

Joseph Vs. Kanakam

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Court : Kerala

Decided On : Nov-22-2002

Reported in : 2003(1)KLT261

Judge : Pius C. Kuriakose, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47 - Order 21, Rule 2; Limitation Act - Schedule - Article 125

Appeal No. : C.R.P. No. 328 of 2001

Appellant : Joseph

Respondent : Kanakam

Advocate for Def. : A.S.P. Kurup and; Sadchith P. Kurup, Adv.

Advocate for Pet/Ap. : K.P. Dandapani and; Tom K. Thomas, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Pius C. Kuriakose, J.

1. This Civil Revision Petition at the instance of the additional 2nd decree holder impugns an order passed by the executing court by which that court has accepted

the contention raised by the judgment-debtors that they have paid a sum of Rs. 75,000/- out of court in full settlement of the decree-debt, A resume of the facts is given below.

2. The decree in question is a simple money decree passed in favour of a partnership firm by name M/s. Sreyas Financiers represented by its then Managing Partner Mr. M.K. Divakaran Nair who is no more. The revision petitioner is the present Managing Partner of the said firm. Execution proceedings were initiated only after the demise of Sri. M.K. Divakaran Nair.

3. The judgment-debtors-respondents entered appearance and filed objections to the notice under Rule 66 of Order XXI CPC. The objections were filed more than 2 years after they entered appearance. In the objections they took up a contention that on 10.8.1995 the original judgment-debtor, whose legal representatives the additional judgment-debtors are, had paid a sum of Rs. 75,000/- to Sri. M.K. Divakaran Nair. Along with the objections, they produced a photostat copy of an agreement (referred to hereinafter as Ext. B1) which evidences the payment of Rs. 75,000/-. On the basis of Ext. B1, it was prayed by them through the objections that credit should be given to the amount mentioned in Ext. B1 against the decree-debt.

4. The decree-holder opposed by filing a detailed statement. According to the decree-holder, the firm had never received the amount covered by Ext. B1 and at any rate, the amount could not be given credit to since the same was not certified as required by Order XXI Rule 2 C.P.C.

5. In the instant case, the executing court rejected the judgment debtors' plea. Against that order, C.R.P. No. 190 of 2000 was filed before this Court by the judgment-debtors. This Court set aside the order passed by the executing court and remanded the case back to the executing court for fresh disposal after affording opportunity to the judgment-debtors to adduce evidence in support of their case. It was after the remand order that the second judgment-debtor gave evidence and got Ext. B1 document marked in evidence. The court below relied on the evidence adduced by R.W. 1 as also Ext. B1 and noticing the circumstance that no contra evidence was forthcoming and the further circumstance that a suit

was already filed against Sri. M.K. Divakaran Nair by the second judgment-debtor for performing the further obligations under Ext. B1, held that a sum of Rs. 75,000/- was paid towards the decree-debt in the present case. This was done overruling the objections raised by the decree-holder on the basis of Sub-rule (2) of Rule 2 of Order 21 and Rule 2A of Order XXI C.P.C.

6. Heard Adv. Sri. Tom K. Thomas representing M/s. Dandapani Associates for the revision petitioner. The case for the respondents was argued in part by Adv. Sri. A.S.P. Kurup and then by Adv. Sri. Sadchith P. Kurup. Copies of the relevant papers pertaining to the execution proceedings were supplied to me by the counsel and I have perused them.

7. Before me, it was argued on behalf of the revision petitioner that Ext. B1 document should not have been admitted in evidence and that the same has not been properly proved. It was further argued that Ext. B1 in any event will not show that a sum of Rs. 75,000/- was paid towards the decree-debt in the present case. The learned counsel also argued that, at any rate, the alleged payment has not been certified as required by Rule 2 of Order 21 C.P.C. and therefore, the executing court is interdicted from entertaining the plea of discharge of payment on the basis of Ext. B1.

8. I have carefully perused Ext. B1 which is written in the vernacular. It is dated 10th August, 1995 and purports to be an agreement on a plain paper executed by Sri. Divakaran Nair in his personal capacity, in favour of Sri. Kuttappan Nair. The essential terms of this document are, an acknowledgment to the effect that a ready cash payment of Rs. 1,00,000/- had been received by Divakaran Nair from Kuttappan Nair for the conduct of business in immovable property jointly by them, that some three items of immovable properties belonging to three individuals had been purchased by Divakaran Nair (obviously as part of the joint business) and that after deducting the sum of Rs. 1,00,000/- already paid, a further amount of Rs. 1,88,250/- is also payable by Divakaran Nair to Kuttappan Nair. The relevant term of this agreement is that out of the aforementioned total amount of Rs. 2,88,250/- a sum of Rs. 75,000/- payable to M/s. Sreyas Financiers (decree-holder) is adjusted and the balance amount agreed as payable by Divakaran Nair is

mentioned as Rs. 2,13,250/-.

9. At the outset I must state that Ext. B1 does not inspire much confidence in me. It is agreed that as early as on 8.11.1995, some three months after the alleged execution of Ext. B1 by Sri. Divakaran Nair, the decree-holder levied execution and attached the immovable property belonging to the judgment-debtors. They were served with notice in early 1996 but they did not appear before the executing court and accordingly the court set them absent. This was on 11.3.1996. Only when they were served with notice under Rule 66 of Order XXI, did they enter appearance and seek time for filing objections. They went on seeking time and it was only after availing as many as eight chances that they filed their objections ultimately on 21.8.1998. If, as a matter of fact, they had made the payment of Rs. 75,000/- (an amount sufficient to liquidate the full decree-debt), they would have produced this document at the earliest opportunity. Having regard to the normal course of human conduct, their failure to produce this document as soon as they had knowledge about attachment of the property or about the steps which were being taken by the petitioner, is a circumstance which shows that they did not have such document at that time or at least that they knew that the document was not relevant. A plain reading of this document will show that it has been written with casual abandon, that it contains a vital mistake of mentioning the balance amount allegedly due under it as Rs. 2,13,250/- (written in both figures and letters) instead of Rs. 1,13,250/-.

10. The learned counsel Sri. Tom K. Thomas would submit that Ext. B1 document has not been properly proved, that it will not show that Rs. 75,000/- mentioned therein was paid to the then Managing Partner of the decree-holder firm towards the decree-debt in the present case. He would further argue that the court below is not justified in deciding the case in favour of the respondents on the score of there being no counter-evidence from the side of the decree-holder since counter-evidence becomes necessary only if legal evidence has been adduced by the judgment-debtors. The learned counsel would then argue with more seriousness that even if Ext. B1 is accepted as evidence for payment of a sum of Rs. 75,000/- towards decree-debt which is the subject-matter of the present execution proceedings, then also credit cannot be given for the said amount to the claimants

under the present execution petition since the payment has not been certified as envisaged by Rule 2 of Order XXI C.P.C. He invited my attention to Article 125 of the Limitation Act and said that the present claim is hopelessly barred by limitation and submitted that since Section 5 of the Indian Limitation Act is not applicable to execution proceedings, there is absolutely no question of the respondents being permitted to raise the claim now. According to the learned counsel, Order XXI Rule 2A C.P.C. contains a clear interdict against entertainment of a plea for discharge of payment unless the payment or adjustment has been certified in the manner prescribed under the Code.

11. The learned counsel invited my attention to the decision in *C.K. Xavier v. Bhagaraj Singh* (1987 (1) KLT 385) and argued that the remedy of a debtor who has actually made payment towards decree-debt out of court but unfortunately not got the payment or adjustment certified as provided under Rule 2 of Order XXI C.P.C. is to institute a regular suit. He relied very much on the decision of the Supreme Court in *Lakshmi Narayanan v. S.S. Pandian* (2000) 7 SCC 240. It was a case where the decree in question was one for eviction in respect of a building. After passage of the decree, decree-holder levied execution. At that time the parties arrived at some compromise out of court. Pursuant to the compromise, a portion of the building was surrendered by the judgment-debtor who was allowed to retain possession of the remaining portion as a lessee for three years on condition that upon the expiry of the three-year period, he will surrender possession failing which the decree-holder will be entitled to execute the very decree. The compromise memo was filed before the executing court and that court dismissed the execution petition 'as not pressed'. The judgment-debtor failed to surrender the remaining portion of the building even after the expiry of the three-year period. The decree-holder levied execution again. It was contended by the judgment-debtor that the decree stood extinguished by the compromise which had been filed before the court within time. Repelling all the arguments, it was held by Syed Shah Mohamed Quadri, J. on behalf of Bench consisting of himself and Y.K. Sabharwal. J. :-

'After the rights of the parties are crystallised on passing of a decree by a competent court, in law they are not precluded from settling their disputes outside

the court. But to have the compromise recognised by a court, it has to be recorded under Rule 2 of Order 21 CPC. The consequence of not having it so recorded is contained in Rule 2(3) of Order 21 which prohibits every court from executing the decree from recognising a payment or adjustment which has not been certified or recorded by the court.'

Referring to Order XXI Sub-rule (2) of Rule 1, Mr. Tom further argued that when payment towards decree-debt is made in any one of the modes envisaged by Order XXI Rule I, it is obligatory that the judgment-debtor shall give notice of such payment to the decree-holder either through court or directly by registered post acknowledgment due. The learned counsel's argument is that in the present case there is no payment and even if there is payment, the failure of the judgment-debtors to get it certified by the decree-holder and to get the same recorded by the court is fatal. It is the argument of the learned counsel that it is the duty of the judgment-debtors to file requisite applications informing the court of the payment and seeking issuance of notice to the decree-holder as to why the payment or adjustment should not be recorded as certified. The Limitation Act provides a period of 30 days as per Article 125 for this certification and since the judgment-debtors had not made any application at all, the payment allegedly made cannot be recognised at all.

12. By way of reply to these arguments, Sri. Sadchith would make an initial submission that to answer the question it may not be sufficient that the provisions in Order XXI alone are considered. It was argued that Section 47 of the Code is a provision which gives very wide powers to the executing court to determine all questions regarding execution, discharge or satisfaction of the decree. According to learned counsel, Section 47 forms part of the Code in the full sense while Order XXI and for that matter all Orders in the Code come within the Schedule and therefore when there is a conflict between the Section and the Order, it is the Section that should prevail. I must mention at the very outset that Sri. Sadchith who is a novice to the profession argued admirably. He cited the earlier decision of the Allahabad High Court in *Ganga Dihal Rai v. Ram Oudh* (AIR 1929 Allahabad 79) in support of his argument that a application contemplated by Rule 2 of Order XXI C.P.C. by the judgment-debtors praying for an adjustment of payment to be

recorded need not be a separate application but it will suffice if prayer is contained in the very objection filed.

13. Mr. Sadchith would then cite the decision of the Madras High Court in *Bappanna v. Vengayya* (AIR 1937 Madras 511) in support of two propositions: firstly, Sub-rule (3) of Rule 2 of Order XXI C.P.C. does not give right to the decree-holder to ignore any payment which he has received towards the decree-debt since there is a mandate to the decree-holder to certify the payment; secondly, the argument that the judgment-debtors are not entitled to apply for certification and recording of the payment in view of Article 125 of the Limitation Act is no longer available to the decree-holder. According to the learned counsel, a reading of the earlier order passed by this Court in C.R.P. No. 190 of 2000 will show that the point of limitation was never raised. The second proposition advanced by the learned counsel on the authority of *Bapanna* (supra) seems at first blush attractive. On going through the entire order in the C.R.P. I also find that the question of limitation has not been specifically considered by this Court therein. But then, Section 11 C.P.C. does not apply to execution proceedings. At best, the principles of constructive *res judicata* and the like principles recognised through Section 11 and other provisions of the C.P.C. such as Order XXI Rule 2 may be applicable. But the remand order passed by this Court earlier is an open remand and the question now sought to be raised is the question of limitation.

14. The learned counsel would then argue that this is a case where the previous Managing Partner of the decree-holder-firm has played fraud on the original judgment-debtor and in cases where there is fraud, the question of limitation cannot apply. He relied on the decision in *Shrirama Row v. Bapayya* (AIR 1924 Madras 189). I have gone through the said decision. It has nothing to do with the facts of the present case where fraud is neither alleged nor established.

15. The learned counsel very strongly argued on the authority of the decision of the Supreme Court in *M.P. Shreevastava v. Veena* (AIR 1967 SC 1193) and *Bherulal v. Rawautar* (AIR 1981 M.P. 181) that the question whether the decree stands satisfied is a question which can be raised by the judgment-debtor even without an application under Order XXI Rule 2 for certification or recording.

16. Meeting all the arguments very ably, Sri. Tom K. Thomas invited my attention to the relatively recent decisions of the Supreme Court in *Sultana Begum v. Prem Chand Jain* (AIR 1997 SC 1006) and *Badamo Devi v. Sagar Sharma* (1999) 6 SCC 36. According to me, these two decisions completely answer all the arguments raised by the counsel for the respondents as regards the scope of Section 47 C.P.C. as distinct from Order XXI Rule 2 of the Code. In *Sultana Begum* (supra) S. Saghir Ahmad, J. held that when in a statute there are two conflicting provisions which are not reconcilable with each other, the provisions should be harmoniously constructed. The learned Judge further held that 'The Courts have also to keep in mind that an interpretation which reduces one of the provisions as a 'dead letter' or 'useless lumber' is not harmonious construction. To harmonise is not to destroy any statutory provision or to render it otiose'. The learned Judge went on to hold:-

'Interpreting the provisions of Section 47 and Order XXI Rule 2 in the light of the above principles, there does appear to be any antithesis between the two provisions. Section 47 deals with the power of the Court executing the decree while Order XXI, Rule 2 deals with the procedure which a Court whose duty it is to execute the decree has to follow in a limited class of cases relating to the discharge or satisfaction of decrees either by payment of money (payable under the decree) out of Court or adjustment in any other manner by consensual arrangement. The general power of deciding questions relating to execution, discharge or satisfaction of decree under Section 47 can thus be exercised subject to the restriction placed by Order XXI, Rule 2 including Sub-rule (3) which contain special provisions regulating payment of money due under a decree outside the Court or in any other manner adjusting the decree. The general provision under Section 47 has, therefore, to yield to that extent to the special provisions contained in O. XXI, Rule 2 which have been enacted to prevent a judgment-debtor from setting up false, or cooked up pleas so as to prolong or delay the execution proceedings. Thus, though it is open to the parties to adjust or compromise their rights under the decree but if it amounts to adjustment of decree, it must be reported to the Court whose duty it is to execute the decree so that that Court may record or certify the same. If it is not done, the Court before whom the execution proceedings are initiated will proceed to execute the decree.'

17. Coming back to the facts, as already indicated, Ext. B1 did not impress me as a document under which a sum of Rs. 75,000/- was paid towards the decree-debt in this case. The pendency of an original suit seeking enforcement of the obligations under Ext. B1 as spoken to by RW. 1 is a circumstance which persuaded the learned Sub Judge to take a view in favour of the genuineness of that document. It is submitted before me that after a full-fledged trial, that suit has been dismissed holding Ext. B1 as a concocted document. It is true that the said judgment has not become final. Another aspect which weighed with the learned Sub Judge is the situation of there being absolutely no counter-evidence to the evidence adduced by the respondents. But then Order XXI Rule 2A contains a complete interdict against giving recognition to any payment or adjustment which has not been certified or recorded in the manner provided under that provision within the time allowed by law which under Article 125 of the Limitation Act is 30 days from the date when the payment or adjustment is made.

The result of the above discussion is that the revision petitioner succeeds, the order impugned is set aside and the court below is directed to proceed further with the execution proceedings in accordance with law. The Civil Revision Petition is allowed as above directing both parties to suffer the costs.