

Poulb Varghese Vs Kochuvariatl Joseph**Second Appeal No. 543 of 1953**

Court: High Court Of Kerala**Date of Decision:** Feb. 17, 1955**Acts Referred:**

Civil Procedure Code, 1908 (CPC) – Order 21 Rule 11, Order 21 Rule 15, Order 21 Rule 15(2), Order 21 Rule 17(2), 42

Hon'ble Judges: Sastjcatran, J; Joseph Vithayathil, J**Bench:** Division Bench**Advocate:** T.N. Subramonia Iyer, for the Appellant; T.S. Venkiteswara Iyer, for the Respondent

Judgement

Joseph Virthayathil, J.

Additional Plaintiffs 2 and 3 are the Appellants The second appeal relates to an order in execution. The decree,

which is one for money, was passed 19-5-1111. The first execution petition was filed; of 3-2-1112. It contained prayers for the issue of was ant

against the judgment-debtors and for atf , TechNet of their properties. But no schedule of properties was filed. It was dismissed on 22-5-1112.

The second execution petition was filed on 19-5-1115;. It also contained a prayer for attachment of properties, but no schedule was filed.

That execution petition was dismissed on 17-8- -1115. The third execution petition was filed on 2-8-1119. It contained a prayer for the issue of

warrant and also a prayer for allowing other reliefs that might he asked for subsequently. There was no specific prayer for attachment of

.properties. That execution petition was dismissed oh 24-2-1120. The next execution petition was filed on 27-4-1123. It also did not contain a

prayer for attachment of properties.

The 7th Defendant contended that the execution petition was barred by limitation, having been, filed more than three years after the disposal of the

prior execution petition. The execution court held, by its order dated 28-4-1124, that the execution petition was barred by limitation. In appeal;

filed by the decree-holder from that order, the District Court held that the execution petition dated 2-8-1119 had not been judicially disposed of..

and that therefore the execution petition dated 27-4-1123 should be deemed to be one in continuation of that petition. This view was confirmed

by.-the High Court in second appeal.

2. Even before the execution court passed the-order dated 28-4-1124 the decree-holder filed anther petition on 10-4-1124 for attachment of

certain, properties with a prayer that the petition should."" be treated as part of the execution petition dated. 27-4-1123 and that that execution

petition should-be amended accordingly. A schedule of properties, sought to be attached was also filed along with the-petition. On 19-4-1124 the

degree-holder applied for immediate attachment of the properties, and attachment was allowed.

Subsequently, the court passed the order holding that the execution petition dated 27-4-1123 was-barred by limitation. After the District Court

reversed that order the decree-holder again applied for attachment of the properties and attachment was ordered on 9-3-1950. In the meanwhile,

the second Defendant died and his legal representatives were impleaded as additional Defendants 8 to 12. When the properties came for sale the

8th Defendant objected on the ground that the petition dated 10-4-1124 for attachment of properties was barred u/s 48, Code of Civil Procedure.

The execution court upheld this objection and held that the petition dated 10-4-1124 for attachment of properties should be deemed to be a fresh

execution petition and that, since it was filed more" than twelve years after the date of the decree, was barred u/s 48, Code of Civil Procedure.

The appeal filed by the decree-holder from this order was also dismissed. Hence this second appeal.

3. The two questions that were urged in the appeal are d) that the petition dated 10-4-1124 which was one for amendment of the execution"

petition dated 27-4-1123 is not a fresh execution petition and that the courts below ought to have allowed the amendment and (2) that the 8th

Defendant is estopped from raising the contention that the petition dated 10-4-1124 is barred u/s 48, Code of Civil Procedure.

4. So far as the first question is concerned, we are inclined to take the view that the petition dated 10-4-1124 for attachment of properties must be

deemed to be a fresh-execution petition and not one for amendment of the execution petition dated 27-4-1123. The execution petition dated 27-

4-1123 did not contain a prayer for attachment of properties. Nor did the execution petition dated 2-8-1119, which must be deemed to be still

pending, contain a specific prayer for attachment of properties.

No schedule of properties was filed along with those execution petitions. Therefore, the prayer for attachment of properties included in the

schedule filed oh 10-4-1124 was a new prayer not contained in the previous execution petitions. The fact that there was a prayer in the petition

dated 10-4-1124 that it should be regarded as one for amendment of the execution petition dated 27-4-1123 cannot alter the real nature of that

petition.

5. This question was discussed at length by the Madras High Court in Sri Raja D.K. Venkata Lingama Nayanim Bahadur Varu (since deceased)

and Another Vs. Rajah Inuganti Rajagopala Venkata Narasimha Rayanim Bahadur Varu and Others, Patanjali Sastri, J., (as he then was), after

referring to the scheme of the Code of CPC relating to execution of decrees observed:

It seems to me that, under such a scheme, every application requiring the court to proceed against a particular property is a substantive application

for execution, and an application for attachment and sale or for sale without attachment of property B where a previous similar application in

respect of property A has succeeded or failed or is still pending is a fresh application for execution and cannot be treated as one for amending and

continuing the prior application, although the prayer in the later application may be worded in that manner. Where no question of limitation arises it

is, of course, immaterial how the subsequent application is regarded, but when it is made beyond the period of limitation, its real character assumes

importance and must be determined, paying mere regard to the substance of matter than to the form or the words used.

With regard to the power of the court to amend the execution petition in such cases this is what His Lordship said:

It may well be that as laid down in B. Bandhu Singh Vs. K.T. Bank Ltd. on which also the learned Judges relied the court has ample powers of

allowing amendment of execution petitions apart from remedying formal defects under Order XXI, Rule 17, but with all respect, we are unable to

agree that a decree-holder can be allowed to amend a previous execution petition by including fresh properties more than twelve years after the

date of the decree.

His Lordship further observed:

If an application to proceed against fresh properties of the judgment-debtor is to be regarded, as in our opinion it should be, as a fresh application

for execution it is difficult to say how the court can have a discretionary power of allowing the decree-holder to proceed against new items of

properties after the expiry of twelve years by way of amending the previous petition for execution filed within that period, for to do so would

plainly contravene the provisions of Section 48, Sub-Section 1, Sub-Section 2 which amply safeguards the decree-holder's right to execute the decree

after the expiry of twelve years in certain cases, and the court should not, as it seems to us allow him in other cases to evade the provisions of the

section under colour of amending a previous application so as to include fresh properties which he may wish to proceed against after the expiry of

such period.

The Appellant in that case relied on the decision of the Madras High Court in Jhorama Vs. Viswasarayi Latchanna Dora, in that case certain un-

enfranchised service imams were attached on the application of the decree-holder. Since such properties were not liable to be attached, the

attachment was released. Subsequently, the properties were enfranchised. In the execution petition which was filed while the attachment was in

force the decree-holder had asked for sale of the properties attached.

In the subsequent execution petition filed after the expiry of twelve years from the date of the decree the decree-holder asked for re-attachment of

the properties before they were sold. It was held that the subsequent application was not a fresh application for execution. This case was

distinguished by Patanjali Sastri, J., who said that there was nothing in the decision opposed to the view taken by him.

6. AIR 1947 Mad 2 was followed by the Cochin High Court in *Kuriakutty v. Aypu Asan* 40 KER 42 In the execution petition filed in that case

within twelve years from the date of the decree the prayer was for arrest and detention of the judgment-debtor. After twelve years from the date of

the decree an application was filed to amend the execution petition by including a prayer for attachment of properties. It was held that the

subsequent application was a fresh application. Koshi, J. (as he then was), who was one of the Judges who took part in the decision said:

With respect to the question what would constitute a fresh application for purposes of Section 48 the Privy Council observed as follows in AIR

1939 80 (Privy Council) . "The question of the character of the application, whether it is a fresh application in the sense of Section 48 or not, has

to be decided on the circumstances of each case. The substance of the matter must prevail over the form of the application. As pointed out by Mr.

Justice Patanjali Sastri in the case reported in AIR 1947 Mad 218 "where no question of limitation arises it is immaterial how the subsequent

application is regarded but when it is made beyond the period of limitation, its real character assumes importance". The balance of judicial opinion

among the Indian High Courts is to the effect that in circumstances similar to the present an application seeking execution against new items of

properties should be treated as a "fresh application" regardless of the form thereof. The decisions in *Sri Raja D.K. Venkata Lingama Nayanam*

Bahadur Varu (since deceased) and Another Vs. Rajah Inuganti Rajagopala Venkata Narasimha Rayaniam Bahadur Varu and Others, and AIR

1948 272 (Nagpur) , exhaustively reviewed the case law bearing on the subject. In the *Oudh* case (*Noor Mohamed Khan v. Rameswar Prasad*

Singh (F)) an "application for substitution of completely different property from the property contained in the execution was regarded as a fresh

application even though it was framed as an application for amendment.

7. The same view was taken by the Cochin High Court in *Govindan Nair v. Lakshmi Amma*, 43 KER 546 (H). The leading judgment in that case

was also written by Koshi J. In that case also the prayer contained in the execution petition filed within twelve years from the date of the decree

was only for the arrest and detention of the Judgment-debtors. After twelve years from the date of the decree a prayer was sought to be

introduced in the execution petition for relief against the properties of the judgment-debtors by means of an application.

It was held that the application should be regarded as a fresh application and that it was barred u/s 42 of the Cochin Code of CPC (Section 48 of the Indian Code).

8. The question was considered by a Pull Bench of the Travancore High Court in Karuna-kara Paniker v. Kochunni, 32 Trav. LJ 442 (I), The Full

Bench held that although Order XXI, Rule 15 (2) of the Travancore Code of CPC (Order XXI Rule 17 (2) of the Indian Code) hermits

amendment of an execution application even after the period of limitation, an application led after the expiry of the period of limitation, for

execution against properties not included in the earlier application should be regarded as a fresh application and not as an amendment of the earlier

application. Nokcs, J., said:

The reason for this rule is that an old application cannot be amended (or renewed or revived or continued) by a new application, unless the new

application is the same in character, extent or scope as the old..... Order XXI, Rule 15 (Travancore Code of Civil Procedure) gives a

power of amendment of certain specified particulars in an execution application. To substitute new properties against which execution is sought

cannot be described as an amendment of the particulars in the execution form. They must include a description of immovable properties (see Rules

11 and 15 (1)), and doubtless a minor correction, for example, an alteration of the survey number, may be an amendment: but this term cannot

reasonably cover a description of property completely different from the property described in the earlier form.

9. To the same effect is the decision of this Court in Krishna Kammathi v. Kunjan Pillai AIR 1951 KER 184 although the question of law was not

discussed by the learned Judges. In that case the execution petition which was filed within twelve years from the date of the decree contained a

prayer for attachment of certain properties. Subsequently after the expiry of twelve years from the date of the decree another application was filed

with a prayer for attachment of certain other properties. It was held that the subsequent application was a fresh application and was barred u/s 48,

Code of Civil Procedure.

10. Learned Counsel for the Appellants relied on the decision of this Court in Muhamathu Kunju v. Muhammathu Kunju AIR 1952 Trav-C 23 .

The facts of that case are the following:. In O.S. No. 89 of 1101 of the District Court of Alleppey: which was a suit for money, the Plaintiff applied

for attachment before judgment of certain immovable properties on the footing that they belonged to the Defendant. The Defendant's children

premised a claim contending that the properties! belonged to them, the decree was allowed to lie over until after the passing of the decree.

The suit was decreed on 14-3-1103. Subsequently, the decree-holder applied for sale of the properties attached before judgment. Then the claim

" j was enquired into and the court passed an order allowing the claim. The decree-holder filed O. S. No. 36 of 1105 to set aside the order on the

claim petition. The trial court decreed the suit. The Defendants preferred an appeal before the High" Court. While the appeal was pending the

execution petition for sale of the properties was dismissed, and a fresh execution petition was filed on 2-e-1110 for sale of the properties. That

was dismissed on 14-7-1110.

The next execution petition was filed on" 3-1-1J18. The High Court set aside the decision of the decree, with a prayer for bringing to sale the,

properties attached before judgment. In the mean?, while the appeal filed from the decision in Order 8. No. 36 of 1105 was decided by the High

Court on 3-1-1118. The High Court set aside the decision off the trial court. As a result of this decision the decree-holder could not proceed

against the properties on the basis of the attachment before judgment.

The High Court observed in the judgment that as universal donees of their father his children would be liable for his debts. Taking advantage of this

observation the decree-holder applied on 30-12-1120 for amending his execution petition by? introducing a prayer for fresh attachment of the

properties which had been attached before judgment. There was also an alternative prayer for, sale of the properties even without attachment. Thai

execution court disallowed the prayers and dismissed the application. The decree-holder appealed to the High Court from this order.

The High Court held that, in the circumstances H of the case, it could not be said that the court was absolutely powerless to allow the amendment

asked] for but that the decree-holder was not entitled to? proceed against the properties that belonged to-J the children of the judgment-debtor.

Koshi, J. (as J he then was), who wrote the leading judgment in the ease observed:

We are afraid if the decision of the appeal far to rest solely on the question whether the lower! court should have allowed the amendment we

would have found it difficult to sustain the order. No doubt the court"s discretion to amend a pending execution application after twelve years had

elapsed from the passing of the decree is a discretion to be exercise very carefully and very sparingly. But in circum-L stances similar to the present

courts have not felt"s powerless to allow suitable amendments to be needed in order lo enable the decree-holder to proceed fur their with the

execution. Here the necessity for that amendment arose on account of the decision the High Court gave raising a pending attachment long] after the

execution application was filed.

His Lordship then referred to the decision On the Madras High Court in 1939 Mad 988: 1940 Mad 19 . already referred to above, and also the

observation of Patanjali Sastri, J., about; that decision in Sri Raja D.K. Venkata Lingama Nayanim Bahadur Varu (since deceased) and Another

Vs. Rajah Inuganti Rajagopala Venkata Narasimha Rayanim Bahadur Varu and Others, . His Lord ship further observed:

In our opinion, the learned Judge in the Court below took a very narrow view about the court powers to amend an execution application WEB a

fresh application would be barred under twelve years" rule. However, questions more fundamental to the case than this were raised before and as

we have, after careful consideration, to the conclusion that the decree-holder cannot seek to proceed against the properties in the hands of the

children of the deceased judgment-debtor in proceeding in execution, our decision that there was no serious impediment for the amendment being

allowed serves the decree-holder no useful purpose. All the same, we think it proper to make it clear that we cannot agree with the decision of the

court below on the ground on which it is based and that we cannot accept the very strenuous argument the learned Counsel for the Respondent

urged before us to sustain it. All the decisions brought to our notice on this aspect of the case are referred to and reviewed in Sri Raja D.K.

Venkata Lingama Nayanam Bahadur Varu (since deceased) and Another Vs. Rajah Inuganti Rajagopala Venkata Narasimha Rayanim Bahadur

Varu and Others,

We do not think that in making this observation His Lordship took a view different from that taken by him in 40. KER 462 : 40 KER 546 (H) and

AIR 1951 KER 184 That the Court has got power to amend an execution petition even after the expiry of twelve years from the date of the

decree is not disputed. The question whether an application for execution against properties not included in the previous execution petition is a

fresh application or whether it is only an amendment of the previous application is the real question for decision in this case. That question was not

considered in Jhorama Vs. Viswasarayi Latchanna Dora, or 1939 Mad WN 988 :AIR 1940 Mad 19) (C).

In both those cases the application was for proceeding against properties which had been attached within twelve years from the date of the decree.

But, in this case, the application dated 10-4-1124 is for attachment of new properties. As stated already, in the previous execution petition dated

27-4-1123 there was not even a prayer for attachment of properties. The execution petition dated 2-8-1119 which is deemed to be still pending

did not also contain a prayer for attachment of properties.

In the circumstances, we find no reason to disagree with the view taken by the courts below that the application dated 10-4-1124 is not really one

for amendment of the previous execution application but is a fresh application for execution. In the light of the decisions referred to above, We

have no hesitation in holding that the application dated 10-4-1124 is a fresh application for execution and that it is barred u/s 48 Code of Civil

Procedure, having been filed more than twelve years from the date of the decree.

11. As for the argument that the 8th Defendant is estopped from raising the contention that the application dated 10-4-1124 is barred u/s 48,

Code of Civil Procedure, we do not think that there is any force in it. Even before notice was issued on that application to the Defendants, the

court held by its order dated 24-4-1124 that the execution petition dated 27-4-1123 was barred by limitation. After that order was set aside in

appeal the decree-holder again applied for attachment of the properties included in the schedule filed on 10-4-1124 and attachment was ordered.

Even at that time notice on the application dated 10-4-1124 has not been served on the Defendants. In the meanwhile the second Defendant died

and after Defendants 8 to 12 were impleaded as his legal representatives, the 8th Defendant filed the objection to the application dated 10-4-1124

and also prayed by a special petition that the objection might be accepted. It was stated in the objection that the 8th Defendant came to know of

the application dated 10-4-1124 and of the subsequent execution proceedings only shortly before the date on which the objection was filed. In the

circumstances it cannot be said that the 8th Defendant is estopped from raising the contention that the application dated 10-4-1124 is barred u/s

48, Cod of Civil Procedure.

12. The question whether the application dated 110-4-1124 was barred u/s 48, Code of Civil Procedure, was not considered by the court when it

passed the order on 28-4-1124. The only question that was considered was whether the execution petition dated 27-4-1123 should be deemed

to be one in continuation of the execution petition dated 2-8-1119. That was the only question that was considered by the District Court and by

the High Court. There was, therefore, nothing to prevent the 8th Defendant from raising this contention at a later stage.

13. In the result, we confirm the orders of the courts below and dismiss the second appeal with costs.