
(1995) 06 KL CK 0044

High Court Of Kerala

Case No: Criminal P. No. 1157/95 H

Sudhakaran, V.K.

APPELLANT

Vs

Kerala Financial
Corporation

RESPONDENT

Date of Decision: June 21, 1995

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 105, Order 21 Rule 106, 115

Hon'ble Judges: P.K. Balasubramanyan, J

Bench: Single Bench

Advocate: Sebastian Davis, for the Appellant;

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

P.K. Balasubramanyan, J.

This revision is by the judgment debtor who challenges the order of the executing Court by which that count restored on a motion by the decree holder the execution petition earlier dismissed for default. It is seen that the execution petition was dismissed on the ground that there was an error in depositing the amount in that the money order commission to be deposited was omitted to be deposited. The decree holder filed E.A. 5 of 1993 submitting that the omission to deposit the money order commission also in the execution petition was an inadvertent omission and that in the interests of justice it was just and necessary to restore the execution petition especially in view of the fact that a fresh execution petition might be barred. The judgment debtor opposed the application for restoration contending that a fresh execution petition if filed would be barred by limitation and hence the Court could not restore the execution petition dismissed for default. Originally the Court below allowed the application for restoration without discussion of the objections raised by the judgment debtor. That order was challenged before this Court in C.R.P. 1876 of 1994. This Court thought that the order of the Court below was

non-speaking and hence setting aside the order directed the executing Court to consider the objections of the judgment debtor to the application for restoration. The executing Court has now overruled the objections of the judgment debtor and has restored the application in its view that the interests of justice warranted the restoration of the execution petition in that the earlier disposal was due to an inadvertent error committed by the decree holder.

2. In challenging the order of the executing Court, learned Counsel for the revision Petitioner contended that if on the date the application for restoration is made, the execution would have become barred by limitation, the Court had no power to restore the earlier execution petition dismissed for default. He relied on the decisions of this Court reported in *Kodhupennamma v. The Bank of Deccan Ltd.* ILR 1973 (2) Ker. 214, *Ramakrishnan v. Mohammadkutty* 1973 KLT 805 and *Anthony v. Anthony* 1987 (1) KLT 663 in support of his contention. He also referred to the earlier decisions of the Madras High Court reported in [M.V. Sundaresa Aiyar for himself and as Official Receiver of the estate of Pakala Venkata Rao Vs. Pakala Subba Rao and Others](#), followed in the decision of the Full Bench of the Travancore-Cochin High Court in *Pappathi Ammal v. Sivagannam* AIR 1954 T.C. 526. According to me the reported decisions of this Court relied on by the judgment debtor all related to second applications for execution in which earlier dismissal for default was sought to be treated as a statistical disposal of the application and the contention was that the dismissal would not amount to a judicial disposal. This Court took the view that a dismissal for default also would be a judicial disposal and if on the date the second application was made praying for a revival of the earlier application, the execution of the decree would be barred, the same could not be permitted. The decision of the Madras High Court and that of the Travancore-Cochin High Court also only proceed along these lines. In *Kochupennamma's* case ILR 1973 (2) Ker. 214 this Court refused to accept an argument that the later application was only one for restoration of an earlier application dismissed for default. According to me, the ratio of these decisions has no application in a case where the Court is requested to restore an earlier application dismissed for default on the ground that the default occurred due to an inadvertent error or bona fide omission. In my view the Court has always the power to restore such an application dismissed for default and such a power cannot be denied to the Court on the ground that when it is entertaining the application for restoration a fresh execution petition would be barred. With respect to learned Counsel for the judgment debtor, I cannot accept the authorities relied on by him as authority for the proposition that a Court cannot restore an execution petition dismissed by it for default earlier merely on the ground that when it is requested to restore the same, a fresh execution petition would be barred. I therefore hold that the Court below had the power to restore the execution petition earlier dismissed for default and on the facts of the present case it was certainly justified in restoring the same considering the reason why the execution petition was earlier dismissed for default.

3. In any view the order of the Court below is only one restoring an execution petition dismissed by it for default. I have found that the executing Court has jurisdiction to restore an application dismissed by it for default. The introduction of Rules 105 and 106 of Order 21 of the CPC by the Amendment Act of 1976 (these rules were available in Kerala even earlier) would also suggest that as far as possible the proceedings in execution had also to be disposed of after affording both the litigating parties an opportunity of being heard and on merits. This broad approach regarding the powers of Court is also noticed in the decision of the Division Bench of this Court in *Madhavi Amma v. Indusekharan* 1992 (2) KLT 260.

4. The present revision is one u/s 115 of the Code of Civil Procedure. Apart from the fact that I find no error of law or of jurisdiction in the order of the Court below, I also find that there is no failure of justice in the act of Court by which that Court restored the execution petition dismissed by it earlier for default. After all, the effort of the Court must be to execute the decree it has granted after considering the merits of the rival contentions and not to enable one of the parties to get away with a technical knock out. I find no warrant for interfering with the order of the Court below u/s 115 of the Code of Civil Procedure.

I dismiss the Revision Petition