

Radhakrishnan Vs. State of Kerala

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Court : Kerala

Decided On : Nov-24-2005

Reported in : I(2007)BC331; 2006(1)KLT28

Judge : V. Ramkumar, J.

Acts : Limitation Act - Sections 5; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 151 - Order 21, Rules 41, 105, 105(2), 106, 106(1) and 106(3); [Constitution of India](#) - Articles 226 and 227

Appeal No. : W.P. (C) Nos. 5927 and 28645 of 2005

Appellant : Radhakrishnan

Respondent : State of Kerala

Advocate for Def. : A.S.P. Kurup,; Blaze K. Jose,; K.K. Sunil Kumar,;

Advocate for Pet/Ap. : Shaji P. Chaly and; Abdul Jaleel A., Advs.

Disposition : Petition dismissed

Judgement :

V. Ramkumar, J.

1. The first defendant/first judgment debtor and legal representatives of the 4th judgment debtor in O.S.No. 156/1985 on the file of the I Addl. Sub Court,

Thiruvananthapuram are the petitioners in these Writ Petitions filed under Articles 226 and 227 of the [Constitution of India](#). The said suit was one for realisation of a sum of Rs. 1,87,219.25/- from the defendants of whom the first defendant is the principal debtor and the other defendants represent the interest of the guarantors. The said suit was decreed on 12-9-1986. On 6-3-1998 the plaintiff/decreed holder-Bank filed E.P. 65/1998 for executing the decree by attachment and sale of the charged properties. As on 6-3-1998 the total amount due with interest was Rs. 5,20,638.08. After the judgment debtors filed their objection to the E.P., the E.P. stood posted to 20-5-1998. On that day for the reason that there was no representation on behalf of the decree holder-Bank, the E.P. was dismissed for default. On 9-11-1998 the decree holder filed E.A. 245/1998 for restoration of the E.P. which had been dismissed for default. The said application was filed under Order 21 Rule 106 C.P.C. with a prayer to condone the delay, set aside the order dismissing the execution petition and restore the same. The affidavit of Adv. Sri. Kunjukrishnan Potti of Trivandrum Bar who was appearing for the decree holder-Bank was also filed along with the said application. In the said affidavit it was stated that the execution petition was posted to 8-4-1998 for putting up the back records and on that day his former clerk had noted the next posting date as 17-7-1998 instead of 20-5-1998 and it was the new Clerk who discovered on 30-10-1998 that the E.P. had been dismissed for default on 20-5-1998 and this fact could be discovered only after tracing out the file by the new clerk and that there was no wilful default, negligence or laches on the part of the decree holder or the counsel in not appearing before the court on 20-5-1998 and that about Rs. 5 lakhs is to be realised from the judgment debtors and unless the execution petition is restored to file the decree holder will suffer irreparable loss and hardship. The above application was vehemently opposed by the judgment debtors including the petitioners herein who inter-alia contended that the restoration petition filed under Order 21 Rule 106 C.P.C. was hopelessly time barred and that the delay could not be condoned by resort to Section 5 of the Limitation Act. Over-ruling the said objection the court below as per order dated 7-6-2004 allowed E.A. 245/1998 on condition that the decree holder deposits Rs. 500/- with the Kerala State Legal Services Authority and on payment of Rs. 250/- to the first judgment debtor and Rs. 250/- to judgment debtors 10, 11 and 12 on or before 21-6-2004. Aggrieved by

the above order the petitioners herein filed applications for review as E.A. Nos. 528/04 and 904/04. Both the review petitions were dismissed as per order dated 9-8-2004. It is the said order which is assailed in these Writ Petitions.

2. I heard the learned Counsel appearing for the respective petitioners and the learned Counsel appearing for the decree holder/Union Bank of India.

3. Assailing the orders passed by the Executing Court the learned Counsel appearing for the petitioners in both the Writ Petitions made the following submissions before me:

The E.P. was dismissed for default on 20-5-1998. The time within which a restoration petition under Order 21 Rule 106(1) C.P.C. should be filed is 30 days as stipulated under Sub-rule (3) of Order 21 Rule 106 C.P.C. This was a case where the decree holder was represented by a counsel. Hence the application under Order 21 Rule 106(1) C.P.C. should have been filed on or before 19-6-1998. E.A. 245/98 under Order 21 Rule 106 C.P.C. was admittedly filed only on 9-11-1998. It was thus filed long after the time stipulated under Sub-rule (3) of Rule 106 of Order 21 C.P.C. Section 5 of the Limitation Act has no application to all proceedings in execution including a petition under Order 21 Rule 106 C.P.C.. Hence E.A. 245/98 was hopelessly time-barred and the prayer to condone the delay in filing the said petition was misconceived. (Vide Francis v. John - : 2004(3)KLT1113 and Damodaran Pillai v. South Indian Bank Ltd.- 2005 (4) KLT 192 (SC). The Court below was therefore not justified in allowing E.A. 245/1998 and dismissing the review petitions filed against the said order.

4. I am afraid that I cannot agree with the above submissions. E.P. 65/98 was filed on 9-3-1998. On 23-3-1998 the executing Sub Court posted the E.P. to 3-4-1998 with the following endorsement:

Put up with back records.

On 3-4-1998 also the E.P. was directed to be put up with records and posted to 20-5-1998. It was on 20-5-1998 that the E.P. was dismissed for default since there was no representation on behalf of the decree holder. An application under Order

21 Rule 106(1) C.P.C. postulates the passing of an order under Sub-rule 2 of Rule 105 of order 21 C.P.C. Dismissal of an application under Sub-rule 2 of Rule 105 of Order 21 C.P.C. pre-supposes a posting of the case for hearing and failure on the part of the applicant to appear on that date. As noted earlier E.P. 65/1998 stood posted to 20-5-1998 not for hearing but for being put up with back records. It was really a direction to the Bench section to put up the execution petition together with back records. The question of posting the E.P. for hearing the same arises only after it is put up with back records. Hence 20-5-1998 was not a date fixed for hearing of the execution petition within the meaning of Sub-rule 2 of Rule 105 of Order 21 C.P.C. If so, the dismissal of the execution petition on 20-5-1998 was not really one under Sub-rule 2 Rule 105 of Order 21 C.P.C.. This means that E.A. 245/1998 though one filed under Order 21 Rule 106(1) C.P.C. was really one under Section 151 C.P.C. invoking the inherent power of the court to restore the execution petition dismissed for default on a date on which the E.P. was not posted for hearing. There is no time limit prescribed for filing an application for restoration by invoking the inherent power of the court under Section 151 C.P.C.. A similar situation pointedly arose before the Madhya Pradesh High Court in Khoobchand Jain and Anr. v. Kashi Prasad and Ors., : AIR 1986 MP66 wherein it is observed as follows:

In my opinion, the date on which the execution application was dismissed for default of appearance of the decree-holders, namely, 21-8-1979 was not a date fixed for 'hearing' within the meaning of Rule 105. It was a date awaiting report as to execution of the warrant which was supposed to be issued on submission of a list of moveable property by the decree-holders within three days of the earlier order dated 21-7-1979. Consequently, the dismissal of execution application on 21-8-1979 was not under Rule 105(2) of Order 21 of the Civil P.C., and therefore, the provisions of Rule 106 are not attracted. The dismissal of the execution application in default of appearance on 21-8-1979 is referable to inherent powers of the Court.

xxx xxx xxx20. Since the dismissal of the execution application on 21-8-1979 was under inherent powers, the application for its restoration will be by invoking the inherent powers of the Court and in that event, no time limit is prescribed for

invoking the inherent powers of the Court.

The above decision was considered by the apex court in Damodaran Pillai's case relied on by the learned Counsel for the petitioners. In paragraphs 19 and 20 of the decision of the apex court it was observed as follows:--

19. Mr. Joshi, however, placed strong reliance upon Khoobchand Jain and Anr. v. Kashi Prasad and Ors. : AIR 1986 MP66 . The said decision, in our opinion, has no application to the facts and circumstances of the present case. Therein the Execution Application was dismissed on a day which was not fixed for hearing. The said order of dismissal, therefore, was not passed in terms of Sub-rule (2) of Rule 105 of Order XXI of Code of Civil Procedure. In that situation it was opined:

In the present case, the decree-holders had already applied for execution and paid process fee for issuance of a warrant of attachment. It was, therefore, for the Court to issue a warrant of attachment of such property as was in possession of the judgment-debtors. Submission of the inventory of movable property in possession of the judgment-debtors is not necessary under the relevant rules. In case, the warrant is returned unexecuted, the decree-holders could, in their discretion, make an application for examination of the judgment-debtors under Rule 41 or could resort to any other mode to recover the decretal amount.²⁰ It was further observed: Since the dismissal of the execution application on 21-8-1979 was under inherent powers, the application for its restoration will be by invoking the inherent powers of the Court and in that event, no time limit is prescribed for invoking the inherent powers of the Court.

5. The above observation of the Hon'ble Supreme Court will indicate that the aforementioned decision of the Madhya Pradesh High Court was not disapproved but instead it was distinguished on the ground that the dismissal of the execution petition in the case before the Madhya Pradesh High Court was on a date which was not fixed for hearing of the said petition within the meaning of Order 21, Rule 105(2) C.P.C.. In the present case also the dismissal of the execution petition cannot be treated as one under Order 21 Rule 105(2) C.P.C.. Hence there is no question on the said execution petition being restored by resort to Order 21 Rule 106(1) C.P.C.. This being the facts situation the decision of the Madhya Pradesh

High Court applies to the case on hand on all fours.

6. The executing court has accepted the explanation put forward by the counsel appearing for the decree holder for his non-appearance before Court on 20-5-1998. He is a senior member of the Thiruvananthapuram Bar and the lapse on his part happened solely due to the omission on the part of his former clerk in not noting the correct date. I see no ground to interfere with the discretion exercised by the court below. The executing court was, therefore, right in allowing E.A. 245/1998 and dismissing the petitions for review filed by the petitioners herein from whom as on 6-3-1998 a sum of Rs. 5,20,638.08/- was due to the decree holder bank.

These Writ Petitions are without any merit and are accordingly dismissed. No costs.

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