

**Chaturvedula Venkata Lakshminarasimham and anr. Vs. Sha Ven Vaktaji Gomaji and Co., Sait Vummaji Manrupchand Firm**

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**SooperKanoon Citation :** [sooperkanoon.com/800800](http://sooperkanoon.com/800800)

**Court :** Chennai

**Decided On :** Jul-20-1948

**Reported in :** (1948)2MLJ488

**Appellant :** Chaturvedula Venkata Lakshminarasimham and anr.

**Respondent :** Sha Ven Vaktaji Gomaji and Co., Sait Vummaji Manrupchand Firm

**Judgement :**

Govindarajachari, J.

1. These civil miscellaneous second appeals arise out of proceedings in execution of two decrees. The decree-holders are different but the material judgment-debtors are the same. The facts in the two cases are so identical and the execution of the two decrees proceeded on lines so closely parallel that it is sufficient for the disposal of both the appeals to state the facts in one of them.

2. C.M.S.A. No. 15 of 1947 arises out of proceedings in execution of the decree in O.S. No. 12 of 1933 on the file of the Court of the Subordinate Judge of Bezwada. The first of the petitions to execute this decree was E.P. No. 67 of 1934 which was dismissed on 24th July, 1934. On 8th September, 1934, the decree-holder applied in E.P. No. 127 of 1934 for rateable distribution of the proceeds of a sale to be held in E.P. No. 29 of 1933 on the file of the Court of the Subordinate Judge of Bezwada and in case no such sale was held for attachment and sale of the immoveable property mentioned in the schedule attached. E.P. No. 127 of 1934 was dismissed on 16th July, 1935, with the endorsement,

As E.P. No. 29 of 1933 was dismissed for want of bidders this petition does not lie. No sale. Dismissed.

On the 30th of October, 1937, the decree-holder filed an execution petition. It was returned several times for compliance with certain requisitions made by the office, and both the courts below have found that this execution petition was not finally re-presented. The correctness of this finding cannot now be questioned. It would appear that the execution petition was being returned firstly for producing the power of attorney which enabled the decree-holder's clerk to sign the execution petition and secondly, for the purpose of making a correct calculation of the interest due on the decree. I may observe in passing that the lower appellate Court has held that neither of these defects is such as to make the execution petition one not in accordance with law. The correctness of this conclusion has not been seriously challenged by Mr. Venkatarama Sastri, the learned advocate for the appellants-judgment-debtors.

3. On the 29th of April, 1940, still another execution petition was filed. The prayer was that certain moveables of the judgment-debtors should be attached and sold. The execution petition was not pressed and was rejected on the 6th of January, 1941, with an observation that,

the question of limitation would be considered when the next execution petition is filed.

On the 26th of April, 1943, the decree-holder filed E.P. No. 95 of 1943 out of which C.M.S.A. No. 15 of 1947 arises. The prayer here also was that certain moveables should be attached and sold. During the pendency of this execution petition the decree-holder filed E.A. No. 195 of 1944 for treating the main petition E.P. No. 95 of 1943 as a continuation of E.P. No. 127 of 1934 and for permitting him to proceed with the latter. E.P. No. 95 of 1943 and E.A. No. 195 of 1944 were dismissed by the learned Subordinate Judge of Bezwada on the 18th of November, 1944, on the ground that E.P. No. 95 of 1943 was barred by limitation and that the prayer in E.A. No. 195 of 1944 could not be granted. There was no appeal against the order in E.A. No. 195 of 1944 but the order in E.P. No. 95 of 1943 was appealed against to the District Court of Kistna at Masulipatam in A.S. No. 26 of 1945. The learned District Judge of Kistna allowed this appeal as also the appeal in the connected case and held that the Execution Petitions of 1943 are not barred by limitation. His reasoning can be briefly summarised. Agreeing with the learned Subordinate Judge he held that the unnumbered execution petition of 1937 was never re-presented. He further held that that execution petition could not be regarded as an execution petition in which no final order was passed and which must therefore be treated as pending. He held however that it could be regarded as a step-in-aid of execution and so treating it, he thought that what is material is the date of the application itself and not the date of any order passed on it. Since the E.P. of 1937 was filed on 20th October, 1937, it gave according to the learned District Judge a further period of three years within which the decree-holder could file a fresh execution petition. As the execution petition of 1940 was admittedly filed on the 29th of April, 1940, it followed that that execution petition was in time as also the later execution petition of 1943 which was filed within three years of the dismissal of the execution petition of 1940. Mr. Venkatarama Sastri argued that the learned District Judge was not right in treating the date of the filing of the execution petition of 1937 as the starting point even if that execution petition is to be viewed as an application to take a step-in-aid of execution. Article 182, Clause (5) provides a period of three years, the time from which the period begins to run being defined in the following words:

5. Where the application next hereinafter mentioned has been made the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order.

From the language of the Article it is clear that whether the execution petition of 1937 is regarded as an application for execution or as an application to take some step-in-aid of execution of the decree, the starting point of limitation is the final order passed on such application. The Article does not permit any differentiation like what the learned District Judge has attempted.

4. In support of his decision, on this matter the learned District Judge relied on an observation of Leach, G.J., in *Ayi v. Solai* : AIR1945Mad139 . The question in that case was whether an application to take a step-in-aid of execution within the meaning of Article 182(5) of the Indian Limitation Act should be made in a pending execution petition. This was answered in the negative. While referring to the change that had been made in Article 182(5) in 1927 and to the provision which corresponded to Article 182(5) in the previous Limitation Act, the learned Chief Justice pointed out that under Article 182(5) as amended in 1927 the starting point is the final order, while previously it was the date of the application itself. Then occurs the following sentence:

Nothing really turns on this, because for the purpose of answering the question referred it is immaterial whether the starting point is the date of the application or the date of the order passed thereon.

It is obvious that the question before the Full Bench in no way depended on whether the starting point was the one or the other. It is really surprising how the learned District Judge read this observation of the learned Chief Justice as supporting the inference that while the starting point is the date of the final order if the previous application was one for execution, it would be the date of the application itself if the previous application was one to take some step-in-aid of execution. In fact at page 475 after referring to *Kunhi v. Seshagiri* I.L.R. (1882) Mad. 141, the learned Chief Justice observed that, a fresh period of limitation starts from the date of the final order in an application to take a step-in-aid of execution as well as from the date of a final order in an application for execution.

Mr. Kameswara Rao, the learned advocate for the respondents-decree-holders, relied on the decision in *Satyanarayana v. Kajireddi* : AIR1946Mad61 , where it was observed that the Full Bench which decided *Ayi v. Solai* : AIR1945Mad139 left open the question whether time began to run from the date of the application or the date of the order on it because it was unnecessary to decide it on the facts of that case. That only means that the question has now to be decided on the wording of Article 182 (5). Judging from the language of that Article I have no doubt whatever in holding that whether the previous application was one for execution or to take some step-in-aid of execution of the decree, the starting point is the date of the final order on it and not the date on which it was filed.

5. That an application for execution which is returned by the Court but never re-presented thereafter should be treated as if it had never been presented at all, has been held in a series of cases: *Chidambara v. Murugesam* : AIR1939Mad841 , *Official Receiver, Ramnad v. Marayanasami Thevar* : AIR1942Mad216 , *Khadir Sahib v. Viswanatha Aiyar* : AIR1943Mad297 and scarcely admits of any doubt. See also *Venkatappa v. Venkatappa I.L.R.* (1944) Mad. 266 and *Seshagirirao v. Subbarami Reddi* : AIR1945Mad154 .

6. A distinction was attempted in *Khadir Sahib v. Viswanatha Aiyar* : AIR1943Mad297 between a case where an application for execution is returned for rectifying a defect by way of non-compliance with the provisions of Order 21, Rules 11 to 14, and a case where the return is for complying with requisitions in respect of matters which cannot be described as defects falling under Order 21, rules n to 14. In the former class of cases the application for execution is not one in accordance with law while in the latter it is one in accordance with law. It was however held in *Khadir Sahib v. Viswanatha Aiyar* : AIR1943Mad297 , that for the purpose of the present discussion there is no distinction between the two classes of cases. It was pointed out in that decision that the petition which was returned in *Official Receiver, Ramnad v. Narayanaswami Thevar* : AIR1942Mad216 , was in conformity with the law, but that it still made no difference in the decision arrived at. The learned Judges in *Khadir Sahib v. Viswanatha Aiyar* : AIR1943Mad297 , noticed that *Somayya, J.*, expressed a contrary opinion in *Sundarabalakadiresa Thevar v. Avudai Ammal* : AIR1942Mad495 , but they disagreed with that judgment and followed the decision of the Bench in *Official Receiver, Ramnad v. Narayanasami Thevar* : AIR1942Mad216 , and observed that 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. As already stated it may be assumed that in this case the application of 1937 was one in accordance with law. But that, in my opinion, makes no difference and since the application was admittedly not re-presented, the question of limitation must be decided as if there was no application made at all in 1937.

7. Mr. Kameswara Rao drew my attention to the decision in *Muthuvenkatasubba Reddiar v. Thangavelu Chetti* : AIR1948Mad462 , in which there is an observation that the judgment in *Khadir Sahib v. Viswanatha Aiyar* : AIR1943Mad297 , was with respect to the particular facts which arose therein and which, the learned Judges add ' are not the same as in the present instance.' I do not read this as expressing any disapproval of the judgment in *Khadir Sahib v. Viswanatha Aiyar* : AIR1943Mad297 . In *Muthuvenkatasubba Reddiar v. Thangavelu Chetti* : AIR1948Mad462 , the facts were somewhat peculiar. An execution petition returned for re-presentation after compliance with certain requisitions was re-presented after the time given for the purpose by the Court. On the decree-holder mentioning to the Court that he was not pressing it the Court passed an order in the following terms: 'This is not pressed and hence dismissed'. This was held by the learned Judges in *Muthuvenkatarasubba Reddiar v. Thangavelu Chetti* : AIR1948Mad462 , as amounting to an order excusing the delay in the re-presentation of the petition followed by an order of dismissal and the order of dismissal was held to be a final order within the meaning of Article 182(5) of the Limitation Act. Having regard to the wording of the order the learned Judges were perhaps quite justified in inferring or implying an order excusing the delay in re-presentation, but that however bears in no way on the question whether the doctrine that has been developed in regard to execution petitions returned but not re-presented would not apply also to a case where the execution petition was one in accordance with law but is still returned for re-presentation after compliance with certain requisitions made by the Court.

8. The ground therefore on which the learned District Judge held that the application of 1937 saves limitation

cannot be accepted.

9. Mr. Kameswara Rao however attempted to support the judgment of the lower appellate Court in several alternative ways. He first referred to the execution petition of 1934 in which there was, as already stated, a two-fold prayer. In an affidavit sworn to by the decree-holder on the 21st of March, 1944, it was stated that the dismissal order of the execution petition of 1934 was passed without issuing any notice to the parties or their pleaders and without hearing them, and that neither the decree-holder nor his vakil was aware that such an order of dismissal was passed and that as soon as it was known that the said execution petition was dismissed, another execution petition was filed on the 30th of October, 1937. Mr. Kameswara Rao argued that if this allegation is true the execution petition of 1934 has not been validly disposed of and must therefore be held to be pending, and that consequently it would be open to his client to remind the Court of the pendency of such an execution petition and ask for its continuance. In the first place, this allegation as to the circumstances in which the execution petition of 1934 was passed and the way it was dismissed seems to have been made for the first time in 1944. In the earlier execution petition of 1940 all that was said was that the execution petition of 1934 was dismissed meaning presumably that it was dismissed in the usual course. It is not known what allegation was made in the execution petition of 1937 regarding the manner of disposal of the earlier execution petition of 1934, but there is no reason to think that anything different from what was said in 1940 was said in 1937. I am not therefore prepared to accept the truth of the somewhat belated statement of the decree-holder in his affidavit of 1944.

10. Assuming for a moment that the allegation referred to above is true, the judgment-debtors have more than one answer. In the first place, the present execution petition No. 95 of 1943 is for attachment and sale of moveables. It is not easy to see how this application could be regarded as a continuation of the execution petition of 1934 which sought relief by way of attachment and sale of immoveable properties. It is also quite possible that having regard to the fact that the immoveable property which was sought to be proceeded against had already been attached at the instance of another creditor in E.P. No. 29 of 1933 and was being brought to sale, the decree-holder did not in his E.P. No. 127 of 1934 press for or take adequate steps in regard to the prayer in his execution petition for attachment and sale of the same immoveable property. Again as held in *Maharaj Bahadur Singh v. A.H. Forbes* (1929) 57 M.L.J. 184, as the intervening applications are essentially different in character from the application of 1934, it is quite open to the Court to infer an abandonment of that application and 'in any event,' to borrow the language of the Privy Council in the decision just quoted, 'the combined effect of the previous applications marks such substantial departure from the original application (of 1934) so as to make it impossible to hold that the application (of 1943) was a continuation of the application (of 1934).'

11. Mr. Kameswara Rao cited in this connection *Chalavadi Kotiah v. Pooloori Alimelammah* : (1908)18MLJ46 and *Subbachariar v. Muthuveeran Pillai* (1912) 24 M.L.J. 545 : I.L.R. 36 Mad. 553. In the former case, there was no intervening application while in the latter there was an intervening application; but its effect was not considered by the learned Judges. Having regard to the fact that the present application itself is for relief by way of process against moveables, that the application of 1940 also was for attachment and sale of moveables and that presumably the application of 1937 also was for the same purpose, it is impossible for the decree-holder to summon to his aid any doctrine of continuation of the application of 1934 in the application of 1943.

12. It was then said that by an amendment of the present execution petition the decree-holder alleged two other ways in which limitation in respect of the present execution petition was saved. One is by the application of Section 78(2) of the Provincial Insolvency Act arising by reason of the insolvency of the father of the judgment-debtors-appellants. The other is said to arise by reason of certain acknowledgments of liability made by the father in respect of the decree debt. There is no doubt that these allegations were inserted in the execution petition by an amendment as per an order of Court. It is also true that Exs. P-5 to P-8 relate to the insolvency of the father of the appellants. No reference however is made in the judgment of the learned Subordinate Judge of Bezwada to either of these aspects and as already stated the learned Subordinate Judge

held that the execution petitions are out of time. In the memorandum of appeal presented to the District Court of Kistna no complaint was made that these aspects ought to have been considered by the learned Subordinate Judge and the judgment of the learned District Judge which is no doubt in favour of the decree-holders does not suggest that there was any discussion before him in regard to either of these points.

13. It can therefore be safely presumed that the decree-holders were advised to give up and gave up these pleas even in the Court of first instance.

14. Moreover, there seems to be little substance in either of the pleas put forward. The affidavit in Ex. P-6 and the deposition Ex. P-7 which are both of 1940 are said to contain the relevant acknowledgments but having gone through both of them I find it difficult to say that there is any unequivocal admission that the decree debt was subsisting at the time of the alleged acknowledgment. The point as to Section 78(3) also seems to me to be not maintainable as admittedly the father of the appellants obtained an order of absolute discharge and his adjudication was not annulled. As held in *Nandlal v. Ramdatta* I.L.R. (1942) Nag. 306, Section 78(2) of the Provincial Insolvency Act cannot apply where the order of adjudication is not annulled but the insolvent obtains an order of absolute discharge. Further it is difficult to see how there can be any extension of the period during which the insolvency of the appellants' father was subsisting in order to calculate limitation in regard to his sons who were admittedly not insolvents. I am therefore unable to accede to Mr. Kameswara Rao's request that the lower appellate Court should be called upon to submit its findings in regard to these two aspects. It is fairly clear to me that these were abandoned even before the learned Subordinate Judge of Bezwada, evidently because it was realised that there was no substance in them.

15. The result is that the execution application of 1940 as also the execution application of 1943 must be held to be barred by limitation. I therefore set aside the judgment of the learned District Judge of Kistna and restore that of the learned Subordinate Judge of Bezwada and dismiss both the execution petitions with costs throughout in both the cases.

16. Leave refused.

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