**P. Abdul Khadir Vs. Ajiyur Ahammad Shaiva Ravuthar's son, Ajiyur Ahammad Shaiva Ravuthar and Ors.**

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**Court** : Chennai

**Decided On :** Sep-27-1911

**Reported in** : 12Ind.Cas.679; (1912)22MLJ35

**Appellant** : P. Abdul Khadir

**Respondent** : Ajiyur Ahammad Shaiva Ravuthar's son, Ajiyur Ahammad Shaiva Ravuthar and Ors.

**Judgement** :

Sundara Aiyar J.

1. This second appeal arises in proceedings in execution of the decree of the District Munsif's Court of Cannanore for money in O.S. No. 591 of 1896. The present application for execution was presented on the 27th September, 1909. The decree was passed on the 15th January 1897. So this application was put in more than 12 years after the date of the decree. The judgment-debtors objected that the application was barred by Section 48 of the Code of Civil Procedure, as more than 12 years had elapsed since the date of the decree and the decree-holder had made prior application for execution. The application immediately preceding the present one was presented on the nth January 1909 for attachment of the defendant's moveables and for their arrest. While that application was still pending, the present one was put in. In addition to the reliefs asked for in the previous application the plaintiff prayed also for the attachment of immoveable properties belonging to the defendants. The District Munsif disallowed the objection, holding that the defendants were fraudulently evading the execution of the decree and that therefore the bar under Section 48, Civil Procedure Code, did not apply. On appeal the District Judge confirmed the Munsif's finding of fraud so far as the 1st defendant was concerned, as he had evaded the execution of warrants of arrest taken out against him in order to defeat the execution. But he held that no fraud was proved against the 2nd defendant. He was, however, of opinion that, as fraud had been proved against the 1st defendant, the plaintiff was entitled to execute the decree against both the defendants. The 2nd defendant has appealed to this court against the order of the District Judge. His contentions are (1) that the finding of fraud as against the 1st defendant is not based on legal evidence; (2) that even if that finding be upheld, it has not been proved in the case that plaintiff exercised due diligence in the execution of his decree and that he was prevented by the 1st defendant's fraud from realising the amount due to him and that this court has a discretion to refuse execution in the circumstances 5 and (3) that, in any event) the 1st defendant's fraud would not justify the granting of the execution against the 2nd defendant. With regard to the first contention I am of opinion that it is not entitled to prevail. Mr. Rozario's argument on this point is that the District Judge acted illegally in relying on the statements

contained in the process-server's returns as evidence of intentional evasion of the warrants of arrest by the 1st defendant. But, in my opinion, the returns are admissible under Section 35 of the Evidence Act, as evidence of the facts reported by the process-server. Even if the statement of the process-server that the 1st defendant left his usual place of residence in order to escape arrest should be regarded as legally inadmissible, it was open to the District Judge to infer from the circumstances of the case that his absence was due to a deliberate attempt to evade arrest. It has been fully established by decided cases that the expression ' fraud ' in Section 48 should be construed in a broad sense, and that a deliberate evasion of the process of the court with intention to defeat the execution of the decree would amount to fraud. I would overrule this contention. I am also of opinion that the seond contention is equally unsustainable. Section 48, Civil Procedure Code, provides: ' Nothing in this section shall be deemed to preclude the court from ordering the execution of a decree upon an application presented after the expiration of the said term of 12 years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve 5 ears immediately before the date of the application.' Fraud at some, time within 12 years prior to the application for execution being sufficient to entitle the decree-holder to ask for execution, it is clear that it is not incumbent on him to show continuous diligence during all the time prior to the application. The language of the section also shows clearly that the decree-holder is not bound to show that, but for the fraud or force complained of, he would have realised the fruits of his decree. All that has to be proved is that the judgment-debtor, by fraud or force, at some time prevented the execution, that is, in my opinion, made the decree-holder's attempts to execute at the time to which the fraud relates, unsuccessful It is not necessary, as contended by Mr. Rosario, for the decree-holder to show that the judgment-debtor guilty of fraud had means to pay the decree amount or that the decree-holder could not, at any other time before his last application have realised his decree. Mr. Rosario relies on Annamalai v. Rangasami I.L.R. (1883) M. 365 and Seshachalam Chetty v. Rajam Chetty : (1898)8MLJ203 in support of his argument. The former case does not really help him. It is true, no doubt, that it was found in that case by the lower court that the judgment-debtor was possessed of means to satisfy the decree and that the decree-holder had exercised due diligence in his attempts to execute. But the learned Judges who decided the case did not lay down that either of these conditions should be satisfied. The case is authority only for the position that the expression 'fraud' is used in the section in a comprehensive sense so as to include all improper attempts to defeat the execution. The judgment of Shephard J. in the second case no doubt supports the appellant's argument. But the learned Judge's attention does not appear to have been drawn to the language of the section already referred to, which, in my opinion, clearly shows that the argument cannot be supported. On the other hand Venkayya v. Raghava Charlu I.L.R. (1879) M.320 in which Seshachalam. Chetty v. Rajam Chetty : (1898)8MLJ203 was referred to in the arguments is clearly against Mr. Rosario's contention. The learned Judges who were parties to the judgment, adverting to the language of the section, were of opinion that fraud or force on the part of the judgment-debtor at any stage of the execution wouli give the decree-holder a fresh starting point and a fresh period of years from that date. See also Mohsin Ali v. Masul All (1911) 8 A.L.J. p. 1020. With regard to the next contention of Mr. Rosario that the court has a discretion to allow or refuse execution after 12 years even where fraud has been proved, I have serious doubts whether such a discretion exists. Rai Sham Kissen v. Damar Kumari Debi (1906) II C.W.N. 440 no doubt supports the appellant's argument. But I am inclined to hold that the language of Section 48, ' nothing in this section shall be deemed to preclude a court from ordering the execution of the decree,'' etc., was not really intended to give the court

power either to grant or refuse execution as it might think fit. The former part of the section says that ' no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years,' etc. It appears to me that the draftsman, having provided that the court shall be precluded from granting execution after 12 years, merely meant that the rule of limitation thus provided would not be applicable in cases where the judgment-debtor is guilty of fraud or force when he went on to say 'nothing in this section shall be deemed to preclude the court from ordering the execution,' etc. The provision that execution should be allowed for 12 years from the time that fraud or force has been used seems to me to support this view. It is, however, unnecessary to decide this point as I am clearly of opinion that there is no ground in this case for the exercise of any discretion against the decree-holder, and I reserve to myself an opportunity for considering it further when it should be necessary to decide the question.

2. It remains to deal with the question whether the District Judge having found that the 2nd defendant was guilty of no fraud or force, the plaintiff is entitled to execution against either of the defendants or both. The question really arises only in so far as it concerns the prayer for the attachment of immoveable property, as in other respects the application for execution was only a continuation of the previous application. It is necessary to turn once more to the language of Section 48. It gives power to the court to order the execution of the decree ' where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application.' The learned vakil for the appellant contends that, where there are more judgment-debtors than one, the court cannot allow execution afrer the expiration of 12 years, at all events unless both the judgment-debtors are guilty of fraud or force ; while Mr. Anantakrishnaiyer's contention for the respondent is that the fraud or force of any one of several judgment-debtors who are jointly and severally liable under a decree would give additional time to the decree-holder against them all. Neither of these contentions commends itself to me. Having regard to the object of the section I am of opinion that this is not a case where the singular ' judgment-debtor ' must be taken to mean the plural 'judgment-debtor' where there are several judgment-debtors. It may happen that oneof the judgment-debtors is in solvent circumstances, and it might be profitless for the decree-holder to take out execution against the other judgment-debtors. The result of upholding the appellant's contention would be that, though the only solvent judgment-debtor might be guilty of fraud, the decree-holder would not be entitled to time against him because the other judgment-debtors, who had no means of discharging the debt, were not guilty of any fraud or force. It seems to me clear that the misconduct of any particular judgment-debtor would give the decree-holder further time against him for execution. But would it give him time against his co-judgment-debtors I think not. The expression ' the judgment-debtor' may mean either the particular judgment-debtor against whom execution is sought or all the judgment-debtors. But I do not think I would be justified by any rule of interpretation or by the ordinary meaning of the language used as men of common sense would understand it in holding that ' the judgment-debtor' means any one of a number of judgment-debtors against whom the decree has been passed. Mr. Anantakrishnaiyer contends that the policy of the Limitation Act is to treat a decree against a number of persons jointly and severally as entire for the purpose of execution, and that Section 48 should be interpreted in the light of this policy. No doubt, where an appeal has been preferred against a decree or the decree has been amended or judgment reviewed, time would run for execution only from the date of the final or revised decree, though not all the judgment-debtors may be concerned in the appeal, review or amendment.

It is also true that, where an application is made against one of the several judgment-debtors, that would give a further starting point as against all including those against whom no application has been made. But it may be that a different policy underlies Section 48, C.P.C. The legislature gives 12 years time as a reasonable period within which execution may be expected to be finished, and provides for an extension of the time where fraud or force is resorted to by a judgment-debtor. There is nothing improbable in the legislature having wished to confine this special relief based on the ground of fraud to the particular judgment-debtor or judgment-debtors guilty of misconduct. Article 182 of the Limitation Act gives a fresh starting point of limitation, in one class of cases, against some only of several joint and several judgment-debtors. Clause 6 in the 3rd column of that article lays down that, where a notice to show cause why the decree should not be executed against a judgment-debtor is issued under a provision of the Civil Procedure Code requiring such notice, a further starting point is obtained in such a case against those only to whom such notice is issued. The grounds of the extension being the issue of the notice, the legislature seems to have considered it proper to confine it to the person to whom notice is issued. It appears to me that a similar reason probably induced the legislature to restrict the relief under Section 48 also so as to be available only against the person guilty of fraud or force. At any rate, I am unable, against what appears to me to be the plain meaning of the words of the section, to hold that fraud by one judgment-debtor would give relief to the decree-holder against his co-judgment-debtors. I must therefore hold that the plaintiff's application is barred as against the 2nd defendant so far as the prayer for attachment of immoveables is concerned. I would modify the order accordingly. The plaintiff and the 2nd defendant must each bear his own costs throughout.

Phillips, J.

3. This is an appeal by the second 'defendant against an order allowing a decree to be executed after the expiry of twelve years from its date on account of the fraud of the first defendant. The fraud alleged and proved is the evasion of a warrant of arrest by first defendant, and I agree with my learned brother for the reasons given by him that such evasion in order to prevent execution of the decree does amount to fraud. The most important question to be determined is whether the fraud of the first defendant keeps the decree alive as against the second defendant also. Section 48 (2), C. P. C, runs as follows: ' Nothing in this section shall be deemed to preclude the court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within twelve years immediately before the date of the application.' It is contended that the use of the article ' the ' before judgment-debtor shows that the clause applies only to cases of fraud by a single judgment-debtor, or (in decrees where there are several judgment-debtors) to cases of fraud by all the judgment-debtors--as the use of the singular 'judgment-debtor'' may also include the plural. If this interpretation were applied, it would follow that where there was a decree against ten judgment-debtors, and only nine of them had been guilty of fraud, the section would not apply, and I do not think that this was the intention of the legislature, nor do I think that this interpretation need be put upon the section. A further contention is raised that Section 48 (2) only enlarges the, time for execution as against the particular judgment-debtor who has been guilty of fraud. There is, in my opinion, nothing in the wording of the section to support this argument, for it merely lays down that, if execution has been defeated by force or by fraud of the judgment-debtor, the execution of a decree may be ordered after the

expiry of twelve years and does not say that the execution shall be limited, and ordered only against the fraudulent judgment-debtor. No authority has been cited for the proposition that a joint decree may be barred against one of the joint debtors and not against the others, whereas explanation I to Article 182 of the Limitation Act is authority for the proposition that execution against one of several joint debtors saves limitation as against them all. Applying the same principle to this case, I think that the fraud of one judgment-debtor must be held to enlarge the time for execution not only against himself but also against all the joint judgment-debtors. If execution is to be allowed only against the fraudulent judgment-debtor it would be open to a pauper, who was one of several joint debtors, to prevent by fraud or force the execution of a decree within twelve years, and the result of his action would be to exonerate his solvent fellow debtors leaving the unfortunate decree-holder a remedy against the pauper alone. If the article 'the' before 'judgment-debtor' in Section 48 be read in a generic sense, the difficulty of interpretation is, in my opinion, removed, and I must hold that the section is not intended to enlarge the time for execution of the decree only against the judgment-debtor who is guilty of fraud, but allows execution of the decree against all the judgment-debtors, even though only one of them has been guilty of the fraud or force.

4. In Rai Sham Kissen v. Damar Kumari Debi (1906) 11 C.W.N. 440 it was held that the power of a court under Section 230 of the old Code, (corresponding to Section 48, C.P.C.,) was discretionary. Whether this be so or not it is unnecessary to determine now, for in this case, which is one of fraudulent evasion, I think the discretion, if any, should be exercised in favour of allowing execution.

5. Holding this view it is unnecessary to consider the further plea urged for respondent that the present application for execution should be treated as a continuation of an application put in before the expiry of twelve years from the date of decree. I would, therefore, dismiss the appeal with costs.

Sundra Aiyar, J.

6. As my learned brother is of opinion that the appeal should be dismissed with costs, it is dismissed with costs under Section 98, C.P.C.