

Varkey Varkey Vs. Augusthy Varkey

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Court : Kerala

Decided On : Jan-18-1963

Reported in : AIR1964Ker149

Judge : P. Govindan Nair, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 2(3), 2(11) and 47

Appeal No. : Second Appeal No. 186 of 1959

Appellant : Varkey Varkey

Respondent : Augusthy Varkey

Advocate for Def. : T.N. Subramonia Iyer, Adv.

Advocate for Pet/Ap. : George Vadakkal, Adv.

Disposition : Appeal allowed

Judgement :

P. Govindan Nair, J.

1. The decree-holder is the appellant. A decree on the following terms was passed on 10th of March 1955:

'Annlaya prakanam rupa 500-0 Dhe Annriaya thiyami multhel 6% palisayum uadmyude kodathi Chilaur rupa 77-2-3 dihi vidhi thiyathi muttel 6% patisayun sanidham 2-10 vathi prathiyilum pathika vasthuvil sthapicnun ladani-Kolhumma itinun vidhi kadan randu masathinham wir-kathparham pathika vasthuvil nadapadh hadathikajunn thninum vithi.'

Since then the first plaintiff died. When the second plaintiff sought to execute the decree, the objection was taken that he was only an agent of the first plaintiffs and that on the death of the first plaintiff, the agency had terminated and therefore the second plaintiff was not entitled to execute the decree. Reliance for this contention was placed on the following statement in the decree giving the summary of the plaint.

'1-10 Vadhiku vendi 1-10 vadiku ladahi kittan anniaam 1-10. vadiku vendhiku vendi santia ladakunnaumum 2-10 vandhiye cashhi chenthinkkumu'.

The courts Below have accepted the contention raised by the judgment-debtor and have dismissed the execution application.

2. It appears to me that the question for decision depends upon the construction of certain sections of the Code of Civil Procedure and they are Sections 2(3), 2(11) and 47(3). These are extracted below:

'2 (3). 'Decree-holder' means any person in whose favour a decree has been passed or an order capable of execution has been made'.

'2 (11). 'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.

'47 (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section be determined by the Court.

Explanation:-- For the purposes of this section, a plaintiff whose suit has been dismissed, a defendant against whom a suit has been dismissed and a purchaser at a sale in execution of the decree are parties to the suit'.

3. From the decretal portion extracted above, it is clear, and there can be no doubt that the decree-holder in this case is the second plaintiff and the second plaintiff alone. The questions that can be determined in execution are those specified in section 47, and, if at all, the question that was mooted in the courts below can arise only under Sub-section (3) of Section 47. Such a question, it seems to me, can arise only on the death of the decree-holder, who, as I said, on a prima facie reading of the decree is the second plaintiff, if the second plaintiff is the decree-holder, as long as he is alive, the further question as to who is the representative of the first plaintiff cannot arise in execution.

But counsel for the respondent strenuously contended before me that on a proper construction of the decree, it is evident that the decree-holder is the first plaintiff and that the first plaintiff having died, the court can and must determine the further question as to who is the representative of the first plaintiff. This argument is entitled to weight if the assumption made that the decree-holder is the first plaintiff is correct. I am unable to accept this contention in view of the specific provision made in the decree. No doubt, it is seen from the statement which I have extracted above, that the decree happened to be passed in favour of the second plaintiff on the basis of the consent given or the request made by the first plaintiff that a decree may be passed in the name of the second plaintiff for and on behalf of the first plaintiff. Even so, from the definition of 'decree-holder' it is clear that the decree-holder can only be the person in whose favour a decree has been passed. The grounds on which the decree had been so passed, the reason for the same and the motives which prompted the first plaintiff to so request are matters, I consider, entirely foreign to the scope or the enquiry falling under Section 47 of the Code of Civil Procedure. Section 2(11) also throws some light on this aspect. The sub-section provides for a case where a party had sued in a representative character, and enacts that when such a person dies, his legal representatives are those on whom the estate devolves, so, it seems to me to be clear that it is only in cases where a party suing in a representative character dies that an enquiry on whom

the estate devolves can arise.

4. And I am fortified in this view by the later decisions of the Madras High Court where the question arose in execution as to whether an enquiry that a transfer or a decree was benami for somebody else than the person who appeared as transferee can or cannot be enquired into in execution. These decisions are in *Jaldu Palasubrammam Chetty v. Kothandaramaswami Nayanam varu* AIR 1942 Mad 688 (FB) and *Kristam Naidu v. Durvada Patrudu*, AIR 1927 Mad 903 and the rule has been laid down that such an enquiry cannot be had in execution proceedings. Acuarly in these two cases, an enquiry as to who was the legal representative of the dead benamidar, was allowed. But it has also been laid down in these cases that as long as the benamidar is alive, the question as to who is the legal representative cannot arise. In fact the Madras High Court in an earlier decision in *Palaniappa Chetty v. Subramania Chettiar*, AIR 1925 Mad 701 had gone to the extend of holding that even in a case where a benamidar is dead such an enquiry ought not to be held in execution, whateven that be. In this case, the second plaintiff is still alive and as long as he is alive he is the only person entitled to execute the decree. There can be no enquiry as to the true ownership of the decree in execution.

5. Counsel for the respondent invited my attention to a number of rulings, four of which are *Atchutarama Rao v. Bapanayya*, AIR 1942 Mad /48, *Abdul Sac v. sundara Mudahar*, AIR 1930 Mad 817 (FB), *Nil Kanta Ghosal v. Ram Chand Roy*, AIR 1928 Cal 835 and *Babu Satyendra Narain v. Wahiduddin Khan*, AIR 1940 Pat 472. The first of these decisions was concerned about a scheme drawn up and about the interpretation of a decree which ronowed. The question was whether the decree, read in the light or the scheme, warranted the interpretation that a particular direction was granted to the defendant by the decree the general rule that a decree passed in such a case should be understood in the light of and in consonance with the provisions of the scheme framed was laid down, I do not think the decision is helpful in resolving the question arising in this appeal.

In AIR 1930 Mad 817 (FB), their Lordships said that when a person's name is seen on the party array, the question may have to be decided whether really he is a

party to a suit or not Their Lordships dealt with the difference between cases where a person had been impleaded wrongly and cases where a party had been rightly brought on the party array, but against whom no relief was claimed, in the first of these classes of cases, where the court had held that a party had been brought on the party array wrongly though his name continued to be mentioned in the record, he is not really a party to the suit in the latter case, though no relief was granted against him, he is suit a party to the suit. And for determining this question as to whether a person whose name appears in the records is a party against whom relief is given up or is a person who has been wrongly brought on the party array, the judgment and even the pleadings in the case may be looked into, is what has been decided in the case. I think the decision has no application.

In AIR 1928 Cal 835, an alleged true owner of the decree sought to execute the decree after the death of the benamidar in whose name the decree had been passed. I have already said that when the benamidar in whose name the decree has been passed is dead, the question may arise as to who is his legal representative and it will be a question arising under section 47 of the Code of Civil procedure. AIR 1940 Pat 472 is a case where the Patna High Court has followed the decision of the Madras High Court in AIR 1925 Mad 701 and has taken the extreme position that a beneficiary cannot execute the decree on the ground that the decree-holder was his benamidar and that no enquiry relating to the true ownership of the decree even when the alleged benamidar is dead, can be had.

6. In the light of the above discussions, I have set aside the orders passed by the courts below and that the appellant is entitled to execute the decree against the first defendant and it is not open to the first defendant to challenge the execution of the decree according to the terms thereof. I therefore allow this appeal, set aside the orders of the courts below and allow execution to be taken by the appellant. In the circumstances of the case, direct the parties to bear their costs throughout.