

**Sunil Kumar Vs. Prakash**

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**Court :** Kerala

**Decided On :** Nov-10-2004

**Reported in :** AIR2005Ker181; 2005(1)KLT800

**Judge :** R. Bhaskaran and; K.R. Udayabhanu, JJ.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 3, 7, 38, 39, 39(3) and 42 - Order 21, Rule 82; Small Cause Court Act - Sections 12 and 13

**Appeal No. :** C.R.P. Nos. 114, 825, 1173, 1174, 3260, 3261 and 3448 of 2001

**Appellant :** Sunil Kumar

**Respondent :** Prakash

**Advocate for Def. :** K.V. Sohan, Adv.

**Advocate for Pet/Ap. :** E.V. Nayanar, Adv.

**Disposition :** Petition allowed

**Judgement :**

ORDER

**R. Bhaskaran , J.**

1. In all these Civil Revision Petitions, the common question for consideration is whether a decree passed by a Court of Small Causes can be transferred to a Civil

Court for execution by attachment and sale of immovable property of the judgment-debtor.

2. These Revisions are placed before us on reference by a Single Judge of this Court who thought that the decision of another Single Judge (K.T. Thomas, J. as His Lordship then was) reported in *Raman Namboodiri v. Kunhayamath* (1989 (1) KLT 74) requires reconsideration in the light of a Division Bench decision of Travancore-Cochin High Court in *Mohammed Mastan Kunju Mohammed Abdul Khadar v. Mytheen Kunju Pakiru Mohammed* (1956 KLT 343 = AIR 1956 TC 213). In these C.R.Ps., the original decrees granted were those of the Additional Small Cause Court, Bangalore. The Execution Court dismissed the execution petition relying on the decision in *Raman Namboodiri's* case. It is stated in *Raman Namboodiri v. Kunhayamath* that under Section 7 of the C.P.C., Small Cause Court has no jurisdiction for execution of a decree against immovable property. It is also held that even if the decree is transferred to a Civil Court for the purpose of execution, that Court also has no jurisdiction to execute the decree by sale of immovable property. The reason stated by the learned Judge for holding so is that Section 39 of the C.P.C. prescribes that a decree may be sent for execution to a Court of competent jurisdiction and that what is meant by a Court of competent jurisdiction can be seen from Sub-section 3 of Section 39 and that it should be a Court which would have jurisdiction to try the suit in which such decree was passed. It is further held that under Sections 12 and 13 of the Kerala Small Cause Court Act, a Court of Small Cause alone has got jurisdiction to execute the decree passed by the Small Cause Court and not the Civil Court.

3. Section 7 of the C.P.C. came up for interpretation before a Division Bench of the Travancore-Cochin High Court in *Abdul Khader v. Pakiru Mohammed* (1956 KLT 343 = AIR 1956 TC 213). Their Lordships relied on the decision of the Lahore High Court in *Jalla Mall Jawahar Mall v. Motia* ((1941 Lah.109)). In *Abdul Khader's* case a decree passed by a Court of Small Causes was transferred for execution to the same Court on its regular civil jurisdiction. The Division Bench held that the execution of the decree passed by the Small Cause Court by the same Court, in exercise of civil jurisdiction was in effect transferring the decree from Small Cause Court and as it was after such transfer, the property was attached and sold and

the same was therefore valid. Since the Division Bench in Abdul Khader's case heavily relied on the decision of the Lahore High Court, and accepted the reasoning of that decision, it is necessary to discuss the decision of the Lahore High Court in Jella Mall's case. The Division Bench of the Lahore High Court observed that the fact is that in all the Subordinate Courts of at least five of the Indian High Courts, the practice of transferring the decrees of the Small Cause Court to the Court of ordinary jurisdiction to enable the Court to sell the immovable property in execution of the Small Cause Court decree, was recognised. The Lahore High Court examined Section 7 of the C.P.C. and 0.51 and held that the bar provided under the C.P.C. was only for execution of a decree against immovable property by Small Cause Court acting as such. It was held that the Court could not think of the Legislature forcing a litigant to go to a particular Court for his remedy and when he has got his remedy from that Court to find that it is in fructuous because it cannot be enforced against the only property which the judgment-debtor may have. It was further held that the only reason for denying Small Cause Court, the jurisdiction to execute such decree might be that there is no right of appeal for the aggrieved party from the decision of the Small Cause Court if that Court was to execute the decree. Therefore the bar is only for the Court of Small Causes to execute the decree and not for the decree passed by the Court of Small Causes to be executed and realised through a Civil Court having jurisdiction.

4. Section 38 of the C.P.C. allows a decree to be executed either by the Court which passed the decree or by the Court to which it is sent for execution. Section 39 provides for transfer of decree by the Court which passed it to another Court of competent jurisdiction. Sub-section 3 of Section 39 provides that for the purpose of the section a Court shall be deemed to be a Court of competent jurisdiction, if at the time of making the application for the transfer of the decree to it, such Court would have jurisdiction to try the suit in which such decree was passed. Section 42 of C.P.C. stipulates that the Court to which the decree is transferred for execution will have the same powers as if it had been passed by itself. The exception to this power as provided in Sub-section (4) is not relevant for the purpose of these cases. 0.21, Rule 82 C.P.C. prescribes that sale of immovable property may be ordered by any Court other than a Court exercising Small Cause jurisdiction.

5. A Full Bench of the Allahabad High Court in *Ram Lochan v. Mahadeo Singh* (AIR 1970 All. 544) considered the powers of the transferee Court under Section 42 of the C.P.C. as amended by U.P. Amendment Act 24 of 1954. It was held that after Section 42 was amended in 1954, the transferee Court would have no power to execute the decree by attachment and sale of the property where the decree was passed by a Court of Small Cause. Section 42 as amended by the U.P. Amendment read as follows:

'The Court executing the decree sent to it shall have the same powers in executing such decree as the Court which passed it. All persons disobeying or obstructing the execution of the decree shall be punished by such Court in the same manner as if it had passed the decree and its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.'

The Full Bench held that after the amendment, the powers of the transferee Court had been made co-terminous with the powers of the transferer Court. This decision of the Full Bench of the Allahabad High Court was upheld by the Supreme Court in *Mahadeo Prasad Singh v. Ram Lochan* (AIR 1981 SC 416). The Supreme Court held that the Amendment Act 24/54 had taken away the power of the transferee Court to execute the transferred decree by attachment and sale of the immovable property by making it co-terminous with that of the transferer Court which, in the instant case, was the Small Cause Court and in view of the prohibition contained in O.21, Rule 82 C.P.C. it had no power to execute its decree by sale of immovable property. In paragraph 31 of the judgment, the Supreme Court has clearly stated that it was the Amendment Act 24/54 which took away the power of the transferee Court to execute the transferred decree by attachment and sale of the immovable property by making it co-terminous with that of the transferer Court. In paragraph 36 of the judgment it is also observed by the Supreme Court that the amendment made by Act 24/1954 was subsequently deleted by the U.P. Amendment Act 14/1970 and the Amendment Act was not having retrospective operation. It did not affect the previous operation of Amendment Act 24/1954. So far as the cases before us are concerned, it is the unamended provisions which are applicable to the cases and that provisions read

as follows:

'42. Powers of Court in executing transferred decree.- (1) The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.'

Therefore it is clear that, but for the U.P. Amendment Act 24/1954, the transferee Court would have jurisdiction to execute the decree of Small Cause Court by attachment and sale of immovable property.

6. In Raman Namboodiri's case, this Court also referred to Section 39 of the C.P.C. and, in particular, Sub-section 3, to find that a decree may be sent for execution to a Court of competent jurisdiction and such Court would be the Court which has jurisdiction to try the suit in which such decree was passed. According to the learned Single Judge, Sub-section 3 was introduced by Amendment Act, 1976 and that makes the position clear that the transferee Court must be the Court which has got jurisdiction to try the Small Cause Court case. The objects and reasons for amendment are as follows:

'Clause 19.- Section 39 of the Code provides for the transfer for execution of a decree by the Court which passed the decree to another Court. There is a conflict of decisions with regard to this Section as to whether-

- (i) the transferee Court must be a Court of competent pecuniary jurisdiction, and
- (ii) if so, whether the competence should be judged with reference to the decree or suit. The Section is being amended to clarify the position by providing that the transferee Court must have pecuniary competence to deal with the suit in which the decree was passed.'

In the light of the above objects and reasons, the reason for inclusion of Sub-section 3 was only to emphasis the pecuniary jurisdiction of the transferee Court.

7. In Raman Namboodiri's case the learned Judge also relied on Sections 12 and 13 of the Small Cause Courts Act. It is stated that Section 12 debars a Court of Small Causes from taking cognizance of suits exempted under the Act and Section 13 interdicts the Civil Court from trying a suit of Small Causes. With great respect Section 13 does not contain such a prohibition. It reads as follows:

'13. Exclusive jurisdiction of Courts of Small Causes.-- Save as expressly provided by this Act or by any other enactment for the time being in force a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction of the Court of Small Causes by which the suits is triable.'

A Full Bench of the Allahabad High Court in *Manzurul Haq v. Hakim Mohsin Ali* (AIR 1970 All. 604 (FB)) had occasion to consider Sections 15 and 16 of the Provincial Small Cause Courts Act (1887). In paragraphs 20 and 21 of the Full Bench decision, there is a discussion of this aspect and we quote the same:

'20. By virtue of Section 15, Civil P.C. the Court of Munsiff is the only Court in which civil suits upto a certain valuation can be filed. If the civil suits exceed that valuation, they have to be filed in the Court of the Civil Judge. However, from that it cannot be inferred that the Civil Judge lacks the initial jurisdiction to entertain cases below a certain valuation. In view of the fact that the law requires that all the suits shall be instituted in the Court of the lowest grade competent to try it, a civil suit upto a certain valuation is filed in the Court of the Munsiff. But for that provision it could have been filed in the Court of the Civil Judge also. Even with the provision, where the Court of Munsiff does not exist and a Court of Civil Judge exists, all the suits whatever their valuation might be, will have to be filed in the Court of the Civil Judge. In such circumstances it cannot be said that the Court of the Munsiff has exclusive jurisdiction to try civil suits upto a certain valuation.

21. Similar is the effect of Section 16 of the Provincial Small Cause Courts Act. If a Small Cause Court has not been established for any particular area, all the civil suits, whether or not they might be cognizable by a Court of Small Causes, shall have to be instituted in the Court of the Munsiff exercising jurisdiction in that area. It is only after a Small Cause Court has been established for that area that all suits cognizable by a Court of Small Causes are to be instituted before the Court of the

Small Causes and not before the Court of the Munsiff. The Court of Small Causes thus becomes a Court of 'preferential jurisdiction', and not of 'exclusive jurisdiction'.'

In paragraph 40 of the same judgment it is stated as follows:

'40. A perusal of the section, as reproduced above, would show that it is only an enabling provision and not a disabling provision. In other words, it only says that a Court of Small Causes shall have the jurisdiction to take cognizance of all suits of the nature specified in Sub-clause (2) thereof. It does not say that no other Court shall have jurisdiction to take cognizance of such suits. Therefore, so far as Section 15 is concerned, in my view, it cannot form the basis of an argument that a Court of Small Causes is a Court of exclusive jurisdiction.'

In *Bhaiyalal v. Tikaram* (AIR 1970 M.P. 237 (FB)), it was held that where a suit of small cause nature is instituted and tried as a regular suit in contravention of Section 16 of the Provincial Small Cause Court Act, 1887, and the judgment is rendered, it cannot be said that the judgment so rendered is without jurisdiction or it is a nullity. The decision in *Raman Namboodiri's case* (1989 (1) KLT 74) was followed by another Judge of this Court in *Sankar Singh v. Hosdrug Housing Co-op. Society Ltd.* (1996 (2) KLT 226) in a different context. The question considered in that case was whether an award which was for more than Rs. 20,000/- passed under Section 76(a) of the Co-op. Societies Act can be executed by a Munsiff. It was held that at the time when the petition was filed, the Munsiff Court has no jurisdiction to try the suits for such violation. It was also observed that if the petitioner wants he can re-present the execution petition in the Munsiff's Court itself since, subsequently, the pecuniary jurisdiction of the Munsiff Court is increased.

8. There is another important aspect in these cases. The decree passed in most of these cases are of Rs. 18,000/- and above. In two cases, the same were for Rs. 15,000/-. In fact, if the suits were to be filed in Kerala, these suits could only have been filed as regular suits before a Civil Court. Therefore, at any rate, the transferee Court has got the jurisdiction to execute the decree by application of Section 39 of the C.P.C. itself. The learned counsel for the respondent contended

that in such a case, the transfer should have been made to the Munsiff's Court and not to the sub Court as the suits were to be filed before the Munsiff's Court in Kerala. We find it difficult to accept the above contention. Though under Section 15 of the C.P.C, every suit shall be instituted in the Court of the lowest grade competent to try it, it does not mean that the Subordinate Judge's Court has no jurisdiction to try the suits with lesser pecuniary jurisdiction. The uniform opinion of almost all the High Courts is that Section 15 of C.P.C. embodies only a rule of procedure and not of jurisdiction. If a suit which ought to have been filed before Munsiff Court was filed before the Subordinate Judges Court and a decree is passed, the decree is not a nullity. It is only a case of irregularity not affecting the jurisdiction of the Court to try it. Therefore, the argument based on Section 39 C.P.C. that if the suits were to be filed in Kerala, they could only be filed before the Munsiff Court and the execution petition before the Subordinate Judge's Court is incompetent is not tenable. The order of transfer to the Subordinate Judge's Court is not challenged. Only if the Subordinate Judge's Court has no jurisdiction at all to execute the decree, it can be interfered in revision.

9. Section 31 of the Small Cause Court Act, 1957 also gives some indication about the question involved in this case. Section 31 reads as follows:

'31. Modification of Code as so applied.-- Notwithstanding anything in Sections 29 and 30-

(a) When in exercise of the jurisdiction of a Court of Small Causes, a Court invested with that jurisdiction sends a decree for execution to itself as a Court having jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes; or

(b) when a Court, in exercise of its jurisdiction in suits of a civil nature which are not cognisable by a Court of Small Causes, sends a decree for execution to itself as a Court invested with the jurisdiction of a Court of Small Causes;

the documents mentioned in Order XXI, Rule 6 of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908) shall not be sent with the decree unless in any case the Court, by order in writing, requires them to be sent.'

It is therefore seen that the Legislature had contemplated cases where Small Cause Court sends the decree for execution to Civil Court. Section 12 of the Small Cause Court Act only provide for exclusion of jurisdiction with regard to suits specified in the Schedule and Section 13 states that a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction of the Court of Small Causes by which the suit is triable. It is not a case of exclusion of the jurisdiction of the Civil Court as held in Raman Namboodiri's case.

10. In the light of the above discussion, we overrule the decision reported in Raman Namboodiri v. Kunhayamath (1989 (1) KLT 74) and hold that a decree passed by a Court of Small Causes can be transferred to a Civil Court and that the decree can be executed by sale of immovable property of the judgment-debtor. All these Civil Revision Petitions are allowed and the execution Court is directed to proceed with the execution in accordance with law.

Parties shall appear before the execution Court on 6.12.2004.

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