

**Rahamathulla Vs. Rasool Bivi and 6 Others**

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**Court :** Chennai

**Decided On :** Feb-04-2000

**Reported in :** 2000(1)CTC672

**Judge :** S.S. Subramani, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) -- Sections 115 and 232/Amended Act, 1976 -- Order 21, Rule 57; [Limitation Act, 1963](#) -- Sections 15 -- Schedule -- Articles 136 and 182

**Appeal No. :** C.R.P. No.3769 of 1999 and C.M.P.No.21196 of 1999

**Appellant :** Rahamathulla

**Respondent :** Rasool Bivi and 6 Others

**Advocate for Def. :** Mr. B. Ramamoorthy, Adv.

**Advocate for Pet/Ap. :** Mr. T.R. Rajagopal, Senior Counsel for ;Mr. R. Subramanian

**Judgement :**

ORDER

1. 14th respondent in E.P.No.151 of 1993 in O.S.No.165 of 1961 on the file of Additional District Munsif Court, Madurai Town is the revision petitioner herein.

2. Suit is one for partition and preliminary decree was passed on 14.9.1962. Thereafter on 25.8.1967 final decree was also passed allotting decree holder/plaintiff 'ADEF' plot in the Commissioner's plan measuring about 940 sq.ft of land. Present execution petition in E.P.No.151 of 1993 was filed on 19.3.1993 for taking delivery of the property. Notice was issued to judgment-debtors. They took a contention that the execution petition is hopelessly barred by limitation and decree holder is not entitled to take possession.

3. Rejecting the said contention, lower court allowed property to be delivered on the basis of final decree. The same is challenged in this revision petition under Section 115 of Code of Civil Procedure.

4. Under Article 136 of Limitation Act, a period of 12 years is provided for execution of decree when the decree of order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place. It is further provided in that Article that a decree for permanent prohibitory injunction shall not be subject to any period of limitation. Under the previous Limitation Act, corresponding provision was Article 182, where the provision was entirely different.

5. It may also be mentioned that under the Act 104 of 1976, Code of Civil Procedure was also amended by deleting Section 48, which also provided that for execution, 12 years limit was provided. In execution application, various reasons are given why the decree couldnot be executed and it is further said that decree holder is not at fault for not executing decree in time.

6. The various reasons are, 16th defendant in the suit challenged the final decree on the allegation that he was minor and his interest was not properly considered and filed in O.S.No.638 of 1971 on the file of District Munsif Court, Madurai. Trial Court accepted that contention and on 25.7.1972 the final decree passed was set aside. Aggrieved by the said Judgment, decree holder filed an appeal in A.S.No.65 of 1973 on the file of Sub- Court, Madurai and the appeal was allowed on 13.12.1974 and the suit filed by 16th defendant was dismissed. Against the decree

in A.S.No.65 of 1973, second appeal was filed by 16th defendant in S.A.No.187 of 1975 on the file of this Court and obtained stay order. Ultimately, second appeal was dismissed by this Court on 18.4.1978.

7. After dismissal of S.A.No.187 of 1975, decree holder filed E.P.No.439 of 1980 for getting possession of property. A suit happened to be filed as O.S.No.798 of 1978 at the instance of tenant who was in occupation of the building for a decree of permanent prohibitory injunction restraining decree holder from executing the decree pursuant to the final decree. He also moved for interim injunction. E.P.No.439 of 1980 could not be proceeded with in view of interim injunction granted in O.S.No.798 of 1978 and same was dismissed on 14.12.1982. Suit in O.S.No.798 of 1978 itself was ultimately dismissed from which there was an appeal as A.S.No.206 of 1981 which was also dismissed. The matter was taken in second appeal in S.A.No.1649 of 1982 and the same was also dismissed on 3.1.84

8. After dismissal of S.A.No.1649 of 1982, decree holder filed E.P.No.380 of 1984. While execution petition was pending, decree holder wanted to correct the discrepancies of her share and moved E.A.No.1405 of 1987, which was allowed. Defendants in the suit filed in C.R.P.No.4773 of 1987 against the order in E.A.No.1405 of 1987 and the execution was stayed. Finally, the revision petition dismissed on 30.3.1988. Immediately 11th defendant's son filed suit O.S.No.282 of 1988 to declare his right as tenant of the property and also moved for injunction in I.A.No.199 of 1988.

9. Even though decree holder made various attempts to have the interim order vacated, same was not successful. It is seen that execution petition was posted on various occasions and finally on 30.11.1990, decree holder filed a memo, which reads thus,

'It is submitted that the above execution petition has been specifically stayed by the First Additional Sub-Court, Madurai in I.A.No.199 of 1988 in O.S.No.282 of 1988 and is in force. Hence the execution petition may kindly be dismissed with a liberty to filed separate execution petition after vacating the abovesaid stay order and thus render justice.'

On 30.11.1990, Executing Court passed the following order,

'C.R.P.4773 of 1987 dismissed on 30.3.1988. Steps Taken. Stayed by the Sub Court. Memo filed and recorded. Stayed by the Sub Court. Hence the E.P. dismissed.'

Thereafter, the present execution petition was filed on 19.3.1993, though it is actually numbered only in the year 1997.

10. In the execution petition, decree holder has said that in view of various litigations pending. She could not executed the decree and the period of pendency of those applications will have to be excluded.

11. Judgment-debtor objected that exclusion of limitation can be had only under Section 15 of Limitation Act and if that section is applied, only the period during which decree holder was prevented from executing decree could be excluded. Even if entire period is excluded, since execution petition is filed beyond 12 years, execution petition will have to be dismissed as time barred. It is further argued by learned counsel that even though there is stay or injunction. that did not prevent decree holder from implementing the decree and consequently Section 15 of the Limitation Act could not be applied. Learned counsel also relied on various decisions in support of that contention and argued that the order of lower court is liable to be interfered with.

12. As against the said contention, learned counsel for respondents submitted that it is not real case of exclusion of period and present execution petition was filed only to revive the earlier execution petition. It is argued that E.P.No.380 of 1984 has not been disposed of and for all purposes, it must be deemed to have been pending and the present petition is only to revive the E.P.No.380 of 1984. The argument is that even though exclusion of period is sought for, the intention is only to revive the earlier execution petition. It is further argued that even if the period cannot be excluded under Section 15 of Limitation Act, if earlier petition is not disposed judiciously or disposed of not on the fault of decree holder, she is entitled to have same revived and if that be so, execution petition is not barred by limitation. Present execution petition and petitioner is only asking or reminding

court to dispose of the petition in accordance with law.

13. After hearing both sides, I feel that the contention of respondent is only to be accepted.

14. It is true that decree holder has sought exclusion of certain period for computing the period of limitation. Lower court has also held that it is not exclusion of period under Section 15 of Limitation Act but the question is whether E.P.No.380 of 1984 was finally disposed of. Lower court held that E.P.No.380 of 1984 was not disposed of and the same is deemed to be pending and present petition is only revival of that petition. How far the said finding of court below is correct is the question to be considered in this revision petition.

15. As stated earlier, Article 182 of old Limitation Act has been drastically amended and in its place Article 136 provides 12 years for execution of decree. Under Article 136, all that is needed is that any application for execution of decree or order must be filed within a period of 12 years from the date when decree or order become enforceable. This article proved for outer limit and does not stand in the way of Court making order on the application filed within that period. If application is filed within the outer limit of 12 years and if that execution petition has not been disposed of, mere lapse of years cannot be a ground to hold that execution petition is barred by limitation. The question whether earlier E.P.No.380 of 1984 was disposed of finally, is to be considered in this revision petition.

16. It is not the case of petitioner that E.P.No.380 of 1984 was filed beyond 12 years. While narrating facts I said that even final decree was passed on 25.8.1967. In view of filing of O.S.No.638 of 1971, decree holder was not in a position to execute the decree in view of injunction granted in that suit. decree holder could have filed execution petition only after 18.4.1978 when S.A.No.187 of 1975 was dismissed. She immediately filed execution petition in E.P.No.439 of 1980 and the same was dismissed. Only because another suit was filed as O.S.No.798 of 1978 by third party, the said petition was dismissed. After final disposal of O.S.No.798 of 1978, E.P.No.380 of 1984 was filed. That also could not be proceeded with in view of prohibitory order in O.S.No.282 of 1988 and execution petition was dismissed only because of the injunction order in O.S.No.282 of 1988. It is clear from the

above proceedings that there is no fault on the part of decree holder in not taking steps and execution petition was dismissed only because of prohibitory order.

17. In *Venkanna v. Bangararaju* : [1964]6SCR251 , a case arose under Section 48 of Code of Civil Procedure, a question came as to whether execution petition has been finally disposed of or at and whether execution petition is barred by limitation. Considering the same, in part 6, their Lordships have held thus,

'....It is said that in this case the decree-holders could not proceed with the execution in view of the stay order of the High Court and, therefore, the executing court could have either dismissed the application or adjourned the proceedings to a future date and it has no jurisdiction to pass an order closing the execution for statistical purposes. It is further said that an order closing proceedings for statistical purposes is not an order of adjournment for an order of adjournment implies that the application is on the file, whereas the object of closing is to take it out of the file, though temporarily, and therefore, the order, in effect and substance, is one of dismissal. Assuming that the order was made by reason of the decree-holder's default within the meaning of Order 21, Rule 57 of the Code, we find it difficult to attribute something to the court which it never intended to do. It is true courts have condemned the practices of executing courts using expressions like 'closed', 'closed for statistical purposes', 'struck off', 'recorded' etc., and they also pointed out that there was no provision in the Code of Civil Procedure for making such orders: see *Biswa Sonan Chunder Gossamy v. Binanda Chunder Dibingar Adhikar*, ILR 10 Cal. 416 ; *V. Damodara Rao v. Official Receiver, Kistna*, ILR 1946 Mad. 527 : AIR 1946 Mad. 170, *Moidin Kutty v. Doraiswami* : AIR1952 Mad51 . It is not necessary to express our opinion on the question whether such procedure is sanctioned by the Code of Civil Procedure or not; but assuming that the court has no such power, the passing of such an order cannot tantamount to an order of dismissal, for the intention of the court in making an order 'closed' for statistical purposes is mala fest. It is intended not to finally dispose of the application, but to keep it pending. Whether the order was without jurisdiction or whether it was valid, the legal position would be the same, in one case it would be ignored and in the other, it would mean what it stated. In either case the execution petition would be pending on the file of the court. That apart, it

is not the phraseology used by the executing court that really matters, but it is really the substance of the order that is material. Whatever terminology may be used, it is for the Court to ascertain, having regard to the circumstances under which the said order was made, whether the court intended to finally terminate the execution proceedings. If it did not intend to do so, it must be held that the execution proceedings were pending on the file of the court. We have no hesitation, therefore, in agreeing with the High Court that E.P. 13 of 1939 is pending on the file of the executing court and that the present application is only an application to continue the same.' (Italics supplied)

18. In Qamarud-Din Ahmad v. Jawahir Lal, ILR 1905 All 334 where execution petition was dismissed as struck off by consent. When second petition was filed, the question came whether that execution petition is barred by limitation or not. Trial court held that the execution petition is barred. But High Court of Allahabad held that the petition is not a fresh petition as then same is filed to revive the earlier execution petition. Considering the same in Page 337 and 338 of the Reports, it is held thus,

' The learned counsel for the appellant contented that the former execution proceedings were finally disposed of and came to an end by the order of 29th November and 23rd December, 1889, or one of them, and that the present application could only be regarded as one for a fresh execution, and therefore was barred under Article 179. But the first of those orders was in aid of the execution. As to the second orders there is nothing to show on whose application or in whose presence or under what circumstances it was made, and the learned judges of the High Court have shown reasons for doubting its regularity. But assuming it to have been perfectly regular, it was in no sense a final order. If the appeal to the High Court against those proceedings and the judgment of that court and the appeal to her Majesty in Council rendered necessary by that judgment had not intervened to interrupt the course of the execution, there was nothing in the terms of the order to preclude the decree holder from coming again to the Court, satisfying the conditions indicated in the order, and obtaining the transmission of the case to the collector's Court.

Their Lordships are of opinion that the execution proceedings commenced by the petition of the 24th August, 1888 were never finally disposed of and that the application now under consideration was in substance, as well as in form, an application to revive and carry through a pending execution, suspended by no act or default of the decree-holder, and not an application to initiate a new one.'

19. In one of the earliest decisions concerning legal position is reported in *Paras Ram v. Gardner*, ILR All 355 consisting of five learned judges. The majority Judgment held thus,

'Stuart, C.J

The interruption to the execution of his decree was not occasioned by any fault or laches of his own, but was caused by the illegal intervention of Dabi Das. Paras Ram's procedure, therefore, under his decree must be held to have been legally continuous, and he may proceed to its execution.'

**Turner, J.**

'.... On the ground that the application we are considering is not a fresh application to execute the decree, but an application to carry out the order which as against the judgment-debtor had become final, and of which the prosecution was interrupted by the allowance of the objection of a third party since disallowed, I am of opinion that the provisions of the Limitation Act relating to applications for the execution of decree do not apply to it.'

**Oldfield, J.**

'I think we may hold that the last application may be considered as a continuance or renewal of the former application for execution in which the proceedings has been interrupted by the reference to the Civil Court, and were renewed on the second application, and latter will not therefore be an application to which the period of limitation in art. 167 will apply.'

20. A Full Bench of Our High Court in one of the earlier decisions reported in *Suppa Reddiar v. Avudai Ammal*, ILR 1905 Mad 50 considered this question. The facts in that case could be summarised thus,

' A mortgage decree was obtained against the counter-petitioner on 28th February, 1894. On 16th May, 1895, the decree-holder assigned the decree to petitioner, who applied for execution on 6th December, 1897. That application was struck off, and so was one which followed it. On 15th June, 1898, petitioner again applied for execution, but counter-petitioner contended that the assignment was for his benefit and that, in consequence, petitioner was not entitled to execute the decree. The District Munsif held an enquiry under section 232 of the Civil Procedure Code and dismissed the application, being of opinion that counter-petitioner's contention was true. Petitioner thereupon brought a suit to establish her claim that the assignment was for her own benefit. On 20th February, 1901, the Appellate Court declared that petitioner had obtained a valid assignment of the decree and was entitled to execute it. On 24th November, 1902, petitioner filed the present execution petition. On the question of limitation being raised,'

The Full Bench held thus,

' .... the petitioner's right to execute the decree was not barred by limitation on 24th November, 1902. The application should be treated not as an application for execution, but as an application to revive or continue an application for execution that had been wrongly dismissed, as a competent court has declared. Article 178 was, therefore, applicable, and time has begun to run from the date of the appellate decree declaring petitioner's right to execute, dated 20th February 1901.'

21. In a Full Bench decision of our High Court in *Sundaramma v. Abdul Khader*, AIR 1933 Mad 418, their lordships held that an application for execution which has been finally and properly dismissed cannot be revived. But, their Lordships further held at page 422 of the reports, thus,

' .... Where an execution petition can be deemed to have been not finally disposed of and can be treated as still pending in the eye of law, the subsequent application may be treated as on for the continuance of the former one. Where the former

execution application was dismissed finally, but for some reason (not due to any default or neglect on the part of the applicant) which subsequently turned out to be untenable, the later execution application would be deemed to be one for a revival of the former one. For all intents and purposes, there is not much difference between revival and continuation of the former application.....' (Italics Supplied)

22. In *Kaliappa Reddiar v. Thangamuthu* : (1956)2MLJ301 , after considering various decision, learned judge held thus,

' As could be seen from the decision in *Ramanathan Chettiar v. Alagannan Chettiar* 1935 70 MLJ 683. *Somasundaram Chettiar v. Alamelu Achi*, 1937 MWN 480, *Korapolu Shedthi v. Gangaayya Shetty*, 1950 (1) MLJ 204, and *Singanna Sathiraju v. Herla Sathamma* : AIR1952 Mad819 , the trend of the rulings same to be that in order to find out whether an order has been a final order or only an order passed for statistical or administrative purposes, the surroundings circumstances should be taken into consideration. It also appears to be the further trend of these rulings that, whether an order is made by the court itself on its own initiative or at the invitation of the decree-holder, the circumstances under which the order happens to be made should still be the guiding factor in coming to the conclusion whether the order was a final order or was one passed merely for statistical purposes.' (Italics Supplied)

In that case the sale could not take place due to want of bidders an decree holder made endorsement on the execution petition as not pressed. When subsequent execution petition was filed, the questions of limitation was raised. In that context learned judge held as above. Learned Judge held that it was not because of the fault of decree holder sale could not take place and consequently it is only Judicial disposal.

23. A Division Bench of Andhra Pradesh High Court in the decision reported in *Venkatapathi Naidu v. Sidhamma Naidu*, 1960 (II) AWR 85, after analysing various decisions, at page 90 of the reports, it is held thus,

' In our judgment, a final order is one which, for all intense and purposes, closes the matter on hand and the court nor being invited to pass any such further on any

subsequent stage. The finality of the order does not depend upon the language used by the court at the time of passing the order. What has to be considered is the essence of the disposal. There is no hard and fast rule of interpretation. We have to look at the facts for finding out what was exactly meant and interpret it consistently with the powers vested in the court. The true test is whether the order puts an end to the application in respect of which it is made, so far as the court passing it is concerned.'*(Italics Supplied)*

24. A Full Bench of Rajasthan High Court in the decision reported in *Government of Rajasthan v. Sangram Singh* held thus,

'... The previous application for enforcement of the decree was not dismissed at the instance of the decree-holder. In considering whether an application is for the revival of the previous application or not there is no question of partial or total stay, what is to be considered is whether the previous execution application was disposed of or was kept pending. If it was kept pending, it automatically follows that it can be revived either suo motu by the court or being invited to do so by the decree-holder. This point should be borne in mind while applying the principles of revival. Consigning of a case to record without properly disposing it off is an act of the court and a decree-holder cannot be penalised by treating such application as disposed of and not pending.....'

25. In *Venkatachalamayya v. Venkatanarasimha Rao*, 1964 (1) ANWR 115, execution petition was dismissed as stayed. When subsequent execution petition was filed, an argument was taken that whatever be the intention, what has to be looked into is the terms of the order. If the executing Court ordered a dismissal of the petition, that would be absolute and cannot be questioned. The said contention was repelled by the Division Bench, wherein it is held thus,

'... Where the former execution application is dismissed finally but for some reason (not due to any default or neglect on the part of the applicant) which subsequently turns out to be untenable, the latter execution application would be deemed to be one for revival of the former one. The Full Bench observed that the test to be applied for the principle of revival is that, the interruption to the execution proceedings is due to an intermediate order which was afterwards set aside or the

execution proceeding must have been rendered infructuous by some such obstacle and the interruption to the execution should not have been occasioned by any fault to laches of the applicant Subsequently, another Bench of this Court in Venkatapathi Naidu v. Sidhamma Naidu, 1960 (2) An.WR 85, consisting of Satyanaryana Raju and Anathanaryana Ayyar, JJ., also applied a similar principle, though we do not find that the full Bench case was referred before them. They observed that the finality of the order does not depend upon the language used by the court at the time of passing the order. What has to be considered is the essence of the disposal. There is hard and fast rule of interpretation. The court has to look as the facts far finding out what was exactly meant and interpret it consistently with the powers vested in it. The true test is whether then order puts an end to the application in respect of which it is made, so far as the Court passing it is concerned. In that case also, the order dismissing the execution petition was held not to be a 'final order' within the meaning of Article 182(5) of the Limitation Act, but only an order made for statistical purposes. It means that the execution to be pending and it was not barred by limitation. If the order of dismissal made on the execution petition is not a correct order, the court has got power not only to do justice but also to rectify its own mistake by ordering the application and restore the prior execution petition to file even without notice to the judgment debtors.'(Italics Supplied)

26. In Chidabaram v. Periyasamy : AIR1978 Mad370 , (as he then was) in para 3 held thus,

'If an execution petition is dismissed for statistical purposes, there being no adjudication of the rights of the parties on merits or there being no disposal of the contention of the parties conclusively, such an order is not a final order passed for statistical purposes. Such being the case, a fresh application filed must be deemed to be one for revival or continuance of the former applications. The order in the present case significantly directs the attachment to continue. Hence it can be safely concluded that the said order is an order passed for statistical purposes. In this view also, it cannot be stated that the present application is a fresh application for execution and, in my view, it can be deemed to be only an application of the prior proceedings.'(Italics Supplied)

27. The same principle was applied in *Ramji Lal v. Het Ram*, AIR 1978 P &H; 233, wherein learned judge relied on the full bench decision of Rajasthan High Court cited supra and in para 4 held thus,

' Applying these principles to the facts of this case, there can be no two opinions that since the previous applications were never disposed of and in fact they were kept pending because of the stay orders passed by this court, therefore, the present application has to be considered as an application for revival of the previous ones. All the same, learned counsel for the judgment -debtor laid great emphasis on column No.6 of the present application requiring the decree-holders to state whether any previous execution application was made or not. This column was left blank. In other words, the pendency of the previous applications was not indicated. Be that as it may, since the record of the previous applications makes it amply manifest that none of them was disposed of, therefore non-mentioning of their pendency in column No.6 of the application cannot be fatal. The decision of the executing Court on Issue No.1 is accordingly affirmed.' (Italics Supplied)

28. From the above decisions it is clear that previous execution petition in E.P.No.380 of 1984 must be deemed to be pending and present petition is only to revive the same.

29. An argument was taken that decree holder has also filed a memo to dismiss the execution petition with liberty to file a fresh application. That liberty has not been granted and subsequently execution petition is barred. I do not find any merit in that submission. I have already extracted the memo filed by decree holder. It only discloses that he cannot proceed with the execution petition in view of stay order in O.S.No.282 of 1988 and therefore execution petition was dismissed. Order in memo is also very clear that executing Court dismissed the petition only because of the stay order. When decree holder is prevented from executing the decree, or he cannot proceed with the execution petition, filing a memo that execution petition may be dismissed in view of the stay order cannot be an argument against the decree holder, for even without memo court cannot proceed with the same.

30. Learned Senior Counsel for petitioner relied on the following decisions:

(1) A.S.Krishanappa v. S.V.V. Somiah : [1964]2SCR241 ; (2) Parame-saswaran Nambudri v. Seshan Pattar, AIR 1928 Mad 627; (3) Sun-daramma v. Abdual Khadar, ILR (46) Mad 490; (4) Virchand v. Marulappa AIR 1944 Bom. 303.

All these cases deal with application under section 15 of the Limitation Act. Once I have held that previous application is pending, there is no scope for applicability of Section 15 of Limitation Act. Present execution petition is only a reminder and not a fresh execution petition and there is no scope of applicability of section 15 of Limitation Act.

31. It is true that in the execution application, decree holder sought to exclude the period all litigations have been pending and prohibitory orders were passed. I do not think that by itself will prevent decree holder from contending that earlier execution petition is still pending. When earlier execution petition is pending, executing Court is bound to restore the execution petition once stay has been vacated and in such cases, decree holder also will be justified in filing a fresh application in the nature of reminder. Merely because exclusion of time is sought for under section 15 of the Limitation Act, that will not prevent decree holder or executing court to consider whether the present execution petition is only a reminder or fresh execution petition.

32. Reliance was also placed in the decision reported in K.Ramayya v. K.Nageswararao : AIR 1969 AP250 . I do not think that decision will have any application to the facts of this case. There the decree holder was asked to file a petition to proceed with execution petition and having filed to do so, execution petition was dismissed for his default. In those circumstances, it was held that subsequent execution petition is barred by time.

33. In view of the above reason I hold that the present execution petition is only a reminder of E.P. 380 of 1984 and order of the lower court in ordering delivery of property is correct.

34. As rightly urged by learned counsel for respondent, a decree has been passed in the year 1967 and till date decree holder has been successfully prevented from taking fruits of the decree and that too less than 1000 Sq.ft of property. It is only

proper that earlier steps are taken to put an end to this litigation.

35. I direct the executing court to see that property is delivered to decree holder without any further delay. I direct executing court to effectively implement the decree and put decree holder in possession of property on or before 29.2.2000. If any police aid is required, executing court is also directed to provide the same without waiting for formal application. Amin is also to be empowered to break open the lock, if necessary. Lower Court is directed to report compliance of the above directions by 6.3.2000.

36. In the result, the revision petition is dismissed as above with costs. Consequently, C.M.P. No. 21196 of 1999 is also dismissed.

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