PENTAPATI CHINNA VENKANNA & ORS.

v.

PENTAPATI BENGARARAJU & ORS.

1964

January, 20

(K. SUBBA RAO AND J. R. MUDHOLKAR JJ.)

Code of Civil Procedure (Act 5 of 1908), s. 48—Execution Petition—Fresh application—What is—"closed", meaning of.

The decree holders filed an application for execution of the decree being E.P. No. 13/1939. This execution proceeding had to be stayed as a result of the stay order of the High Court. Ultimately the executing court made an order on E.P. 13/1939 to the effect that the Execution Petition was "closed". On January 21, 1952, the decree holders made an application for reopening the execution E.P. No. 13/1939 and for proceeding with the execution of the decree. The Subordinate Judge, (executing court) holding that the previous execution petition was merely "closed" directed the decree holders to file a regular execution petition. On October 11, 1952 the decree holders filed E.P. No. 58/53 to continue further proceedings in E.P. No. 13/1939. The judgment debtors filed a counter affidavit pleading, *inter alia* that the decree sought to be executed was made on September 22, 1938, and that as E.P. No. 13/1939 was dismissed on December 28, 1948, the present application, having been filed more than 12 years from the date of decree, was barred under s. 48 of the Code of Civil Procedure. On these facts the Subordinate Judge held that though the decree holders were entitled to continue previous execution petition, E.P. No. 58/53 was a fresh application as it differed from the original execution petition. On appeal, the High Court held that E.P. No. 13/1939 was merely closed for statistical purposes, and, therefore, the execution petition filed in 1939 was still pending and the decree holders were entitled to proceed with that petition. Hence the appeal.

The question for consideration is whether E.P. No. 58/53 is a fresh application within the meaning of s. 48 of the Code.

Held: (i) It is true courts have condemned the practice of executing courts using expressions like "closed", "closed for statistical purposes", "struck off" "recorded" etc., and they have also pointed out that there is no provision in the Code of Civil Procedure for making such orders. But assuming that the court has no such power, the passing of such an order cannot be tantamount to an order of dismissal, for the intention of the court in making an order "closed" for statistical purposes is manifest. 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. It is not the phraseology used by the Executing Court that really

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matters, but is 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. In the present case the subsequent application *i.e.* E.P. No. 58/53 is only an application to continue the previous application *i.e.* E.P. 13/1939.

Biswa Sonan Chunder Gossyamy v. *Binanda Chander Dibingar Adhikar Gossyamy*, (1884) I.L.R. 10 Cal. 416, *Vadlamannati Damodara Rao* v. *Official Receiver, Kistna*, I.L.R. 1946 Mad. 527 and *Moidin Kutty* v. *Doraiswami*, A.I.R. 1952 Mad. 51, referred to.

(ii) An application made after 12 years from the date of decree would be a fresh application within the meaning of s. 48 of the Code of Civil Procedure, if the previous application was finally disposed of. It would also be a fresh application if it asked for a relief against parties or properties different from those proceeded against in the previous execution petition or asked for a relief substantially different from that asked for in the earlier petition. In the present case the parties are substantially the same in both proceedings, and the decree holders are only proceeding against properties included in the previous application *i.e.* E.P. No. 13/1939. It cannot, therefore, be treated as a fresh application within the meaning of s. 48 of the Code.

Bandhu Singh v. *Kayastha Trading Bank*, (1931) I.L.R. 53 All. 419, *Sri Raja D. K. Venkata Lingama Nayanim* v. *Raja Inuganti Rajagopala Venkata Narasimha Rayanim*, I.L.R. [1947] Mad. 525, *Ippagunta Lakshminarasinga Rao* v. *Ippagunta Balasubrahamanyam*, A.I.R. 1949 Mad. 251 and *Gajanand Sah* v. *Dayanand Thakur* (1942), I.L.R. 21 Pat. 838, discussed.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 690 of 1962.

Appeal from the judgment and order dated March 5, 1959, of the Andhra Pradesh High Court in Appeal against order No. 151 of 1955.

S. Suryaprakasam and *Sardar Bahadur*, for the appellants.

The respondent did not appear.

January 20, 1964. The Judgment of the Court was delivered by

Subba Rao J.

SUBBA RAO J.—This appeal by certificate raises the question of the applicability of s. 48 of the Code of Civil Procedure, hereinafter called the Code, to the facts of the case.

The relevant facts are as follows: In the year 1928 one Pentapati Venkataramana filed Original Suit No. 3 of 1928 in the Court of the Subordinate Judge, Visakhapatnam, against 29 defendants for accounts of dissolved partnerships and for the recovery of amounts due to him. On March 30, 1932, the suit was dismissed by the learned Subordinate Judge. On appeal, the High Court of Madras set aside the decree of the Subordinate Judge and passed a joint and several decree in favour of the plaintiffs and defendants 24 to 27 for a sum of Rs. 54,350 with interest thereon. On February 15, 1939, the decree-holders filed an application for execution of the decree, being E.P. No. 13 of 1939, and prayed for realization of the decretal amount by attachment and sale of 31 items of properties described by them in the schedule (Ex. B-4) annexed thereto. The judgment-debtors filed an objection to the attachment of some of the said items, but that was dismissed. Against the order of dismissal of their objection, the judgment-debtors filed an appeal to the High Court, being C.M.A. No. 26 of 1944. Pending the disposal of the C.M.A., the High Court granted an interim stay of E.P. 13 of 1939. Later, the appeal was dismissed on April 26, 1945. After the dismissal of the appeal, when the decree-holders sought to proceed with the execution, the judgment-debtors filed another application being E.A. No. 575 of 1945, alleging that the decree has been adjusted and for recording satisfaction of the decree. But the said application was dismissed on December 12, 1945. The judgment-debtors went up on appeal to the High Court against the said order of dismissal and obtained an interim stay of E.P. 13 of 1939. On September 9, 1947, the High Court allowed the appeal and remanded the case to the trial court for ascertaining whether there was an adjustment of the decree as pleaded by the judgment-debtors. On remand, the executing court again dismissed the application filed by the judgment-debtors. Against the said order, the judgment-debtors again preferred an appeal, being C.M.A. No. 127 of 1948, in the High Court of Madras and obtained an interim stay of the execution. The interim order was made absolute on November 24, 1948. As the execution of the decree was stayed by the High Court, the executing court made an order on E.P. 13 of 1939 to the effect that the petition was "closed". On July 31, 1951, the

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High Court dismissed C.M.A. 127 of 1948. On January 21, 1952, the decree-holders made an application being E.A. No. 142 of 1952, in E.P. 13 of 1939 for reopening the said execution petition and for proceeding with the execution of the decree. The learned Subordinate Judge, holding that the previous execution petition was merely "closed", directed the decree-holders to file a regular execution petition. On October 11, 1952, the decree-holders filed E.P. No. 58 of 1953 to continue further proceedings in E.P. 13 of 1939 as per the order made in E.A. No. 142 of 1952 passed on October 4, 1952. In that petition the decree-holders prayed that the properties mentioned in the draft proclamation filed in E.P. No. 13 of 1939 and brought to sale may be sold for the realization of the money due to the decree-holders and the proceeds applied for the discharge of the decree-debt. The judgment-debtors filed a counter-affidavit pleading, *inter alia*, that the decree sought to be executed was made on September 22, 1938, and that as E.P. No. 13 of 1939 was dismissed on December 28, 1948, the present application, having been filed more than 12 years from the date of the decree, was barred under s. 48 of the Code. The learned Subordinate Judge held that though the decree-holders were entitled to continue the previous execution petition, E.P. 58 of 1953 was a fresh application, as in form as well as in details it materially differed from the original execution petition. On appeal, a division Bench of the Andhra Pradesh High Court took a different view and held that E.P. 13 of 1939 was merely closed for statistical purposes and, therefore, the execution petition filed in 1939 was still pending and the decree-holders were entitled to proceed with that petition. The High Court further observed that the said position was not contested by learned counsel for the respondents. We understand this observation only to mean that learned counsel appearing for the respondents therein did not contest the position that if the execution petition was not dismissed but was only closed for statistical purposes, the decree-holders were entitled to proceed with that petition. The High Court remanded the case to the learned Subordinate Judge for disposal according to law after considering the other contentions of the judgment-debtors. Hence the appeal.

Mr. Suryaprakasam, learned counsel for the appellants, raised before us the following two points: (1) The previous execution petition was dismissed and, therefore, it was not pending at the time of filing of E.P. 58 of 1953, and, therefore, the later execution petition was a fresh application within the meaning of s. 48 of the Code; and (2) even if the previous application was only closed for statistical purposes, and the decree-holders could apply for reviving those proceedings, E.P. No. 58 of 1953 was a fresh execution petition because the parties and the properties proceeded against were different and the relief asked for was also different.

Before we consider the question raised, it would be convenient at the outset to look at the material provisions of s. 48 of the Code. It reads:

> "(1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—
>
> (a) the date of the decree sought to be executed."

This section corresponds to paras 3 and 4 of s. 230 of the Code of 1882. The relevant part of the section read:

> "Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted, no subsequent appliction to execute the same decree shall be granted after the expiration of twelve years from any of the following dates:
> .....".

A comparison of the said two provisions shows that the phrase "fresh application" has been substituted for "subsequent application". This amendment became necessary in order to make it clear that the application mentioned in s. 48 of the Code is a fresh substantive application and not an application to revive or continue a substantive application already pending on the file of the court.

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The question, therefore, is whether E.P. 58 of 1953 is a fresh application within the meaning of s. 48 of the Code. The answer to this question mainly turns upon the question whether the previous application *i.e.*, E.P. 13 of 1939, was finally disposed of by the executing court. From the narration of facts given by us earlier it is clear that the said execution petition was "closed" for statistical purposes. As the High Court stayed the execution pending the appeal filed by the judgment-debtors, the decree-holders were not in a position to proceed with the execution petition, and, therefore, it was closed. Some argument was raised on the question whether the said execution petition was closed for statistical purposes or was dismissed that it was contended that under the Code of Civil Procedure there was no power conferred upon a court to close execution proceedings for statistical purposes, and that even if such an order was made, it must be deemed to be an order dismissing the execution petition. The actual order dated December 28, 1948 has not been placed before us. But in E.P. 58 of 1953 in col. 6 thereof it is mentioned that E.P. No. 13 of 1939 was closed on December 28, 1948. In the counter-affidavit filed by one of the judgment-debtors it is stated that E.P. 13 of 1939 was dismissed on December 28, 1948 and not merely closed. After the disposal of the appeal by the High Court and before the filing of E.P. No. 58 of 1953, the decree-holders filed E.A. No. 142 of 1952 for reopening E.P. No. 13 of 1939. On that petition the learned Subordinate Judge made the following order:

> "The previous E.P. was merely closed. Petitioner may file a regular E.P. on which proceedings will continue from the stage at which they were left in E.P. 13 of 1939."

This order discloses that the previous execution petition was only closed. The Subordinate Judge must have presumably looked into the previous record. The learned Subordinate Judge proceeded on the assumption that the previous execution petition was pending, though he dismissed the present execution petition on another ground. This factual position was not contested even in the High Court, for the High Court stated that the previous application was merely closed for

statistical purposes. In the circumstances we must proceed on the assumption that the Execution Petition 13 of 1939 was only closed for statistical purposes.

Learned counsel for the appellants contends that the Code of Civil Procedure does not sanction the passing of an order closing an execution petition for statistical purposes and that that practice has been condemned by courts. Under O. XXI, r. 17(1) of the Code, the Court may reject an execution application if the requirements of rules 11 to 14 have not been complied with. Under r. 23 thereof, if the judgment-debtor does not appear or does not show cause to the satisfaction of the court why the decree should not be executed, the court shall order the decree to be executed, and where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such orders as it thinks fit. Under r. 57 thereof, "Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date .....". Relying upon these provisions it is argued that though the power of the court to make an order under O. XXI, r. 23(2) is wide and it can make any order it thinks fit, it can only make one or other of the two orders mentioned in r. 57 when it could not proceed with the execution because of the default of the decree-holder. 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 O. XXI, r. 57 of the Code, we find it difficult to attribute something to the court which it never intended to

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do. It is true courts have condemned the practice 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 Gossyamy* v. *Binanda Chunder Dibingar Adhikar Gossyamy*(1); *Vadlamannati Damodara Rao* v. *The Official Receiver, Kistna*(2); *Moidin Kutty* v. *Doraiswami*(3). 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 manifest. 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.

Even so, it is contended that E.P. No. 58 of 1953 is a fresh application. Learned counsel compared the recitals in E.P. 13 of 1939 and E.P. 58 of 1953 and pointed out that all the respondents in the former execution petition are not respondents in the present execution petition; that legal representatives of some of the defendnts are added to the present execution petition; that the decree-holders did not

(1) (1884) I.L.R. 10 Cal. 416, 422. (2) I.L.R. 1946 Mad. 527.
(3) A.I.R. 1952 Mad. 51.

seek to proceed against all the properties against which they sought to proceed in the former execution petition; and that one of the reliefs, namely, to attach the amount deposited in court, asked for in the present execution petition is a completely new one and that, therefore, the present execution petition is, both in form and in particulars, completely a different one. But a comparison of the two execution petitions shows that the parties are the same: the new parties added in the present execution petition are either the legal representatives of the deceased parties or the representative of a party who has become insolvent. In the present execution petition the decree-holders are not proceeding against any property against which they did not seek to proceed in the earlier proceeding; they only omitted some of the properties. The decree-holders cannot be compelled to proceed against all the properties against which at one time they sought to proceed. The relief by way of attachment of the amount deposited in court had been asked for by the decree-holders by a separate petition, namely, E.A. No. 143 of 1962, and that was dismissed and, therefore, nothing turns upon it. The result is, therefore, in substance under both the execution petitions the decree-holders seek to proceed against the same parties and against the same properties.

The law on the subject is well-settled. In *Bandhu Singh* v. *Kayastha Trading Bank*(1), where a decree-holder included new items of property for attachment in an application for execution of his decree filed 12 years after the date of the decree, it was held that the application to attach fresh property was a fresh application within the meaning of s. 48 of the Code and, therefore, having been made more than 12 years after the date of the decree, could not be entertained. In *Sri Raja D. K. Venkata Lingama Nayanim* v. *Raja Inuganti Rajagopala Venkata Narasimha Rayanim*(2). where an application was made for amending a pending execution petition with a view to attach another property not included in the pending application, the court held that the application for amendment could not be allowed, as it was made beyond the period of 12 years from the date of the decree. In *Ippagunta Lakshminarasinga Rao* v. *Ippagunta*

(1) (1931) I.L.R. 53 All. 419. (2) I.L.R. 1947 Mad. 52 5

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Balasubrahmanyam(1), where the execution petition filed beyond 12 years of the decree asked for a new relief not asked for in the earlier execution petition, it was held that the subsequent application, having been filed beyond 12 years, was hit by s. 48 of the Code. In *Gajanand Sah* v. *Dayanand Thakur*(2), the decree-holder was not allowed to substitute a new property different from the one against which he wished to proceed in the earlier application on the ground that 12 years had expired from the date of the passing of the decree.

The result of the decisions may be summarized thus. An application made after 12 years from the date of the decree would be a fresh application within the meaning of s. 48 of the Code of Civil Procedure, if the previous application was finally disposed of. It would also be a fresh application if it asked for a relief against parties or properties different from those proceeded against in the previous execution petition or asked for a relief substantially different from that asked for in the earlier petition.

In this case, as we have pointed out, the parties are substantially the same in both the proceedings, and the decree-holders are only proceeding against properties included in the previous application. It cannot, therefore, be treated as a fresh application within the meaning of s. 48 of the Code. It is only an application to continue E.P. No. 13 of 1939 which is pending on the file of the executing court.

That apart, the decree-holders filed E.A. No. 142 of 1952 in E.P. No. 13 of 1939 expressly asking for the reopening of the said execution petition and for proceeding with it. As we have held that the earlier execution petition is still pending on the file of the court, the executing court will be well within its rights in proceeding on the basis of the earlier execution petition even without a new petition.

In the result, we hold that the order of the High Court is right. The appeal fails and is dismissed. There will be no order as to costs.

Appeal dismissed.

(1) A.I.R. 1949 Mad. 251.

(2) (1942) I.L.R. 21 Pat. 838.