

M. NazruddIn Vs. the Idol of Arulmigu Navaneedha Krishnasami and Durgai Amman Vahaira Temples, Represented by Trustees and ors.

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Court : Chennai

Decided On : Nov-16-1998

Reported in : (1999)1MLJ747

Appellant : M. Nazruddin

Respondent : The Idol of Arulmigu Navaneedha Krishnasami and Durgai Amman Vahaira Temples, Represented by Trustee

Judgement :

ORDER

S.M. Sidickk, J.

1. The revision petition is the judgment-debtor/defendant and respondents herein are the decree-holders/plaintiffs before the First Additional District Munsif's Court at Tiruchirapalli in E.A.No. 778 of 1998 in E.P.No. 246 of 1998 in O.S.No. 3062 of 1992.

2. This revision petition is directed as against the fair and decretal order dated 8.10.1998 passed in E.A.No. 778 of 1998, which is an application filed by the revision petitioner/judgment-debtor/ defendant under Order 21, Rule 26 as well as under Section 151 of C. P.C., to pass a temporary order of stay of executing proceedings in E.P.No. 246 of 1998 in O.S.No. 3062 of 1992 on the file of First

Additional District Munsif's Court at Tiruchirapalli till the disposal of the application filed to set aside the ex parte decree dated 15.4.1998. The same was resisted by the respondents/decrees-holders/plaintiffs by filing a counter-statement to this stay petition in E.A.No. 778 of 1998. On consideration of the rival contentions of both the parties, the learned First Additional District Munsif at Tiruchirapalli in her order dated 8.10.1998 stated that the exparte decree was passed on 17.1.1997, and the revision petitioner/judgment-debtor/defendant filed an application to set aside the ex parte decree on 15.4.1998 and it is in SR. stage, and there will be considerable delay in the disposal of the application to set aside the exparte decree, and the respondent/decrees-holders/plaintiffs obtained a decree for delivery of possession, and the execution of the same was being delayed by the revision petitioner/judgment-debtor/defendant thereby causing hindrance.

and the said contention of the decree-holders is acceptable and the stay petition under Order 21, Rule 26 of C.P.C. and Section 151 of C.P.C. filed by the revision petitioner/judgment-debtor/defendant filed by the revision petitioner/judgment-debtor cannot be accepted because it will affect the fruits of the decree of possession obtained by the decree-holders

and so stating the learned 1st Additional District Munsif, Tiruchirapalli dismissed the stay petition filed by the revision petitioner/judgment-debtor in E.A.No. 778 of 1998 on 8.10.1998, against which the present revision petition is filed.

3. The learned Counsel for the revision petitioner/ judgment-debtor/defendant Mr. V. Raghavachari argued that the learned 1st Additional District Munsif ought to have seen that the revision petitioner/judgment-debtor has taken steps to get the exparte decree set aside as early as in the month of April, 1998 along with the application under Section 5 of the Limitation Act, and the said applications were numbered as I.A.Nos.926 of 1998 and 928 of 1998 in O.S.No. 3062 of 1992 on the file of the very same 1st Additional District Munsif's Court at Tiruchirapalli and without even considering those applications numbered in I.A.Nos.926 of 1998 and 928 of 1998, the 1st Additional District Munsif's Court, as the execution court, dismissed the application filed for the stay of execution in E.A.No. 778 of 1998, and such a dismissal without considering these facts is erroneous, and the

respondents/decreed-holders/plaintiffs have not denied the filing of the application to set aside the *ex parte* decree, and in such circumstances the execution court ought not to have dismissed the stay petition in E.A.No. 778 of 1998, and the learned 1st Additional District Munsif ought to have seen that the petition to get the *ex parte* decree set aside is one of the grounds contemplated under Order 21, Rule 26 of C.P.C. and so it ought to have followed the judgment reported in (1867) 8 South W.R. 202(203), and so the Revision Petition must be allowed and stay of execution proceedings for a reasonable time must be granted till the disposal of the applications filed on the original side to set aside the *ex parte* decree.

4. The learned Senior Counsel Mr. M. Venkatachalapathy appearing on behalf of the respondents/decreed-holders/plaintiffs repudiated the above arguments and contended that not only an application to set aside the *ex parte* decree under Order 9, Rule 13 of C.P.C. is pending but also an application under Section 5 of the Limitation Act is also pending on the original side in O.S.No. 3062 of 1992, and so far the decree passed in the suit in O.S.No. 3062 of 1992 has not been set aside, and no efforts were made by the revision (sic)/judgment-debtor/defendant to get a discharge of these petitions filed under Section 5 of the Limitation Act and under Order 9, Rule 13 of C.P.C., and at any rate, Order 21, Rule 26 of C.P.C. will only apply to a transferee court, and this is evident from the words 'the court to which a decree has been sent for execution', and it can only mean the court to which a decree has been transferred, and so the 1st Additional District Munsif's Court as the transferor court cannot stay the execution of the decree under Order 21, Rule 26 of C.P.C., and hence the application under Order 21, Rule 26 of C.P.C. filed in E.A.No. 778 of 1998 is misconceived, and the execution court rightly dismissed the stay petition, and in those circumstances the revision petition cannot be allowed and reasonable time should not be granted to stay the execution of the decree.

5. In reply to the said arguments of the learned Senior Counsel Mr. M. Venkatachalapathy appearing on behalf of the respondents/decreed-holders/plaintiffs, the learned Counsel for the revision petitioner/judgment-debtor/defendant further contended that Order 21, Rule 26 of C.P.C. will also apply to the execution court wherein decree is being executed viz., the transferor

court, and Order 21, Rule 26 of C.P.C. will not be confined to the execution taken only in the transferee court and this can be seen from the words employed 'the court to which a decree has been sent for execution' in Order 21, Rule 26 of C.P.C., and per contra the words used in Section 33 of C.P.C. for the transfer decree 'for execution to another court', and similarly the words 'for execution to another court' are also found in Section 42(2)(a) of C.P.C. which relates to the power of the court executing the transfer decree.

6. In short while the learned Counsel for the revision petitioner/judgment-debtor would contend that Order 21, Rule 26 of C.P.C. will apply to the transferor court as well as to the transferee court, whereas the learned Senior Counsel appearing for the respondents/decreed-holders/plaintiffs would contend that Order 21, Rule 26 of C.P.C. will only apply to transferee court. To appreciate the rival contentions of both the counsel on record, it is but necessary for me to refer to the commentaries of the Code of Civil Procedure because there is no decided case brought to my notice by either one of the counsel about the decided case of our Madras High Court or other High Court on the application of Order 21, Rule 26 of C.P.C.

7. The learned author Mulla on the Code of Civil Procedure of 1908, Volume II, published by N.M. Tripathi Private Limited, Bombay-1996 Edition would observe at page 1682 as follows:

The rule applies to the court to which a decree, has been transferred for execution and not to the court which passed the decree and sent it for execution. It empowers the transferee court upon a sufficient cause shown, to stay execution of the decree so transferred to it for execution for a reasonable time and for the purposes set out in Sub-Rule (1)....

8. The learned Author Mulla in his book on the Code of Civil Procedure, Volume II at page 1682 would also refer to the decisions of the Calcutta High Court reported in : AIR1934 Cal4 and the decision of Rangoon High Court reported in A.I.R. 1936 Ran 184 and the decision of Mysore High Court reported in Raghavendra Rao v. Laxminarasaya A.I.R. 1962 Mys. 89 and the decision of Madhya Pradesh High Court reported by : AIR 1958 MP131 and the decision of Rajasthan High Court reported in Sohan Lal v. Raj Mal and the decision of Orissa High Court reported in

A.I.R. 1977 Ori. 77. All these decisions of other High Courts mentioned at page 1682 of the commentaries of the learned author Mulla on the Code of Civil Procedure, Volume II at page 1682 relate to the question of the power to grant stay under Order 21, Rule 29 of C.P.C., and the power to grant by transferor court is absolute power but only the transferee court can stay the execution proceedings to a limited extent. In other words the power of the transferee court to stay the execution of the decree under Order 21, Rule 29 of C.P.C. is the subject-matter of these decisions. But we are not concerned in this revision about the powers of the transferee court under Order 21, Rule 29 of C.P.C. to stay the execution because in the present case the 1st Additional District Munsif's Court has passed the ex parte decree on its original side in O.S.No. 3062 of 1992, and the very same 1st Additional District Munsif's Court entertained the execution petition for delivery of possession in E.P.No. 246 of 1998 on the execution side, and therefore these decisions referred to by the learned author Mulla at page 1682 of his commentaries will have no application to the facts of the present case.

9. The commentary of the learned author Mulla at page 1682 with regard to the scope of Order 21, Rule 26 appears to be not correct view in view of the Commentaries by the learned author M/ s. Manohar and W.W. Chitaley in A.I.R. Commentary on the Code of Civil Procedure Volume III Published by the All India Reporter Limited, Nagpur, 1977 Edition at pages 816 and 817, where the learned Authors in the A.I.R. commentary would state as follows:

Under Section 42 of C.P.C. the court executing decree sent to it has the same powers in executing such a decree as if the decree had been passed by itself. But there is this difference between the transferor and the transferee court in the matter of ordering a stay that while the transferor court can make an absolute order for stay, the transferee court can stay execution only for a reasonable time and for particular purposes only

Thus the executing court may order stay of execution:

(iii) to enable him to get the decree passed ex parte against him set aside.

10. Below this commentary the learned authors M/s. V.R. Manohar and W.W. Chitalay in this book would refer to the decisions reported in 7974 Rajdhani L.R. 682 (Delhi) and (1867) 8 South W.R 202 (203) (DB). I have sent for these two decisions from the library of the Madras High Court 1 was informed that these books are not available in the library of the Madras High Court.

11. At any rate there is the commentary of the learned authors in A.I.R. commentary in respect of the Scope of Order 21, Rule 26 of C.P.C. and it is found at pages 816 and 817 where we find not only the transferee court but also the transferor court has the power to stay the execution, and the power of stay given to the transferor court is an absolute power to grant stay, whereas the transferee court can stay the execution only for a reasonable time, and the execution court can order stay of execution to enable the judgment-debtor to get the exparte decree passed against him set aside. This view of the learned authors in the A.I.R. commentary at pages 816 and 817 -1977 Edition - appears to be reasonable in view of the words mentioned in Sections 39 and 42 and Order 21, Rule 26 of C.P.C.

12. As per Section 38 of C.P.C. a decree may be executed either by the court which passed it, or by the court to which it is sent for execution. Section 39(1) of C.P.C. states that the court, which passed a decree, may on the applicant of the decree-holder, send it for execution to another court of competent jurisdiction. Section 42(1) of C.P.C. states that the court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. Section 42(2) of C.P.C. further states that without prejudice to the generality of the provisions of Sub-section (1), the powers of the court under sub-section shall include the following powers of the court passed the decree viz., (a) the power to send the decree for execution to another court under Section 39. Thus we get the words 'for execution to another court' appearing in Sections 39 and 42(2) of C.P.C. whereas a different word is altogether used by the Parliament in Order 21, Rule 26 of C.P.C. where it is stated, 'the court to which a decree has been sent for execution'. If the intention of the Parliament was to confine the scope of Order 21, Rule 26 of C.P.C. only the transferee court, then definitely it would have mentioned the words, 'the court to which a decree has been transferred', and they

need not have employed the words 'the court to which a decree has been sent for execution'. In my view the words 'the court to which a decree has been sent for execution' cannot only mean the transferee court but also the transferor court.

13. It is also relevant to note that in the present case the decree was passed by the 1st Additional District Munsif's Court at Tiruchirapalli in O.S.No. 3062 of 1992 on the original side, and the said decree was sent for execution to the same court in E.P.No. 246 of 1998 on the execution side. A civil court can have dual capacity or multifarious capacities like Original Side Jurisdiction, execution side jurisdiction, Insolvency jurisdiction and also the Rent Control jurisdiction and the like. Therefore it cannot be said in the present case that the 1st Additional District Munsif's Court when entertained the execution petition in E.P.No. 246 of 1998 is the court which passed the decree but it is also the court for execution of such a decree to which the decree was sent for execution from the original side. Otherwise the meaning that can be attributed to the words 'the court to which a decree has been sent for execution' can only be confined to the transferee court and that seems to be not a correct view. In this respect the learned authors M/s. Manohar and W.W. Chitalay in A.I.R. Commentary on this aspect referred to the decisions of Delhi High Court and Such W.R., and further the learned authors have stated that the execution court may order stay of execution to enable the judgment-debtor to get the decree passed ex parte against him set aside, and this view seems to be the reasonable view and in consonance with the words, 'the court to which a decree has been sent for execution' in contra distinction to the words 'for execution to another court' appearing in Sections 39 and 42(2) of C.P.C.

14. It is admitted by the respondents/decreed-holders/plaintiffs in para 3 of the counter filed by the 5th defendant in the stay petition in E.A.No. 778 of 1998 before the execution court in the following words:

Even in the trial court, the petition to set aside the ex parte decree is only in the SR. stage and that too it has been filed after execution petition. Therefore there is no possibility of getting any stay.

Therefore it is conceded by the respondents/decreed-holders/plaintiffs that there is no possibility of getting any stay on the trial side in this case, where an application

to set aside the ex parte decree is pending. In such an event the remedy that is available to the judgment-debtor is only in the execution court by invoking Order 21, Rule 26 of C.P.C. A person who has a right, must have a remedy. In other words if the judgment-debtor has no remedy to get any stay of execution of decree on the trial side by virtue of the pendency of petitions under Section 5 of the Limitation Act under Order 9, Rule 13 of C.P.C., it cannot be said that he has no remedy also on the execution side, which will result in the position that the judgment-debtor/defendant cannot get stay either from the trial court or from the execution court and which will result in the process of elimination of the judgment-debtor/defendant from the lis itself. If that is so, then it amounts to injustice being done to a party to the suit. Therefore the trial court or the execution court must grant stay for execution of ex parte decree for a limited period till the disposal of the applications filed under Section 5 of the Limitation Act and under Order 9, Rule 13 of C.P.C. In my view Order 21, Rule 26 of C.P.C. will empower the execution court or the transferor court to grant stay of execution of ex parte decree for a reasonable time so as to enable the judgment-debtor to get further orders from the trial court either on the applications under Section 5 of the Limitation Act or under Order 9, Rule 13 of C.P.C.

15. In the present case, I find from the type set of papers furnished by the counsel for the respondents/decreed-holders/plaintiffs that the application under Section 5 of the Limitation Act has been numbered as I.A.No. 926 of 1998, and the application to set aside the ex parte decree under Order 9, Rule 13 of C.P.C. has been numbered as I.A.No. 928 of 1998 and there is no reason to dispose those applications in I.A.Nos.926 of 1998 and 982 of 1998 along with the stay application filed before the execution court in E.A.No. 778 of 1998 simultaneously and if not jointly because in this case the trial court as well as the execution court happens to be one and the same. It is regrettable that the learned District Munsif in this case kept the petitions in I.A.Nos.926 of 1998 and 928 of 1998 pending, while so dismissed the stay petition in E.A.No. 778 of 1998 and ordered delivery of possession of the suit properties. One can understand the dismissal of stay petition earlier while keeping pending the other petition, if these petitions were pending in two different courts altogether. In the present case, the execution court could have waited for some more time to know the fate of the petitions filed under

Section 5 of the Limitation Act and under Order 9, Rule 13 of C.P.C. There is sufficient cause for the revision petitioner/judgment-debtor/defendant to seek an order of stay of execution of the ex parte decree for a reasonable time to get a decision either one way or other in the applications in I.A.No. 926 of 1998 and I.A.No. 928 of 1998. Therefore, the execution court in this case has failed to exercise the jurisdiction vested in it and acted in exercise of its jurisdiction illegally, and so the Revision Petition has to be allowed, and the order passed by the 1st Additional District Munsif's Court at Tiruchirapalli in E.A.No. 778 of 1998 in E.P.No. 246 of 1998 in O.S.No. 3062 of 1992 has to be set aside, and the stay of execution of the ex parte decree in O.S.No. 3062 of 1992 has to be granted to the revision petitioner/judgment-debtor/defendant herein for a reasonable period of two months only from the date of receipt of this order by the court below, and the court below is directed to dispose of the applications in I.A.Nos.926 of 1998 and 928 of 1998 in O.S.No. 3062 of 1992 on the original side within a period of two months from the date of receipt of this order by the lower court, and further the execution court is directed to keep the execution petition in E.P.No. 246 of 1998 pending on its file by recalling the delivery warrant, if any, issued to the Amin, and after the disposal of the applications in I.A.Nos.926 of 1998 and 928 of 1998 on the original side the execution court is at liberty to make further orders for the execution of the decree, and consequently I answer this point in favour of the revision petitioner/judgment-debtor/defendant and as against the respondents/decree-holders/plaintiffs.

16. In the result the revision petition is allowed. The fair and decretal order dated 8.10.1998 passed in E.A.No. 778 of 1998 in E.P.No. 246 of 1998 in O.S.No. 3062 of 1992 on the file of the 1st Additional District Munsif's Court at Tiruchirapalli are set aside. The application for stay of execution of ex parte decree dated 17.1.1997 in E.A.No. 778 of 1998 is allowed in part, and stay of execution of the decree is granted for a period of two months only from the date of receipt of this order from the High Court of Madras by the lower court. The execution court in E.P.No. 246 of 1998 is directed to recall the delivery warrant, if any, issued to the Amin and keep the Execution Petition in E.P.No. 246 of 1998 pending on its file till the disposal of the petitions under Section 5 of the Limitation Act and under Order 9, Rule 13 of C.P.C. in O.S.No. 3062 of 1992 on its original side. The execution court viz., the 1st Additional District Munsif's Court at Tiruchirapalli is directed to consider the

relief of possession in pursuance of the decree dated 17.1.1997 as prayed for in the execution petition after the disposal of the applications under Section 5 of the Limitation Act and under Order 9, Rule 13 of C.P.C. in I.A.Nos.926 of 1998 and 928 of 1998 in O.S.No. 3062 of 1992, which applications are directed to be disposed of within two months from the date of receipt of this order from the High Court, Madras, by the lower court on merits and in accordance with law. In the circumstances of the case, each party in this revision is directed to bear their own costs.

17. The Registry is directed to sent urgently two copies of this order-one to the original side in O.S.No. 3062 of 1992 on the file of the 1st Additional District Munsif's Court at Tiruchirapalli and another copy of this order to the execution court in E.P.No. 246 of 1998 pending on the file of the very same 1st Additional District Munsif's Court at Tiruchirapalli.

18. Consequently the stay petition and the Caveat Petition in C.M.P.Nos. 15479 of 1998 and 3540 of 1998 respectively are all dismissed as unnecessary.

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