

Subramania Chettiar and ors. Vs. Narayanan and ors.

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Court : Chennai

Decided On : Apr-15-1955

Reported in : AIR1955Mad615

Judge : Govinda Menon, ;Basheer Ahmed Sayeed and ;Ramaswami, JJ.

Acts : Limitation Act, 1908 - Schedule - Article 182(5)

Appeal No. : A.A.A.O. No. 140 of 1951

Appellant : Subramania Chettiar and ors.

Respondent : Narayanan and ors.

Advocate for Pet/Ap. : V. Srinivasan and ;T.R. Ramachandran, Advs.

Disposition : Appeal allowed

Judgement :

Krishnaswami Nayudu, J.

1. The question for determination in this appeal is whether the execution petition is in time. The first execution petition was presented on 18-4-1948 within three years of the passing of the decree. The second one was presented on 7-3-1946 and was signed and verified not by the decree-holder but by one Natesa Pillai describing himself as the power of attorney agent of the decree-holder.

It was returned on 11-3-1946 calling upon the petitioner to produce the power of attorney, copy of the final decree, the encumbrance certificate and the sale papers, and two months' time was fixed for complying with the requisitions. 10 months thereafter, the petition was represented on 12-1-1947 beyond the time granted for compliance. Along with the petition, an application for excusing the delay was also presented. The power of attorney required was not produced and an endorsement was made on the execution petition that the power having been cancelled and the petition having been presented by an agent without such a power of attorney the execution petition might be dismissed.

On the application for excusing the delay the Court passed an order dismissing it on 20-1-1947. The execution petition itself was taken up on 27-1-1947, and was dismissed. The order of dismissal was in the following terms:

'As per order in E.A. No. 108 of 1947 dated 20th January 1947 delay execution petition having been dismissed, this E. P. is dismissed,'

The third execution petition out of which the present appeal arises was presented on 7-9-1947. The question is as to whether it could be held that the order dated 27-1-1947 was a final order passed on an application made in accordance with law to the proper Court for execution in which case the third execution petition would be in time. The trial Court held that it was such an order, while in appeal the learned Subordinate Judge of Pudukottai, took a different view and dismissed the petition as out of time. Respondent in the present appeal is not represented.

2. It was urged in the lower appellate Court that the second execution petition having been signed and verified by a person who had no valid authority, was not a valid petition at all and in any event, the petition to excuse the delay having been dismissed on 20-1-1947 the order rejecting the execution petition itself on 27-1-1947 cannot be taken to be a final order within the meaning of Article 182 (5) of the Limitation Act.

As regards the first of the contentious, the lower appellate Court found that since under Order 21, Rule 11, Civil P.C. the execution petition need not be signed and verified by the decree-holder himself, but might be signed and verified either by

the applicant or by some one proved to the satisfaction of the Court to be acquainted with, the facts of the case, and since Natesa Pillai who was an ex-agent, stated in the petition that he was acquainted with the facts of the case, that would be sufficient compliance with Order 21, Rule 11, C.P.C.

The presentation of the execution petition was by the vakil who was found to have had authority. The lower appellate court rightly found that the second execution petition was validly presented into Court. But on the second contention as to whether the order of 27-1-1947 would amount to a final order, within the meaning of Article 182 (5) of the Limitation Act, the teamed Judge placed reliance on two Bench decisions of this Court in -- 'Ghulam Khadir Sahib v. Viswanathayyar', AIR 1943 Mad 297 (A) and -- 'Kuppuswami Nainar v. Rangaswami Goundan AIR 1949 Mad 217 (B), and took the view that as the application for excusing the delay was dismissed and since as a consequence the unnumbered second execution petition was dismissed on 27-1-1947, the order of dismissal would not amount to a final order.

3. In AIR 1943 Mad 297 (A), the execution petition was returned on the ground that the sale papers were not filed and the decree-holder was required to re-present it within three weeks after remedying the defects. The requisition was not complied with and it was represented nearly three years after without an application to excuse the delay. Subsequently, the decree-holder presented an application for excusing the delay in the representation of the unnumbered execution petition and the delay was not excused.

It was held that the unnumbered petition was one in conformity with law, the requirements of Order 21, Rules 11 to 14, Civil P.C. having been complied with, and the mere non-production of the sale papers and the encumbrance certificates could not be held to be an omission which justified the order of return. It was further held that when a petition is returned for the purpose of the petitioner doing something to enable the Court to proceed further with it, the Court really defers its consideration until it is brought back with the defects remedied, that it is only then that Court is placed in a position to consider it judicially and make what can be regarded as a final order on it, and that an execution petition returned for

amendment but not re-presented has no legal existence till it is re-presented, and if it is re-presented after the time limited, it does not acquire the status of a petition calling for an order unless the delay is excused.

In that case, the application for excusing the delay was rejected, and the consequence was that there was no valid petition before the Court to be ordered or rejected. It was urged there, as in the present case, that the petition was found to be in accordance with law and was wrongly returned and therefore it could not be contended that the petition when presented or re-presented had no legal existence. With reference to this contention, the learned Judges observed at page 300 as follows:

'But surely an order of return, right or wrong, if made by a competent Court is not a mere nullity and cannot be ignored by the party affected. Nor is it open to take back the petition and choose his own time for re-presenting it..... He must represent it within the time limited by the order, and if he does not, he must move the Court for an extension of time, or for excusing the delay. If the Court excuses the delay, the re-presented petition will date back to its original presentation.

If the Court however refuses to do so, the position must be the same as if it had never been represented, and consequently it never emerged into legal existence.'

The facts of the present case warrant the application of the principle laid down in that decision.

4. But reliance is placed on the judgment of Somayya J. in -- 'Gopalaswami Mudaliar v. Thiagarajaswami Koil Devasthanam, Tiruvarur', AIR 1945 Mad 347 (C). In that case the execution petition was returned for amendment and was re-presented with an application for excusing the delay in re-presentation. The application for excusing the delay was dismissed. Still the learned Judge held that when there was no defect in the previous execution petition and the same was returned for compliance with certain particulars and the petition was re-presented without undue delay, the order of the executing Court refusing to excuse the delay and dismissing the petition was a final order within the meaning of Article 182 of the Limitation Act, and saved limitation.

Somayya J. preferred to accept the view of King J. in -- Ramachandra Naidu v. Muthu Chettiar, AIR 1943 Mad 340 (D) that, when there was no defect in the previous execution petition and the same was returned and there was no undue delay in the re-presentation, the order of the executing Court refusing to excuse the delay and dismissing the execution petition must be taken to be a 'final order.'

In AIR 1943 Mad 297 (A), the delay in representation was nearly three years and Somayya J. observed that he was in agreement with the view of King J. in AIR 1943 Mad 340 (D) that the decision in AIR 1943 Mad 297 (A) does not apply to a case where there was no undue delay in the re-presentation of the prior execution petition.

5. I feel I am bound by the decision of the Bench in AIR 1943 Mad 297 (A) and the present appeal has therefore to be dismissed. Somayya J. and King J. have taken a contrary view that they were not inclined to follow the view taken by the Bench in AIR 1943 Mad 297 (A).

The view taken by Somayya J. and King J. appears to be quite reasonable as if in fact an execution petition, which is in conformity with law, is presented and if the office returns the petition for amendment and it is eventually found that notwithstanding the return the requirements of Order 21, Rules 11 to 14 have been complied with, the mere fact that an application to excuse the delay is dismissed and the execution petition is also dismissed would not have the effect of holding that the dismissal of the execution petition could not amount to a 'final order.'

6. As there is a conflict between the decision of the Bench in AIR 1943 Mad 297 (A) and the view taken by the learned Judges in the two other cases, and as this question frequently arises, it is desirable that there should be an authoritative decision on the matter. I am of the opinion that the question may be considered by a Bench, preferably, a Full Bench.

7. Place the papers before the Honourable the Chief Justice for orders.

(Opinion Of The Full Bench)

Govinda Menon, J.

8. As the order of reference sets out the facts with sufficient elaborateness it becomes unnecessary for us to restate the same. On the finding that a second execution petition filed in Court on 7-3-1946 was validly presented, what has to be considered is whether its dismissal at a later stage without being numbered on account of the fact that certain requisitions directed to be complied with by the Court were not fulfilled would amount to a 'final order' or not.

It is undisputed that if the requirements had been complied with within the time allowed and thereafter for some reason or other the petition was dismissed then that dismissal would amount to a final order within the meaning of the term in Article 182 (5) of the Limitation Act.

In the present case, the application that was properly presented was returned for curing certain defects, which were not done within the prescribed time and the request for excusing delay in representing the application was rejected with the result that the application which was unnumbered was dismissed on 27-1-1947.

Divergent views on the aspect as to whether such an order is a final one can be gathered from the line of cases either way and we have to choose that which lays down the correct principle.

9. In AIR 1943 Mad 297 (A), Krishnaswami Aiyangar and Kunhi Rahman JJ. came to the conclusion that when an execution petition is returned for the purpose of the petitioner doing something to enable the Court to proceed further with it then the Court really defers its consideration until it is brought back with the defects remedied and it is only then that the Court is placed in a position to consider it judicially and make an order which can be regarded as a final order on it.

It was further held that the question whether an order is a final order within the meaning of Article 182 (5), Limitation Act, is not to be judged by reference to what the Court passing the order thought at the time nor by the language employed by it. It is for the Court before which the nature of the order is questioned at a later stage to decide the matter. Therefore an execution petition which is returned for

amendment but not re-presented within the time specified and the delay in re-presentation subsequently was not excused is not a petition calling for a final order.

According to the learned Judges, therefore, even if the initial presentation was in accordance with law but some defect in the petition has to be remedied, until that is done within the prescribed time the petition as such cannot be deemed to exist as a pending cause and subsequently if that is rejected by the Court it would not be a final order. Some support to this point of view can be gathered from the earlier decisions.

In -- '*Chidambaram Chettiar v. Murugesan Pillai*', AIR 1939 Mad 841 (E), it was held that an application which does not conform to the requirements of Order 21, Rules 11 to 14, Civil P.C. and which for that reason has to be kept in abeyance to permit the defect to be remedied is not an application made in accordance with the law and therefore even if the direction allowing time to remedy the defect is regarded as an order of the Court it would not be an order passed on an application made in accordance with the law, and hence cannot be called a final order.

10. In -- '*The Official Receiver, Ramnad v. Sivasuriya Narayanaswami*' AIR 1942 Mad 216 (F), the learned Judges held that the rejection of an unnumbered petition cannot be deemed to be a final order as wrong compliance of the requirements to remedy the defect which prevented the numbering of the petition was due to the act or default of the decree-holder and in the circumstances the unregistered petition cannot be deemed to be pending or revived later on by a fresh application.

The principle which the learned Judges followed is that it is only where an execution petition after compliance with the necessary formalities is numbered and thereafter it is disposed of by an order that the adjudication can be deemed to be a final order. A similar view was taken in AIR 1949 Mad 217 (B), where *Satyanarayana Rao J.* followed the Bench decision in AIR 1943 Mad 297 (A) and held that when an unnumbered petition was returned for compliance with certain requisitions and the same was not returned within the time prescribed and later on an application to excuse delay in re-presentation was dismissed, then in the eye of

the law the unnumbered petition did not exist with the result that the order rejecting the petition or refusing to excuse delay would not be called a final order.

The principle deductible from these decisions is that even if the initial representation did conform to the requirements of the law but still until the petition is numbered it could not be considered to be in existence though it might remain in the archives of the Court and on the rejection of such a petition the Court is not deemed to have passed an order on an existing cause pending before it. The decision in AIR 1943 Mad 297 (A) did not meet with approval at the hands of King J. in AIR 1943 Mad 340 (D); where the learned Judge held that an application, which was in accordance with the law and which was returned for the production of sale papers and extension of time for which was refused by the Court and later on dismissed without being admitted and numbered, was nonetheless an application pending in Court and that its dismissal amounted to a final order within the meaning of Article 182 (5), Limitation Act.

The learned Judge was further of the opinion that it is not always essential that the application should be admitted and numbered before the order passed on it can be called a final order. The learned Judge took a similar view as in -- 'Parankusa Naidu v. Ayyanna Naidu : AIR1943 Mad517 . If there no procedural defect or non-compliance with the imperative provisions of Order 21, Rule 11, Civil P.C. in the presentation of an execution petition but the

same is returned for compliance with certain particulars but that is not represented within the time allowed and the delay in re-presentation is not excused, still any order passed on such an application would be a final order.

This is the purport of the judgment of Somayya J. in AIR 1945 Mad 347 (C). It is evident from this that the act of numbering the petition and adding it on to the pending causes is not an essential one for the order passed on it to be termed a final order. A similar view was taken by the learned Judge in

-- 'Venkataratnam v. Kotayya', AIR 1945 Mad 511 (H). Wadsworth J. in -- 'Nataraja Pillai v. Narayanaswami lycr', AIR 1947 Mad 385 (I) was of the view that where an execution petition is ordered to be returned for supplying certain information within

the time given but the decree-holder does not in fact take return of the petition from the Court and the Court thereupon rejects the petition on a subsequent date the order of rejection would amount to a final order on a subsisting petition for the purpose of saving limitation.

The learned Judge followed the decision of King J. in : AIR1943 Mad517 and distinguished AIR 1943 Mad 297 (A).

11. Gentle C.J. and Thyagarajan J. in --'Seetharama Chettiar v. Muthukrishna Chettiar AIR 1949 Mad 43 (J), considered a case where an execution petition was rejected by a court without numbering it because the party did not take it back to comply with certain particulars within a particular time when ordered by Court and the learned Judges were of the opinion that such a rejection was a final disposal of the petition and therefore the order passed was a final order.

The decisions of King J. in : AIR1943 Mad517 and of Wadsworth J. in AIR 1947 Mad 385 (I) were followed. It is clear from the reasoning of the learned Gentle C.J. that in order to make an order a final one the numbering of the petition and adding it on to the file of pending cases are not essential necessities. The learned Chief Justice enunciated a similar principle in -- 'Muthu Venkatasubba Reddiar v. Thangavel Chetti AIR 1948 Mad 462 (K) sitting with Satyanarayana Rao J. distinguishing the case in AIR 1948 Mad 297 (A).

Two of us, Govinda Menon and Basheer Ahmed Sayeed JJ. in -- 'Sabapathi Mudaliar v. Mahalinga', : AIR1951 Mad353 (L) considered most of the cases noted above and we were of the opinion that if there is a valid presentation in the first instance an order rejecting such a petition for non-compliance with certain requirements would be a final order. It was stated there in the course of discussion that it was impliedly understood that if there had been an initial proper presentation of an execution petition, any intermediate order or subsequent irregularities such as not taking back the return or not numbering would not take away from the effect of the initial valid presentation so as to detract from the final nature of the order which ultimately rejected the petition.

In L.P.A. No. 7 of 1949 (M), Satyanarayana Rao and Raghava Rao JJ. followed the decision in AIR 1948 Mad 462 (K) and distinguished the case in AIR 1943 Mad 297 (A). They also approved of the decisions in -- 'Veerabhadraiah v. Seshiah', AIR 1949 Mad 250 (N) and : AIR1951 Mad353 (L). Lastly we may refer to the decision of one of us Basheer Ahmed Sayeed in -- 'Ramabhadra Reddiar v. Ramachandra Reddiar', : AIR1954 Mad74 (O) in which the previous case law either way came in for discussion.

It was decided there that where an unnumbered execution petition returned for filling up certain particulars was re-presented after a delay of eighteen months without the requirements having been complied without an application for an express order excusing delay but there was an endorsement that the decree-holder was not pressing the petition and that it might be rejected, and the Court passed an order 'not pressed, rejected' such an order would be a final order within the meaning of Article 182 (5) of the Limitation Act.

Reliance was mainly placed upon the decision in AIR 1948 Mad 462 (K).

12. We have now stated the conflicting views which necessitated the placing of this civil miscellaneous second appeal before a Full Bench. After a consideration of the various authorities it seems to us that the correct and more acceptable view is not to treat the numbering and admitting of the execution petition as a necessary 'sine qua non' for any order passed upon it to become final, if as a matter of fact the initial presentation complied with the provisions of the Civil P.C.

The finality of the order does not depend upon the addition of the petition to the numbers of execution petitions pending before the Court but What has to be considered is the essence of the disposal. If after the order is passed it is not possible for the Court to do anything further with the paper that is rejected, then the order would be a final one but if something more has to be done even after the passing of the order in which case the Court will be enabled to take into consideration other matters arising out of the same petition, then it is difficult to say that it is a final order.

We are of the opinion, therefore, that the view taken in AIR 1943 Mad 297 (A) that unless a petition is numbered, it has no legal existence in the eye of the law is not correct and we are unable to follow the same. The opinion of King J., Somayya J. and Wadsworth J. approved of in the later cases is the correct one.

In the result the order of the Subordinate Judge is set aside and that of the District Munsif restored with costs here and in the Court below. There was no appearance of counsel on behalf of the respondent but Mr. K. Hainan for the appellant has placed before us all the relevant decisions for and against the contention and we are grateful to him for the assistance rendered.

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