

# TRANVENCORE COCHIN HIGH COURT

Kochu Vareed

Vs

Mariyam guardian of Ouseph

Second Appeal No. 181 of 1124

(Kunhi Raman, C.J. and Sankaran, J.)

25.06.1951

## JUDGMENT

### **Kunhi Raman, C.J.**

1. The plaintiff-decree-holder and his surety are the appellants. The proceedings in the Court below were for restitution for which an execution petition was filed in respect of a sum of money drawn out by the decree-holder under an ex parte decree. The ex parte decree was passed on 9-10-1117 in O.S. 311 of 1117. In execution of that decree, a certain amount standing to the credit of the judgment-debtor was proceeded against and a sum of Rs. 200 odd was brought into Court and credited towards the decree. Thereupon, the decree-holder who had secured the ex parte decree applied for payment out. This was granted subject to security being furnished. The surety who is one of the appellants in the present case was the person who furnished such security by executing a bond. Subsequently, the ex parte decree was set aside on application made by the judgment-debtor. This was done on 15-10-1118. The suit was heard in due course on the merits and ultimately a decree for Rs. 7 odd was passed on 28-11-1119. From this decision A.S. No. 50/1120 was preferred and the appellate Court on 26-2-1121 confirmed the decision of the trial Court. On 10-12-1122 E.P. 1334/1122 was filed on behalf of the judgment debtor for getting back the excess amount drawn out by the decree-holder when the ex parte decree was in force. This was resisted both by the decree-holder and the surety according to whom the application was barred by limitation. Their contention was that the right to claim the amount accrued on the trial Court setting aside the ex parte decree on 15-10-1118. If that position is not tenable then according to them in any event when the suit was tried on the merits and the decree for Rs. 7 odd was passed on 28-11-1119 the right to claim the excess amount drawn out from the Court must necessarily have arisen. If either of these dates is taken as the starting point for limitation, then the application filed on 10-12-1122 for recovering the surplus was barred by limitation more than three years having elapsed from the starting point of limitation. The answer of the judgment-debtor was that the right accrued only on the decree passed by the appellate Court in A.S.

50/1120 which as already stated was on 26-2-1121. The execution petition in the present case with respect to which the question of limitation is raised was filed as already stated on 10-12-1122 and it was contended that it was within time.

2. Both the Courts below have accepted the respondent's contention that the application for recovering the surplus amount drawn out by the decree-holder was in time. They have both based their conclusion on the wording of the surety bond under which the surety undertook to bring the amount back whenever the Court directed him to do so. It was contended in the Courts below that such a direction was not given prior to three years from the date of execution petition No. 1334 of 1122.

3. In second appeal, the question was argued purely as a question of law based upon the appropriate article of the Limitation Act which would apply to a petition like E.P. 1334 of 1122, Articles 165 and 166, Cochin Limitation Act correspond to Articles 181 and 182, Indian Limitation Act. Therefore, if the residuary article which is Article 165, Cochin Act applies, the application for recovering the surplus amount is clearly barred by limitation. If, on the one hand Article 166, Cochin Act which corresponds to Article 182 of the Indian Act is applicable, then the execution petition is within time.

4. It is conceded by the learned counsel appearing on both sides that there is a divergence of views on this question in the High Courts in India. This is correctly summarised in Rustomji's Commentaries on the Indian Limitation Act 5th Edn., p. 1662 of Volume II :

"There is a conflict of authority as to the limitation applicable in the case of an application for restitution under Section 144, Civil Procedure Code 1908, and the decisions are not easy to reconcile. According to the Madras, Bombay, Lucknow, Patna and Rangoon Courts, the application is considered to be one for execution and as coming within the purview of Article 182. On the other hand, according to the Calcutta, Allahabad and Lahore Courts, the application for restitution under Section 144, Civil Procedure Code, is held to be not an application for execution so as to be governed by Article 182, and is held to come within the residuary Article 181."

The learned counsel for the appellants invites our attention to the view taken by the Nagpur High Court which adopts the view expressed by the Calcutta, Allahabad and Lahore Courts. The case in which this point came up for decision is reported in *Allawali v. Kesharimal Ramlal*<sup>1</sup>,

5. The view taken by the majority of the High Courts in India is based mainly upon the opinion expressed by the Judicial Committee of the Privy Council in the case reported in *Prag Narain v. Kamakhya Singh*<sup>2</sup>, The important decisions on this controversial question were all read in Court by learned counsel appearing on both sides. *Somasundaram Pillai v. Chokkalingam Pillai*<sup>3</sup>, *Kurgodigouda v. Ningangovda*<sup>4</sup>, *Muthukasuppan Chettiar v. Annamalai Chettiar*<sup>5</sup>, *Bhaunath*

*Singh v. Kedarnath*<sup>6</sup>, *Serajul Islam v. Emperor*<sup>7</sup>, *Parameshwar Singh v. Sitladin Dube*<sup>8</sup>, *Ghulam Rasul v. Rammon Mal*<sup>9</sup>, We are inclined to adopt the view expressed by the majority of the High Courts in India, namely Madras, Bombay, Lucknow,

<sup>1</sup>AIR (34) 1947 Nag 239

<sup>3</sup>40 Mad 780

<sup>5</sup> AIR (20) 1933 Rang 180

<sup>2</sup>31 All 551

<sup>4</sup>41 Bom 625

<sup>6</sup> AIR (21) 1934 Pat 246

<sup>7</sup> AIR (15) 1928 Cal 645

<sup>9</sup> AIR (21) 1934 Lah 190

<sup>8</sup> AIR (21) 1934 All 626

Patna and Rangoon. We, therefore, hold that the application in the present case in respect of which the question of limitation is raised must be regarded as one for executing the decree and in that view since it was filed within three years from the date of the appellate decree, it is within time. In other words, it is Article 166, Cochin Limitation Act corresponding to Article 182, Indian Limitation Act that applies to the present case. We are also satisfied that the terms of the surety bond in this case relied upon strongly by both the Courts below to support the contentions of the learned counsel for the respondent as also the provisions of Section 145, Civil Procedure Code (1908) according to which and also according to general principles, the proceedings against the surety can only be by way of execution and not by way of restitution. In the view that we have taken on this interesting question of law that has arisen in this case, both the Courts below have correctly decided the point in issue between the parties and this second appeal must be dismissed with costs.

Appeal dismissed.