

Udayakumar Vs. Muruganandham and Another

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Court : Chennai

Decided On : Sep-19-1995

Reported in : AIR1996Mad170; 1995(2)CTC573

Judge : Srinivasan, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 21, Rule 16

Appeal No. : C.R.P. No. 2369 of 1995

Appellant : Udayakumar

Respondent : Muruganandham and Another

Advocate for Def. : Mr. V. Nicholas, Adv.

Advocate for Pet/Ap. : Mr. Chinnaswamy, Senior Advocate for;M/s. Haja Mohideen Gisthi,;K. Sathuram and;L. Mirali Krishnan, Adv.

Judgement :

ORDER

1. Heard both sides. The order of the learned Judge is unsustainable. The petitioner has filed execution petition in H.P.R. No. 80 of 1995 for executing the decree passed in O.S, No. 206 of 1990. He has stated in that petition that he got assignment of the decree from the plaintiff decree holder on 28-10-94 for proper consideration. There is a prayer in the said petition under Order 21, Rule 16, Code

of Civil Procedure, for recognising him as assignee decree holder. He has also prayed for further reliefs in the execution petition. Notice was ordered in the said petition by the executing court returnable by 2-4-1995. On 3-4-1995 the matter was taken up. The court recorded that service had been effected and it was sufficient. The respondent in the execution petition viz., the original decree holder and the judgment-debtor remained absent. They were set ex parte. The matter directed to be called on 7-4-1995. The executing Court ought to have ordered on that day itself the prayer recognising the petitioner herein as the assignee decree holder. But, without doing so, the executing court adjourned the matter. It was thereafter adjourned from time to time.

2. E.A. No. 88 of 1995 is a petition filed by the petitioner herein for passing an order to send for the entire sale amount, which was with the District Munsif Court, Pollachi, in pursuance of the sale held in H.P.R. No. 101 of 1993 as per the decree in O.S. No. 356 of 1991 to the credit of the suit in O.S. No. 206 of 1990 for ratable distribution of the assets of the judgment-debtor. The Court in which the execution proceedings in O.S. No. 206 of 1990 is pending, is a superior Court. In the said application, the judgment-debtor in the suit and the decree holder in O.S. No. 356 of 1991, are impleaded as respondents. H.A. No. 89 of 1995 is for stay of further proceedings in execution of the decree till the disposal of I. A. No. 88 of 1995.

3. In these applications notice was ordered to the respondents therein. On 3-4-1995, the Court reported that service on the 1st respondent in the said application, i.e. the judgment-debtor in the suit was sufficient and that he was absent. He was not ex parte. The 2nd respondent, who is the decree holder in O.S. No. 356 of 1991, entered appearance through an Advocate by name C. Venkatachalapathy. He took time for filing counter. The matter was adjourned to 10-4-1995 on which date, it was heard. On 17-4-1995, the court passed the order, which is impugned in this Civil Revision Petition.

4. The said order is one of dismissal of H.A. No. 88 of 1995 on the ground that the petitioner herein was not recognised as the assignee decree holder in the execution proceedings. The learned Subordinate Judge has observed that no notice was issued to the decree holder in O.S. No. 206 of 1990 and no order has

been passed accepting the assignment of the decree in favour of the petitioner herein. The said observation is clearly erroneous. The entries in the certified copy of the execution petition and the orders passed therein show that the decree holder in O.S. No. 206 of 1990 was served and he remained absent and was set ex parte by the executing court. In those circumstances, the court ought to have passed an order recognising the assignment. Even if such an order is not passed, it is open to the executing court to recognise the assignment and proceed further to consider the prayer made by the petitioner herein.

5. In *Dhani Ram Gupta v. Lal Sri Ram* : [1980]2SCR469 , the Supreme Court has held the property in a decree passes to the transferee under a deed of assignment when the parties to the deed and assignment intend such property to pass. It does not depend on the recognition of the transfer. Order 21, Rule 16, C.P.C. neither expressly nor by implication provides that assignment of a decree does not take effect until recognised by the court. It is true that while Order 21, Rule 16 enables a transferee to apply for execution of the decree, the first proviso to Order 21, Rule 16 enjoins that notice of such application shall be given to the transferor and the judgment-debtor and that the decree shall not be executed until the court has heard their objections, if any, to its execution. It is one thing to say that the decree may not be executed by the transferee until the objections by the transferor and the judgment-debtor are heard. It is altogether a different thing to say that the assignment is of no consequence until the objections are heard and decided.'

6. In the present case, the judgment-debtor as well as the transferor/deed holder were served in the execution proceedings and they remained ex parte. The Court is bound to pass an order recognising the assignment of the decree in favour of the petitioner herein. When the application I.A. 88 of 1975 was taken up for consideration, the executing court ought to have recorded a finding that the petitioner herein is the assignee decree holder and considered the prayer of the petitioner as on that footing.

7. I hold that the petitioner herein is an assignee decree holder, in as much as the original decree holder has not opposed the application for recognition of the assignment under Order 21, Rule 16 C.P.C. The petitioner has, a right to claim the

relief prayed for in the H.A. 88 of 1995. The prayer is only to send for the amount which is lying to the credit of O.S. No. 356 of 1991 brought into court pursuant to a sale held in H.P.R.No. 101 of 1993 by bringing that amount to the court of subordinate Judge, Udumalpet, to the credit of H.P. No. 30 of 1995 in O.S. No. 206 of 1990.

8. After that amount comes to sub-Court, it is open to the petitioner herein to file an application for ratable distribution. In the application, notice shall issue to the 2nd respondent herein as well as the other decree holders, if any, who make such a claim for ratable distribution with regard to the said amount. The Court shall decide the question of ratable distribution after hearing all the parties concerned and pass appropriate orders.

9. With the above observations, this Civil Revision Petition is allowed, the order of the Subordinate Judge in S.A. No. 88 of 1995 is set aside and the said application is allowed. There will be no order as to costs. ,

10. Petition allowed.