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ILR 1997 KAR 314

MOHAMED ANWAR, J

Syndicate Bank vs S. Hanumantha Nayak and Others*

**LIMITATION ACT 1963 (Central Act 36 of 1963) Article 136 —
petition for execution of decree filed within time for sale
of property — subsequently property being transferred
to third party, Dhr applying for amendment of E.P. beyond
12 years of date of decree for arrest of JDr — Trial Court
dismissing EP as barred — in revision held, amendment
not altering nature of relief for realising decretal amount,
EP not liable to be dismissed.**

HELD:

The impugned order of the Court below is patently untenable in law in as much as mere substitution in the execution petition by amendment of the mode for recovery of the decretal amount after twelve years of the date of decree will not be legally barred by limitation and that such amendment does not alter the nature of the relief of realisation of the decretal amount sought by the petitioner-decree holder. (Para 6)

CASES REFERRED:

AT PARAS

- | | | |
|---|--------|-----|
| 1. AIR 1950 Mys 64(FB) - Marulasiddappa vs Lakshmipathi | (Foll) | 4,5 |
| 2. AIR 1960 Mys 277 - Rau Parsu vs Kallappa | (do) | 4,5 |
| 3. AIR 1942 Cal, 306 - Shekendarali Meah vs Abdul Gafur Choudhury | (do) | 4 |
| 4. AIR 1947 Pat 129 - P.U.N.S.Deo vs B.L. SAHI | (do) | 4 |
| 5. AIR 1972 A.P. 134(FB) - B. Seshaiyah vs B. Veerabhadrayya | (do) | 4,5 |

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Sri B.R. Aswatharam, Advocate for Petitioner
Sri H.S. Chandramouli for R.1

ORDER

Mohamed Anwar, J

Heard Learned Counsel for petitioner. Learned Counsel for respondents could not be heard as he was not present.

2. Petitioner is the decree-holder in Ex.Case No.65/91 and the two respondents are the judgment debtors therein. Undisputedly, petitioner had obtained a money decree on 15.9.1979 in O.S.No.30/78 against respondents. The said decree was put to execution in Ex.Case No.65/91 against respondents for realisation of the decretal amount by attachment and sale of certain immovable property described therein as belonging to judgment debtor-1. Subsequently, it was discovered by the petitioner-decree holder that the said immovable property had been transferred by respondent-1 (judgment debtor-1) in favour of his mother by a registered conveyance deed dt 13.6.79. Then on 24.7.92 petitioner made I.A.No.III under Order 6 Rule 17 read with Section 151 CPC before the Court below praying for permission to amend the Execution petition to substitute the mode of execution thereon as by arrest or detention of respondent instead of by attachment and sale of said property.

3. The learned Judge of the executing Court has rejected the petitioner's said I.A.No.III by his impugned order on the ground that the same was filed after expiry of 12 years from the date of the decree and that if the same is allowed it would cause prejudice to respondents and alter the nature of the execution petition.

4. This reasoning of the Court below has been assailed as untenable by the Learned Counsel for petitioner. To support this contention reliance was placed by him on two decisions of this Court in MARULASIDDAPPA vs LAKSHMIPATHI,¹ and RAU PARSU vs KALLAPPA² and a decision of Calcutta High Court in

1. AIR 1950 Mysore 64 (FB)

2. AIR 1960 Mysore 277

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SHEKENDARALI MEAH vs ABDUL GAFUR CHOUDHURY AND OTHERS³ and also on a decision of Patna High Court in PRATAP UDAI NATH SAH DEO vs BARAIK LAL SAHI⁴. Besides, he also sought to draw support from a full bench decision of Andhra Pradesh High Court in B. SESHIAH vs B. VEERABHADRAYYA⁵.

5. This Court in Marulasiddappa Vs. Lakshmipathi,¹ supra has held that;

“The failure to file a schedule of immovable properties along with the execution application is a mere defect which can be cured by filing a schedule of such properties more than 12 years after the date of the decree, as it is a defect which comes within the scope of rule 11 to 14 of order 21, Civil P.C. and can be allowed to be remedied under Rule 17 of that order.” (Vide head Note (a) para-15)

In Rau Parsu vs Kallappa² it is observed that;

“Where the decree-holder, under the mistaken belief that the judgment-debtor was dead, prayed for the execution of the decree against his son who was described as judgment-debtor and, on subsequently discovering the mistake, made an application after limitation to amend his execution application by substituting for the son of the judgment-debtor the judgment-debtor himself, and the amendment was allowed the amendment relates back to the date of the presentation of the defective execution application and the execution application in so far as it related to the judgment-debtor is not time barred.”

The full bench of Andhra Pradesh High Court in the case of B. Seshiah vs B. Veerabhadrayya⁵ supra, dealing with the scope of repealed Section 48 of CPC has stated that;

“It is a mistake to think that Section 48 lays down any inflexible rule in not allowing any amendment whatever may be the circumstances of the case, to the execution petition merely on the ground that if permitted it would be contrary to section 48 or Article 182 of the Limitation Act.”

3. AIR 1942 Calcutta 306
5. 1972 Andra Pradesh 134 (FB)

4. AIR 1947 Patna 129

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It further proceeded to observe that;

“Where the execution petition for sending the judgment-debtor in Civil prison is sought to be amended after twelve years claiming set off the amendment allowed on ground that if not allowed it would cause injustice and enable the judgment debtor to take unfair advantage and deprive the decree holder of his legitimate claim.”

Similar propositions are made by the High Court of Calcutta and Patna in *EMPEROR vs RAMHANAM SINGH*³ and *SURAJ PRASAD OJA vs RAM LAL SINGH*.

6. In the light of the above stated pronouncements of this Court, as also of the High Courts of Andhra Pradesh, Calcutta and Patna, it becomes clear that the impugned order of the Court below is patently untenable in law in as much as mere substitution in the execution petition by amendment of the mode for recovery of the decretal amount after twelve years of the date of decree will not be legally barred by limitation and that such amendment does not alter the nature of the relief of realisation of the decretal amount sought by the petitioner-decree holder.

7. In the result, the revision is allowed. The impugned order of the Court below is set aside and the petitioner's application i.e. I.A.No.III (which is shown as I.A.No.II in the operative portion of the impugned order) is allowed permitting him to effect the amendment in the Execution Petition No.65/91 pending on the file of the Court below, as prayed in the said application.

Parties to bear their own costs.
