

Padma Vs. Anila Mathew

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SooperKanoon Citation : sooperkanoon.com/728366

Court : Kerala

Decided On : Mar-18-2005

Reported in : 2005(4)KLT514

Judge : R. Bhaskaran, J.

Acts : [Constitution of India](#) - Article 227; [Limitation Act, 1963](#) - Schedule - Article 163; Code of Civil Procedure (CPC) - Sections 48

Appeal No. : C.R.P. No. 604 of 2003

Appellant : Padma

Respondent : Anila Mathew

Advocate for Def. : K.M. Varghese, Adv.

Advocate for Pet/Ap. : Mathew John (K), Adv.

Disposition : Petition dismissed

Judgement :

ORDER

R. Bhaskaran, J.

1. This Civil Revision Petition is filed by the 3rd judgment debtor in O.S. No. 138 of 1985 on the file of the Additional Munsiff's Court, Kottayam. The suit was for

recovery of possession on the strength of title and it was decreed ex parte against defendants 1 to 3 on 18-6-1986. Subsequently the 1st defendant filed I.A.1973 of 1987 to set aside the ex parte decree. Though the trial court dismissed that application, the appellate court in C.M.A. No. 83 of 1988 allowed the same by order dated 21-5-1993. Subsequently, the trial court passed a fresh decree against the 1st defendant, by judgment and decree dated 5-11-1996. On 23-1-1998, the decree-holder filed E.P. No. 64 of 1998 to execute the decree against all the defendants. In that application, the decree sought to be executed was shown as the decree dated 5-11-1996. Subsequently, on 24.10.2001, the decree-holder filed E.A. No. 284 of 2001 to amend the execution petition to include the date of decree as 18-6-1986 also. The execution court allowed the application for amendment of the execution petition. This revision is filed challenging that order.

2. The learned counsel for the revision petitioner contended that since by the time the Execution Application No. 284 of 2001 was filed, the decree dated 18.8.1986 became barred by limitation, the amendment should not have been allowed. He also relied on the decisions in *K. Raheja Constructions Ltd. v. Alliance Ministries* (AIR 1995 SC 1788) and *Manilal v. Oriental Fire & General Insurance Co. Ltd.* : [1990]1SCR272 to contend for the position that where the claim is barred by limitation, the pleadings cannot be amended. In *Raheja Constructions'* case, the suit for injunction was sought to be amended after seven years of the filing of suit into one for specific performance of an agreement and it was found that the amendment cannot be allowed. In *Manilal's* case, the amendment was sought while the case was pending in appeal which relief was already barred by limitation.

3. In *Ragu Thilak D. John v. Dass Estate (P) Ltd.* ((2001) 2 SCC 472), the Supreme Court held that when the suit was filed originally for injunction restraining the defendant from demolishing the plaintiff's compound wall and he alleged that during the pendency of the suit the defendant entered his property and demolished the compound wall and when the plaintiff filed application for amendment of plaint including recovery of damages, the dismissal of the application for amendment of plaint was found to be illegal. It was held that the amendment should be allowed and the question whether the relief was barred by limitation could be considered at the trial of the suit after framing an issue in that respect. In *Estralla Rubber v. Dass*

Estate (P) Ltd. : AIR 2001 SC3295 , the question arose whether the defendant in a suit for eviction filed under the West Bengal Premises Tenancy Act could file an application for amendment of the written statement denying the title of the landlord. The High Court had in exercise of the jurisdiction under Art. 227 of the Constitution allowed the Writ Petition filed by the landlord and set aside the order of the District Judge in revision. The High Court had found that if the amendment was allowed, the respondent/plaintiff would be deprived of the benefit of the admission made by the defendant in its application under Sections 17(2) and 17(2-A) of the Act seeking extension of time for deposit of the admitted arrears of rent. It was also found by the High Court that there was a delay of three years in filing the application for amendment. The Supreme Court held that the amendment was only to elaborate the defence in support of its case and it was open to the defendant to explain the admission in the original written statement and the amendment was required for proper adjudication of the controversy between the parties and to avoid multiplicity of judicial proceedings.

4. The learned counsel for the 1st respondent relied on the decision of this Court in Rajammal v. State Bank of Mysore (1992 (2) KLT 321) wherein Paripoornan J., as His Lordship then was, considered an almost identical question. It was held as follows:

'The import of Art. 136 of the [Limitation Act, 1963](#) and Section 48 of the Code of Civil Procedure is that a fresh execution petition/application filed after twelve years of the decree will be patently barred. The bar cannot be circumvented even by filing an application for amendment or an application seeking to revive a pending application. Such methods, to overcome the bar of limitation, will not be recognised by the court. But it should be clearly noticed that it is only a fresh execution petition or application that is barred. An application to revive a pending or earlier application or a petition to amend the execution petition already filed and which is pending cannot be said to be a 'fresh' execution petition. The mere fact that the petition is to revive an earlier execution petition or to amend the execution petition, by itself, is not conclusive. The question is whether, in fact and in substance, the application so filed can be considered to be a 'fresh' application, for the purpose of Article 136 of the [Limitation Act, 1963](#) and Section 48 of the Code

of Civil Procedure (now repealed). The matter is seen discussed in the Full Bench decision of the Mysore High Court in Marulasiddappa 's case (AIR 1950 Mys.64). One of the decisions relied on therein is the decision of the Allahabad High Court reported in Bandhusing v. Kayastha Trading Bank Ltd. (AIR 1931 All. 134). The matter is also discussed in detail by the Full Bench of the Travancore-Cochin High Court in the decision, in Narayanaa Damodaran Namoodiri's case (AIR 1957 TC 109). In the said decision, the decision of the Allahabad Bandhusing's case (AIR 1931 All. 134), the decision of the Madras High Court reported in Venkata Lingama Nayanin v. Venkata Narasimha Nayanin (AIR 1947 Mad. 216) and other decisions have been adverted to. It is unnecessary to discuss the decisions of various High Courts since the matter is now concluded by a decision of the Supreme Court in Pentapati China and Ors. v. Pentapati Bangararaju and Ors. : [1964]6SCR251 , Subba Rao. J. delivering the judgment of the Bench, stated the law thus:

'...An application made after 12 years from the date of the decree would be a fresh application within the meaning of Section 48 of the Code of Civil Procedure, if the previous application was finally disposed of. It would also be a fresh application if it asked for a relief against parties or properties different from those proceeded against in the previous execution petition or asked for a relief substantially different from that asked for in the earlier petition.'

In this case, the execution petition was filed within 12 years of the original decree. The mistake in not mentioning the date of the original decree as 18.8.1996 was sought to be rectified by way of amendment. All the judgment debtors were made parties to the execution petition which was filed within time and the decree that was mentioned in the execution petition was the decree which was passed after the 1st defendant was permitted to contest the case and a fresh decree was passed. It is pointed out by the learned counsel for the decree-holder that even after the 1st defendant was allowed to contest the case, the decree was an ex parte decree since he did not avail of the opportunity to contest the case. By amending the E.P. by showing the original decree dated 18-6-1986 which was also sought to be executed no prejudice was caused to the judgment debtors as the E.P. was filed against all the judgment debtors within the period of 12 years of

the original decree.

5. In the decision in *Pankaja v. Yellappa* (2004 (3) KLT (SC)(SN) 50 : 2004 AIR SCW 4522), the Supreme Court considered the question whether the expiry of the period of limitation prescribed by law will disable the Court from exercising power of amendment. The Apex Court observed as follows: 'The law in this regard is quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary the same will have to be exercised in a judicious evaluation of the facts and circumstances in which the amendment is sought.

If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straight jacket formula for allowing or disallowing an amendment of pleadings. Each case depends upon the factual background of that case.' Earlier decisions of the Supreme Court were also referred to in that judgment.

6. As already noticed the decree-holder was justified in showing the date of the decree as 5-11-1996 in the E.P. as it was the date of the decree which was passed after allowing the 1st defendant to contest the suit. Even if the date of the decree is taken as 18-6-1986 the execution petition was filed within time and all the judgment-debtors were on the party array. Subsequently, the 1st defendant died and his legal heirs are defendants 2 and 3. In that respect also, they are bound by the decree against the 1st defendant. Since the endeavour of the Court must be to do justice between the parties, it will cause serious injustice if the decree which was not even contested is not allowed to be executed when as a matter of fact the execution petition was filed well within time. The amendment application was correctly allowed by the execution court. Therefore the C.R.P. is without any merit and it is dismissed.