(1996) 08 KL CK 0017

In the High Court Of Kerala

Case No : C.R.P. No''s. 1799, 1800, 1803 and 1805 of 1991

B. Krishnamoorthy APPELLANT

Vs

N.A. Khaleel Rahman RESPONDENT

Date of Decision : 09-08-1996

Acts Referred:

Chit Funds Act, 1982 — Section 1(3), 61, 64(1), 64(2), 64(3)
Civil Procedure Code Amendment Act, 1976 — Section 39(3)
Civil Procedure Code Amendment Act, 1977 — Section 39(3)
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 82, 38, 39, 39(1), 7
Kerala Small Causes Courts Act, 1957 — Section 12, 13

Citation : (1996) 2 KLJ 432

Hon'ble Judges : S. Krishnan Unni, J

Bench : Single Bench

Advocate : S. Venkita Subramania Ayyar and V. Giri, for the Appellant; V. Chithambaresh and K.K. Bhavaaas Menon, for the Respondent

Final Decision : Dismissed

Judgement

S. Krishnan Unni, J.—These civil revision petitions were heard together because they raise the same point regarding the maintainability of execution order passed by the Deputy Registrar of Chits, Thirupur who passed the award in the arbitration proceedings. The Respondent have opposed the maintainability contending that execution petitions are not maintainable. In all these cases, the Deputy Registrar appointed u/s 61 of the Chit Funds Act, 1982 had passed arbitration awards and sent them for execution to the civil court. The Munsiff, Chittur by a common order held that the Registrar is not a civil court and that he cannot transfer the awards for execution u/s 39 CPC and dismissed the execution petitions. The revisions are directed against the said order.

2. The Petitioner contended that the transfer of the award is perfectly legal and valid, u/s 71 of the Chit Funds Act. The Respondents'' counsel contended, that Registrar is not a Court and not being so, cannot transfer his own award for execution. u/s 39,

(1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to Anr. Court of complete jurisdiction,-

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situated outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree consider for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.

Sub-section 3 above which was introduced by an amendment in 1977, states that for the purposes of the section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such court would have jurisdiction to try the suit in which the decree was passed.

3. It is argued that Court would have no jurisdiction over such matters because (1) it is not a suit and (2) the civil court will not have jurisdiction to try the case because it is expressly barred by provisions of Chit Funds Act. The Act defines what are disputes between the subscribers and foremen of the chitties and provides for referring such disputes for arbitration to the Registrar. The Registrar passes an order u/s 66(1) of the Act. It is open to him to settle the disputes himself or refer it for disposal to a person appointed by him referred to as a nominee. u/s 64(2) of the Act where any question arises as to whether any matter referred to for the award of the Registrar is a dispute or not for the purposes of Sub-section (1), the same shall be decided by the Registrar whose decision thereon shall be final. Sub-section (3) of Section 64 states that no civil court shall have jurisdiction to entertain any suit or other proceedings in respect of any dispute referred to in Sub-section (1). The above provision will show that jurisdiction of the civil court is barred to entertain a suit or other proceedings in respect of the disputes referred to in Section 64(1). The scheme of the Chit Funds Act, 1982 is that when the Registrar settles a dispute and passes an award, he ceases to have any more functions. The appeal from the order of the Registrar is to be made to the State Government u/s 70 of that Act. Section 71

states how money can be recovered. Section 71 reads thus:

Section 71- Every order passed by the Registrar or the nominee u/s 68 or Section 69 and every order passed by the State Government in appeal u/s 70 for payment of any money shall, if not carried out,-

(a) on a certificate issued by the Registrar, be deemed to be a decree of a civil court, and shall be executed in the same manner as a decree of such Court, or (Emphasis supplied)

(b) be executed in accordance with the provisions of any law for the time being in force for the recovery of amounts as arrears of land revenue.

The proviso to Section 71(3) says that,

No application for execution under Clause (b) shall be made after the expiry of three years from the date fixed in the order, and if no such date is fixed, from the date of the order.

This mode of execution obviously refers to recovery of amount under the provisions of revenue recovery Act.

4. Learned Counsel for the Respondent cited the decision reported in 1989 (1) KLT 74 [Raman Namboodiri v. Kunhayamath) in which it is pointed out that:

Section 7 of the CPC (for short ''the Code'') provides that the provisions mentioned in the section shall not extent to courts exercising jurisdiction of a Court of Small Causes. One of the provisions included in the Section relates to ''the execution of a decree against immovable property''. Order 21 Rule 82 of the Code contains the provision that ''sales of immovable property in execution of decrees may be ordered by any Come other than a Court of Small Causes''. From aforesaid provisions it is clear that the court which exercises jurisdiction of the Small Causes Court has no power to execute a decree by proceeding against any immovable property. Section 38 of the Code permits a decree to be executed ''either by the court which passed it or by the court to which it is sent for execution''. However, Section 39(1) provides that a decree may be sent for execution to a court "of competent jurisdiction". This has the effect of precluding other courts from executing decrees. What is meant by a court "of competent jurisdiction". Those words ("Of competent jurisdiction") were inserted in the Code by the CPC Amendment Act of 1976. The same Amendment Act inserted Sub-section (3) also in the main Section ... Sub-section (3) reads thus:

For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.

It is observed at page 74 as follows:

Only Such court as would have jurisdiction to try the Suit is a court of competent jurisdiction. By a legal fiction Sub-section (3) includes within the purview of ''court of competent jurisdiction'' such courts which would have become competent if the suit could have been instituted at the time when the application for transfer is made. This in other words, would mean that a decree cannot be transferred to court which has no jurisdiction to try the parent suit either at the time of its actual institution or at the later time when the application for transfer of the decree was filed.

After examining the position it is stated in paragraphs 5 and 6:

5. Section 12 of the Kerala Small Causes Courts Act, 1957 (for short ''the Act'') debars a Court of Small Causes from taking cognizance of the suits which were exempted from the cognizance of a Court of Small Causes. The converse position is enshrined in Section 13 of the Act, as it contains the interdict that ''a suit cognizable by a Court of Small Causes shall not be tried, by any Other Court. The position, therefore, is that the decree which was passed by a Court of Small Causes could not have been passed by the regular court, had the same suit been instituted in that court. In this view, I have to hold that the Petitioner is not entitled to get the decree transferred to the Munsiff''s Court for execution.

6. However, it has to be pointed out that the learned Munsiff did not act correctly in dismissing the execution petition on the mere opinion that the transfer prayed for would not be of any utility as the execution in the transferee court would by then get barred by limitation. Learned Counsel for the Petitioner submitted that an opportunity may be given to the Petitioner to amend the execution petition by incorporating such reliefs as are necessary to proceed against other movable properties of the judgment debtors and also to proceed against the person by arrest and detention. In the interest of justice, I am inclined to afford such opportunity to the Petitioner.

In 1989 (2) KLT 895 (Kavi Rajan v. Co-operative Tribunal), a Division Bench of this Court observed:

The Co-operative Tribunal is not a Court and therefore the provisions of the Limitation Act are not applicable. The Limitation Act does not apply to proceedings under the Kerala Co-operative Societies Act.

The learned Counsel for the Respondent would, therefore, argue that order of the Registrar under Chit Funds Act is not a decree. The Registrar is not a Court and therefore it cannot transfer a decree for execution to any Court. The above arguments weighed with the Court''s below in the dismissal of the execution petitions.

5. But on a closer examination of the provisions involved, I am of the view that the arguments advanced by the Respondents that the Registrar cannot transfer the decree for execution cannot hold water in view of Section 71(a) of the Chit Funds Act. As I had observed earlier, the Chit Funds Act provides for two modes of execution. One is to collect the amount due as arrears of land revenue, i.e.

proceedings under the Revenue Recovery Act. The other mode is that the Registrar should issue a certificate which is deemed to be a decree of a civil court and it shall be executed in the same manner as a decree of such court. Section 71(a) raises a legal fiction or fiction of law, if I may say so. According to the above provision, (1) the order of the Registrar shall be deemed to be a decree of the civil court and (2) it shall be executed in the same manner as a decree of such court. What is the effect of this fiction is contained in the Black''s Law Dictionary, 1959 Second Edition, at pages 494 and 495.

Fictio cedit veritati. Fictio juris non-est ubi Veritas. Fiction yields to truth. Where there is truth, fiction of law exists not.

Fiction est contra veritatem, sed pro veritate habetur. Fiction is against the truth, but it is to be esteemed truth.

Fictio juris non-est ubi Veritas. Where truth is, fiction of law does not exist.

FICTION. An assumption or supposition of law that something which is or may be false is true, or that a state of facts exists which has never really taken place. New Hampshire Strafford Bank v. Cornell 2 N.H. 324; Bihherd v. Smith.

A fiction is a rule of law which assumes as true, and will not allow to be disproved, something which is false, but not impossible. Best Ev. 419.

Thus when a law raises a fiction it presumes certain putative state of things existed and everything is done to give flesh, blood and breath to that putative state of things so as to treat it as a reality. To use a colloquial language, it is really a dummy. But by a legal fiction life is breathed into it so that it is treated like a real baby.

6. Section 71(a) raises such a fiction of law, namely, the order passed by the Registrar is a decree of execution Court and it shall be executed in the same manner as a decree of such court. The word ''such Court'' means the court executing the decree. The provisions u/s 71 show that while executing the order of the Registrar, executing court has to proceed in the same manner as its own decree. It is not executed as a decree received on transfer from Anr. court. Therefore all the arguments raised by the Respondent''s counsel that Registrar is not a court and the order is not a decree and it cannot be transferred to a civil court for execution lose its relevance. The law presumes that the civil court shall execute it as its own decree. In such cases no transfer of the decree is necessary or contemplated.

7. The above discussion shows that the reasoning of the court below in dismissing the Execution Petitions is ill-founded. But the matter does not rest there.

8. An argument raised by the counsel for the Respondents is that the Chit Funds Act, 1982 is not enforced in the State of Kerala and therefore the provisions of the said Act cannot be implemented. Even the question as to whether the Act is

implemented in the State of Kerala, there was dispute at the Bar. In the ''Central Enactments applicable to Kerala'' at page 211 Entry 40 is the Chit Funds Act, 1982. This Court had addressed the Government to clarify the applicability of the Chit Funds Act by letter No. F1-31061/91 dated 22nd July 1996. The Law Secretary has sent a letter, No. 15071/Leg. Pbn. 2/95/Law, dated 3rd January 1996. After referring to this Courts letter it is stated that "in response to the reference cited, it is informed that Chit Fund Act, 1982 (Central Act No. 40 of 1982) has not been made applicable to the State of Kerala so far." While the Government itself has informed thus that the Act is not enforced, there are other circumstances from which we can infer that the Act has not been enforced in the State of Kerala. Section 1(3) of the Act reads thus:

It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and. different dates may be appointed for different States.

This is a provision which enables the Central Government to make the law applicable to different States on different dates by notification in the Official Gazette. AIR Manual, 5th Edition at page 221 contains the dates on which the Act has been enforced in different States and concerned notifications. It is enforced in Bihar, Himachal Pradesh, Karnataka, Madhya Pradesh, Meghalaya, Orissa, Rajasthan, Sikkim, Tamilnadu and West Bengal. It is also enforced in Union Territories of Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Goa, Daman and Diu, Lakshadweep Islands and Pondicherry. It is not enforced in the State of Kerala. Section 1(3) of the Act says, that the Act shall come into force only on such date as the Central Government may by notification in the official Gazette may appoint. This is an essential pre-condition to enforce the law i.e. the Chit Funds Act, 1982. It can be done only by the notification issued by the Central Government. In fact Central Government has issued different notifications making the law applicable to different States. The various States have framed rules also under the Act as provided in Section 89 of the Act. In the above AIR Manual, at page 249, we get details of the Rules framed by each State and the Gazette notifications. Section 89 gives powers to State Government to make rules regarding certain items mentioned in Sub-section 2, items (a) to (t). Section 89(3) says that such rules shall be laid, as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House. Item (a) in Section 89(2) says the procedure for, and the manner of receiving any sum payable under this Act. Learned Counsel for the Respondents would argue that this need not refer to decree amount because Section 71(a) did not mention it specifically.

9. Even if we forget for a moment the argument that rules are unnecessary to implement the provisions of Act, we are faced with the reality that the provisions of the Act are not made applicable to the State of Kerala. It leads us to the next point, i.e. whether in such circumstances, the legal fiction that Registrar''s order

is a decree and it can be executed by the execution Court as its own decree as provided in Section 71(a) can be raised. Apparently the provisions of the law have not been made applicable to State of Kerala and therefore there is no question of raising such a presumption.

10. The learned Counsel for the revision Petitioner has tried to distinguish the matter by a very persuasive arguments. The learned Counsel argued that in executing a decree, the civil courts are not relying on any provisions of the Chit Funds Act, 1982, but on the provisions of Code of Civil Procedure, especially Order XXI. The argument is not without force because the power to execute its own decree with the civil court arises from the provisions of the CPC and not because of any provisions contained in Chit Funds Act, 1982. If this argument is accepted, the revisions will have to be allowed. But then the matter is not free from difficulties. The power of executing Registrar''s order as if it is a decree passed by an Executing Court stems from the legal fiction that is raised in Section 71(a). There is no other provision of law. It obliges the civil courts to treat the order passed by the Registrar under the Chit Funds Act as a decree of the civil court and if the said Chit Funds Act is not brought into force in a particular State, the courts in that State will not be able to treat the orders passed by the Registrar as a decree of the civil court, much less as a decree passed by such court. This is a fundamental factor which affords jurisdiction to the civil court to treat the orders of the Registrar under the Chit Funds Act as decree of a civil court. If the Chit Funds Act is not enforced in a particular State and none of the provisions of the Act are made applicable to the State, it is against the mandate to Section 1(3) of the Act to raise such a presumption. Therefore in the absence of enforcement of Chit Funds Act, 1982 in the State of Kerala, the civil courts cannot treat the orders of the Registrar under the Chit Funds Act as a decree of a civil court and it cannot be executed.

In view of the above discussion, the order of the Lower Court has to be confirmed, though for different reasons, and the Civil Revision Petitions are dismissed. No costs.