

(1957) 07 KL CK 0030

High Court Of Kerala

Case No: S.A. No. 1590 of 1954 (M)

Patti and Another

APPELLANT

Vs

Bhargavan and Others

RESPONDENT

Date of Decision: July 18, 1957

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 16, Order 21 Rule 90, 47

Citation: (1957) KLJ 857

Hon'ble Judges: G. Kumara Pillai, J

Bench: Single Bench

Advocate: M.K. Nambiar and V.M.B. Menon, for the Appellant; N. Sundara Iyer and M. Sethumadhavan, for the Respondent

Final Decision: Allowed

Judgement

G. Kumara Pillai J.

1. This revision petition arises out of certain proceedings in execution of the decree in O.S. No. 7 of 1944 of the District Munsiff's Court of Hosdrug. Under the decree defendants 1 to 7 had to pay certain amounts to plaintiffs 1 to 5 and defendants 8 to 13. Two of those decree-holders, namely, defendants 8 and 9, executed an assignment of their rights under the decree in favor of one Madathil Patti who is petitioner No. 1 in this revision petition on 30-3-1950. In pursuance of the assignment, Madathil Patti applied for recognition of the assignment in his favor and for execution of the decree, and the assignment was recognized in 28-9-1950 and certain properties were also sold in execution on 22-10-1951. After the sale, defendant 2 who was a minor at the time of the decree filed a petition u/s 47 and Order XXI, rule 90, of the CPC for setting aside the sale. In the suit, defendant 2 was represented by his mother, defendant I, as his guardian. Both of them were originally Hindus. Before the assignee, Madathil Patti, applied for execution, defendant I became a convert to Islam. Two grounds were taken by defendant 2 in

his application for setting aside the sale. One was that defendant 1 had ceased to be his guardian on account of her conversion and, that therefore he was not represented by any guardian lawfully appointed in the execution proceedings and so the execution proceedings and sale were invalid and liable to be set aside. The second ground was that the notice required under Order XXI, Rule 16, Civil Procedure Code, had not been given to the original decree-holders about the assignee's application for recognition of the assignment and execution of the decree and that the execution proceedings on the assignee's application were without jurisdiction and null and void. On the first ground, the execution court held that there was proper representation of defendant 2 in the execution proceedings as subsequent to the conversion of his mother to Islam an advocate of the court, Sri. S.R. Pal, had been appointed as his guardian ad litem and the said guardian had contested the execution proceedings. The execution court overruled the second contention also as that contention was raised by Sri. S.R. Pai in the objection petition which he had filed for and on behalf of defendant 2 and it was then repelled. Since the execution court dismissed defendant 2's application for setting aside the sale on account of its findings on the two grounds raised by him, defendant 2 filed an appeal in the court of the Subordinate Judge of South Kanara. The learned appellate Judge also found that there was proper representation of defendant 2 in the execution proceedings as Sri. S.R. Pai had been appointed as his guardian ad litem. But on the second ground he took the view that the execution court had no jurisdiction to proceed with the application of the assignee without issuing the notice required under Order XXI, rule 16, Civil Procedure Code, to the assignors, and that the execution sale was therefore held without jurisdiction and so null and void and liable to be set aside. Without considering the assignee's contention that the question of the jurisdiction of the execution court to proceed with his application was concluded by the principle of res judicata on account of the decision of the same question when it was raised by Sri. S.R. Pai in his objection petition, the learned Judge allowed the appeal filed by defendant 2, and set aside the execution sale. The assignee has therefore, filed this revision petition. In the view that I have taken that the question of the jurisdiction of the execution court to proceed with the assignee's application is concluded by the principle of res judicata on account of the decision on the objection petition filed by Sri S.R. Pai, I do not propose to consider in this revision petition whether the omission to issue the notice under Order XXI, rule 16, Civil Procedure Code, to the assignors will affect the jurisdiction of the execution court to proceed with the execution. On the concurrent findings of the courts below there can now be no doubt that defendant 2 was properly represented in the execution proceedings by Sri S.R. Pai, the guardian appointed ad litem. In paragraph 5 of his order, the learned Munsiff has specifically referred to the fact that this contention that the notice required by Order XXI, rule 16, Civil Procedure Code, had not been given to the assignors and that execution could not, therefore, be proceeded with was raised by Sri S.R. Pai in the objection petition which he filed and that it was then repelled. The decision on Sri. S.R. Pai's objection petition might have

been wrong, but a wrong decision also would constitute res judicata and conclude the parties between whom the adjudication was made. The respondent's learned counsel contended that as the notice required under Order XXI, rule 16, Civil Procedure Code, had not been served on the assignors all the proceedings which took place on the assignee's application for execution including the adjudication of the objections raised by Sri. S.R. Pai were without jurisdiction and a decision rendered in such a proceedings, with jurisdiction by the court, could not be taken as constituting res judicata. This argument overlooks the fact that the contention that the execution proceedings were without jurisdiction was raised and negated in these very execution proceedings themselves at earlier stages of the proceedings, and that defendant 2 is now only repeating at a subsequent stage of the same execution proceedings the very contention which had been overruled at the earlier stage. The rule of res judicata is based on the principle that there should be some finality to litigation. If a question of jurisdiction once decided at an earlier stage of the litigation after hearing both sides, is allowed to be raked up again at a subsequent stage of the very same litigation, there would be no finality at all, and it would be allowing the defeated party to prolong the proceedings indefinitely by filing a petition questioning the jurisdiction of the court to go on with the proceedings every time a previous petition in which the very same contention was raised is over-ruled. Regarding the application of the principle of res judicata in execution proceedings, a Full Bench of the Allahabad High Court has held in Gendalal v Hazarilal (I.L.R. 58 All 313) "where there has been an express adjudication by the court in the presence of the parties, then the question must be considered to have been finally decided, no matter whether it is raised again at a subsequent stage of the same proceedings or in a subsequent execution proceedings". I am in respectful agreement with this observation. Since the question of the effect of the non-service of the notice under Order XXI, rule 16, CPC on the assignors has once been considered and decided after hearing both sides in these very execution proceedings, I hold that it is not open to defendant 2 to raise that question again even if that decision might be a wrong one. If that decision was considered to be wrong, his guardian or he should have taken up the matter in appeal when it was first decided against him. There is no allegation that Sri. S.R. Pai has not been functioning properly as guardian. In the circumstances, I allow the Civil Revision Petition with costs and set aside the order of the appellate Judge. The order of the execution court dated 23-6-1953 is restored and defendant 2's application for setting aside the sale is dismissed.