take effect against them all'.

According to the appellants the decree in O. S. No. 91 of 1946 is a decree passed severally against more persons than one, distinguishing portions of the subject-matter as payable by each, and E. P. No. 54 of 1950 will take effect only against the 1st defendant personally. According to the respondents it is a decree passed jointly against the 1st defendant and the other members of his tarwad, and E. P. No. 54 of 1950 will take effect against all of them.

6. That the decree in O. S. No. 91 of 1946 was against more persons than one is apparently beyond controversy. Part of it -- the portion regarding maintenance -- was against the tarwad of the 1st defendant represented by him as its karnavan, and part of it -- the portion relating to costs -- was against him in his own personal capacity.

7. The further question is whether the decree can be considered as one passed jointly as contended by the respondents or not. It is only partly joint; but one view is that a decree should be considered as joint if any one of the reliefs granted under the decree is granted against the defendants jointly, even though other reliefs may be given against each of them separately.

8. This view is embodied in *Subrartaniya Chettiyar v. Alagappa Chettiyar*, ILK 30 Mad 268. In that case the court held that where a decree awarded mesne profits against A and B jointly and costs against A, B and C jointly an application to execute the decree for mesne profits against A and B kept alive the right to execute the decree for costs against C.

9. This view was not accepted in *Nandlal Saran v. Dharam Kirti Saran*, AIR 1926 All 440. The court said:

'Where a decree is jointly passed against all the defendants in one matter and severally against different defendants with respect to other matters, the first portion of the explanation should apply to decrees passed severally and the second portion to the decree or decrees passed jointly. We find ourselves unable to agree with the opinion of the Madras High Court'.

The judgment stated the principle involved as follows:

'The principle appears to us to be that when A, B and C are jointly liable and the decree-holder is attempting to recover the decretal amount from one of them, he should not be barred from recovering it from the rest if he fails to recover it from that particular judgment-debtor. He exercises due diligence in recovering the amount decreed to him and it will be no fault of his if he does not find the particular judgment-debtor of sufficient substance to pay up the entire decree. In such a case it will be equitable to direct that steps taken in aid of execution against one of the joint judgment-debtors should save limitation as against the others. It is also obvious that when a joint decree is passed the decree-holder cannot execute it at one and the same time against them all separately for the same amount. The case is different when certain portions of a decree are jointly passed and others severally passed against more persons than one. While the decree-holder is executing the joint portion of the decree against one of the joint judgment-debtors, there is nothing to prevent him from executing the other portions of the decree against the several judgment-debtors who are liable thereunder. It would be expected of a diligent decree-holder that he should do so.'

10. Both the decisions mentioned above came up for consideration in *Dhulesaheb v. Municipal Borough, Bijapur*, AIR 1949 Bom 260. In that case Chagla, C. J., with whom Bhagwati, J., agreed dissented from the view expressed in ILR 30 Mad 268 and adopted the view expressed in AIR 1926 All 440. He said:

'The Bench, of the Madras High Court held that the second paragraph of the Explanation to Article 182 must be read literally, and they took the view that although part of the decree was joint in so far as it related to costs and part of the decree was several in so far as it related to mesne profits, still the decree must be looked upon as a joint decree. With very great respect, I am unable to agree with this view of the Madras High Court. It is difficult to understand why even a literal interpretation of the second paragraph of explanation to Article 182, should drive one to the conclusion to which the Madras High Court seems to have been driven. When the explanation speaks of a decree, it must include a decree or part of a decree or a portion of a decree, and putting that interpretation upon the second paragraph of the explanation it is easy to reconcile all difficulties and to come to a solution which is not illogical or anomalous.'

11. We are in entire agreement with the view expressed in AIR 1949 Bom 260, and find it impossible to follow ILR 30 Mad 268. It is that impossibility which compels us to differ from the Madras view, a view which has prevailed for over fifty years in the area from which this appeal arises.

12. in the light of what is stated above we must hold that E. P. No. 54 of 1950 cannot be considered as a step-in-aid of execution which saves E. P. No. 169 of 1956 from the bar of limitation and that this appeal has to be allowed. We do so, though in the circumstances of the case, without any order as to costs.

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