

Tirthasami Vs. Annappayya

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Court : Chennai

Decided On : Nov-12-1894

Reported in : (1895)ILR18Mad131

Judge : Muttusami Ayyar, J.

Appellant : Tirthasami

Respondent : Annappayya

Judgement :

Muttusami Ayyar, J.

1. This was an application for execution of the decree in Original Suit No. 121 of 1882 on the file of the District Munsif of Udipi in the district of South Canara. The appellant is the representative of the Puttige Mutt at that station, and respondent, Annappayya, is the execution-creditor. The decree was passed against appellant's predecessor, but on his dismissal from his office and on appellant's succession to the office, respondent attempted to execute it against the latter. The District Munsif refused the execution, but on appeal the Judge held that execution should be granted if respondent showed in execution proceedings that the decree debt was one contracted for purposes of the Mutt. From this order respondent preferred no second appeal and it became final. The application for execution in which the above orders were made was not further proceeded with.

2. Meanwhile, execution was taken out by other decree-holders against the appellant and similar orders were passed by the District Munsif and by the Judge. In one of them, in which one Budan Saheb was execution-creditor there was a second appeal.

3. As reported in *Sudindra v. Budan* I.L.R. 9 Mad. 80 the High Court hold in that case that the decree should be executed against appellant unless he set it aside by a new suit for fraud and collusion. Thereupon, appellant instituted suits to set aside several decrees passed against his predecessor, and brought Original Suit No. 834 of 1882 against respondent in September 1889. The District Munsif dismissed the suit, and in December 189J the Judge confirmed the decision in Appeal Suit No. 441 of 1889. From this decision, a second appeal is still pending.

4. Meanwhile, another application for execution of the decree in Original Suit No. 121 of 1882 was made in No. 455 of 1889. The District Munsif called upon respondent to prove that the decree debt was binding on the Mutt and allowed him time for that purpose till the 28th June 1890. However respondent produced no evidence, and the District Munsif dismissed his petition for execution. On the 14th August 1893, respondent again applied for execution by attachment of immoveable property. In support of his claim, lie alluded to the order of the High Court in the execution of Budan Saheb's decree in Original Suit No. 334 of 1888, brought by appellant against respondent, and to the dismissal of that suit. Appellant opposed this application as barred by the order on respondent's former application, which was passed in No. 455 of 1889, The District Munsif observed that that order operated as a decree under Section 2 of the Code of Civil Procedure, and barred the present application. On appeal, the Judge considered that the mere striking off of the application did not amount to an adjudication, that the order granting time to prove that the debt was binding on the Mutt was not one passed under Section 158 of the Civil Procedure Code, that appellant was under no obligation to produce his evidence, and that he was therefore not barred from renewing his application for execution, It is contended on second appeal that the order dismissing the application for execution No. 455 of 1889 was passed under Section 158, Civil Procedure Code, and that it precludes, under Section 13, Civil Procedure Code, any fresh application for execution of the same decree.

5. I agree in the opinion of the Judge that the dismissal of a petition for execution for default does not bar a fresh application. The Judge states that Section 158 is inapplicable, because the order on the prior application does not purport to have been made under that section, and that there is nothing to show that time was granted at the instance of the respondent. I also think that Section 158 is inapplicable, but I prefer to rest my opinion on the general ground that by reason of Section 4 of Act VI of 1892, nothing in Chapter VII or XIII of the Code of Civil Procedure applies to proceedings in execution. It was held by the Full Bench of the Allahabad High Court in *Dhonkal Singh v. Phakkar Smgh* I.L.R. 15 All. 84 that when an execution case is struck off the file or dismissed upon a ground other than a distinct finding that the decree is incapable of execution, or that the decree-holder's right is barred .by limitation, or by any other law, or on some ground touching the merits, its dismissal whether termed as dismissal for default or as struck off the file does not operate to bar a frosh application for execution.

6. In *Hajrat Akramnissa Bagam v. Valiulnissa Begam* I.L.R. 18 Bom. 429 the High Court of Bombay held that while there is no statutory authority for restoring to the file an application for execution which has been once dismissed for default, the order of dismissal is ineffectual to bar a subsequent application for execution. In *Delhi and London Bank v. Orchard* I.L.R. 4 IndAp 127 the Privy Council held that an order refusing an application to execute a decree is not an adjudication within the rule of *res judicata*. The real question is whether the order of the District Judge that respondent's right to execute the decree against appellant can only be recognized on proof that the decree-debt is binding on the Mutt is still in force, and whether it bars execution until the condition mentioned therein is complied with. I must answer the question in the affirmative. That the order in question was made is not denied. That it became final is also admitted. It is clear that whatever order the High Court made in execution of Budan Saheb's decree cannot affect the respondent who was no party to that order. The former order being then still in force, it must be complied with and the decree could not be executed as if it bad no existence. It is open to, respondent to apply for a review of that order and to have it vacated.

7. It is suggested that by instituting Original Suit No. 334 of 1888 respondent waived the benefit of the previous order and that he is not now at liberty to fall back upon it. But the suit and the order are not necessarily inconsistent with each other. The judgment may not be tainted by fraud and the debt may yet not bind the Mutt. I am unable to hold that, as a matter of law, there was a waiver. I am therefore of opinion that, so long as the order of the District Judge is legally in force, execution must be refused unless the condition mentioned in it is complied with. On this ground I reverse the order of the Judge and restore that of the District Munsif. In the special circumstances of the case, each party will bear his costs here and in the lower Appellate Court.

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