
(1989) 06 KL CK 0040
In the High Court Of Kerala
Case No : C.R.P. No. 376 of 1989-G

Canara Bank

APPELLANT

Vs

T.K. Thankappan

RESPONDENT

Date of Decision : 23-06-1989

Acts Referred:

Kerala Revenue Recovery Act, 1968 — Section 71

Citation : (1993) 76 CompCas 199 : (1990) 1 ILR (Ker) 243

Hon'ble Judges : T.V. Ramakrishnan, J; P.C. Balakrishna Menon, J

Bench : Division Bench

Advocate : T.R. Govinda Wariyar, P.V. Jyothiprasad and P. Bhavadasan, for the Appellant; K.P. Dandapani, for the Respondent

Final Decision : Allowed

Judgement

Balakrishna Menon, J.—This case comes up before a Division Bench on reference by Varghese Kalliath J., doubting the correctness of the decision of a learned single judge of this court in Maniyan v. Federal Bank Ltd. [1988] 2 KLT 722 : [1991] 71 Comp Cas 328. In that case, it is held that for the reason of the decree-holder's election to resort to the procedure under the Revenue Recovery Act, he is precluded from executing the decree of the civil court and the decree itself is void ab initio as one passed without jurisdiction.

2. A similar question arises for decision in this C. R. P. The revision petitioner, namely, the Canara Bank, had advanced a loan to the respondent for agricultural purposes. For failure, of the respondent to repay the loan, the bank took revenue recovery proceedings by resort to Notification S. R. O. No. 797 of 1979 issued by the Government of Kerala in exercise of the powers u/s 71 of the Kerala Revenue Recovery Act (Act 15 of 1968). The relevant part of the notification is extracted below :

"S. R. O. No. 797 of 1979.--In exercise of the powers conferred by Section 71 of the Kerala Revenue Recovery Act, 1968 (15 of 1968), and in supersession of

Notification No. 68933/B3/78/RD, dated 24th November, 1978, published as S. R. O. No. 1199 of 1978 in the Kerala Gazette No. 52, dated 26th December, 1978, the Government of Kerala, being satisfied that it is necessary to do so in public interest, hereby declare that the provisions of the said Act shall be applicable to the recovery of amounts due from any person to any bank on account of any loan advanced to such person by that bank for agriculture or agricultural purposes."

3. Since no recovery could be effected, the bank instituted O. S. No. 148 of 1985 before the Sub-Court, Kozhikode, and obtained a decree on August 30, 1988. The decree-holder-bank thereafter filed E. P. No. 278 of 1988 for attachment and sale of the cattle purchased by the judgment-debtor with the loan advanced by the bank. It is, at that stage, that the judgment-debtor filed E. A. No. 45 of 1989 for a declaration that the decree obtained by the bank is null and void and cannot be executed. The execution court, following the decision in *Aniyan and Others Vs. Federal Bank Ltd.*, , dismissed the execution petition declaring the decree as null and void. It is against this that the decreeholder bank has filed this revision petition.

4. A speedier remedy as provided for in the above notification for recovery of loans advanced by banks for purposes mentioned therein is perfectly valid and cannot be assailed in the light of the decisions of the Supreme Court in *Maganlal Chhaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay and Others*, *State of U. P. v. Arshad Ali Khan* AIR 1982 SC 780 and *State of Gujarat Vs. Dharamdas Viranand and Others*, The resort to such a remedy cannot, however, be said to create an estoppel by election as held in *Aniyan and Others Vs. Federal Bank Ltd.*, , to preclude the bank from pursuing the ordinary remedy of a suit for recovery of the loan. Spencer Bower, in his *Estoppel by Representation*. Third Edition, referring to election between two alternative courses of action, states at page 324 :

" Where A in his dealing with B, being at liberty to adopt either of two mutually exclusive steps, proceedings, courses of action, or attitudes, in relation to B, elects to take or adopt one of them, and to reject the other, or to "waive" his right in respect thereof, and A's declaration of such election or "waiver" by words, conduct, or inaction, influence B to alter his position to his detriment, A is estopped, as against B, from thereafter resorting to the. course of action which he has thus intimated his intention of relinquishing, dispensing with, or "waiving"."

5. As to the principle of election applied in the conduct of litigations, the learned author states at page 333 :

"The last of the four fields in which the doctrine under discussion may be observed in operation, and, perhaps, the most important and interesting of them all, because yielding the greatest variety of illustrative examples, is the conduct of litigation, in the course of which it very frequently happens that a party litigant

is confronted with the necessity of immediately making a definite choice between two possible courses of action which are mutually exclusive. Whenever, this occurs, the general rule of estoppel by election comes into play : that is to say, if by words, or (as is almost invariably the case) by conduct or inaction, he represents to the other party litigant his intention to adopt one of the two alternative and inconsistent proceedings or positions, with the result that the latter is thereby encouraged to adopt or persevere in a line of conduct which he otherwise would have abandoned or modified, or (as the case may be) to change tactics from which he otherwise would never have deviated, the first party is estopped, as against his antagonist, from resorting afterwards to the course or attitude which, of his free choice, he has waived or discarded."

6. The principle of estoppel by election would arise only in cases where the two courses of action available are mutually exclusive and the opposite party on the faith of the representation by conduct or otherwise has acted to his detriment or has adopted a course of action which otherwise he would not have resorted to. The two remedies available to the bank cannot be said to be mutually exclusive. There is nothing preventing the bank from resorting to the ordinary remedy of a civil suit on failure of the speedier remedy of revenue recovery proceedings. It cannot also be said that resort to the speedier remedy is an indication of abandonment of the remedy by way of a civil suit, nor can it be said that the judgment debtor had on the faith of such representation by election acted to his detriment or had adopted a particular course of action which he would not have otherwise resorted to.

7. The learned judge has referred to the decisions in *Rungama v. Atchama* [1846] 4 MIA 1, *Baikuntha v. Salimulla* [1907] 6 CriLJ 547, *R. Samudra Vijayam Chettiar v. Srinivasa Alwar* AIR 1956 Mad 301 and *Raghavan Nair v. Appu Kidavu* ILR [19791 Ker 25 ; [1979] KLT 458, in support of the proposition that the choice of remedy by way of revenue recovery proceedings estops the bank from pursuing the ordinary remedy of a civil suit and the civil court has no jurisdiction to pass a decree. The learned judge observed at page 332 of 71 Comp Cas :

" Applying this principle to the facts of the case, it should be held that the bank in choosing the revenue recovery proceedings for recovery of the loan amount due from the first petitioner must be deemed to have waived the other. If that be so, the suit is not maintainable in law. The decree passed therein, therefore, is null and void and hence incapable of execution."

8. No question of the choice of remedies or the court's jurisdiction to pass a decree arose in *Rungama v. Atchama* [184G] 4 MIA 1. That case related to the estate left behind by a father consisting of ancestral as well as his separate properties. The father had made a settlement dividing the properties between his two adopted sons. On challenge of the settlement by the first son, the Privy Council held that even though the second adoption was invalid in law and cannot affect the first son's right to the ancestral properties, he was precluded from challenging the division of the separate properties of the father for the reason of

his acceptance and acquiescence. It is in that context that the Privy Council observed at page 103 :

" Applying, then to this case, a principle not peculiar to English law, but common to all law, which is based on the rules of justice, namely, the principle, that a party shall not, at the same time, affirm and disaffirm the same transaction. -- affirm it as far as it is for his benefit, and disaffirm it as far as it is to his prejudice,--we think, that effect must be given against the estate of Jaganadha, to the intentions of Vencatadry, as far as he had the power of effecting them. If Jaganadha takes, as we think he is entitled to do, the whole ancestral property, which the father could not dispose of, without his consent, we think he must give up, for the benefit of Ramanadha, the whole property included in the division, to the disposition of which, his consent was not necessary."

9. In *Baikuntha v. Salimulla* [1907] CriLJ 547, it was held that once a remand order has been carried out, it is not open to the party taking the benefit of it to challenge the same by way of an appeal even though it is open to him to appeal against the final decree in the suit questioning also the validity of the order of remand. This case is not an authority for the proposition that in cases of concurrent remedies, the choice of one will necessarily bar the other. It is observed at page 556 :

" It may be a question of some nicety in any individual case, whether the remedies are alternative or co-existent and cumulative ; for instance, there may be room for discussion whether upon the facts of the case of *Beni Madhub v. Jatindra Mohan* [1907] 5 CriLJ 580, the doctrine of election of alternative remedies had any application. The present case, however, seems to me to be reasonably free from any such difficulty. When an order of remand has been made, its validity may be challenged directly and immediately by an appeal u/s 588, Clause (28), or indirectly u/s 591, when an appeal is preferred against the final decree in the suit (*Moheshur Singh v. Bengal Government*). The party affected by the order of remand, however, must make his election. He may, if he chooses, prefer an appeal against the order of remand and obtain a stay of proceedings during the pendency of the appeal ; he may, on the other hand, carry out the order of remand, take the chance of successful termination of the suit, in his favour, and in the event of defeat, prefer an appeal against the final decree in which the validity of the order of remand may be questioned. He cannot, however, if he has carried out the order of remand and taken the full benefit of it, turn round and prefer an appeal against the order of remand."

10. In *R. Samudra Vijayam Chettiar v. Srinivasa Ahvar*, AIR 1956 Mad 301, it was held that a mortgagor on redemption of the mortgage cannot treat the tenant of the mortgagee as a trespasser once he has treated the tenant as holding under him directly. Initiation of proceedings for his eviction before the Rent Controller was held to constitute an election on the part of the mortgagor to treat him as his tenant, which was wholly inconsistent with his claim for mesne profits against the erstwhile mortgagee. It was for the reason of such an inconsistent stand

taken by the mortgagor, he was held bound by his election. No question of want of jurisdiction of the court to pass a decree arose in that case. In *Raghavan Nair v. Appu Kidavu* [1979] KLT 458, the question referred to the Division Bench is extracted in paragraph 2 of the judgment as follows (at page 460) :

" The principal question involved in the appeal is whether the appellants' suit is incompetent or barred because they approached the court with an interlocutory petition when the receiver in a suit to which they are not parties dispossessed them and invited an adverse order from which they did not appeal."

11. The Division Bench held that a separate suit is not barred for the reason of an adverse order under Order 40, rule 1(2), Civil Procedure Code. The Division Bench held at page 467 :

" A person whose possession is sought to be interfered with by the receiver can seek his remedy by an application to the court which appointed the receiver or institute a separate suit with the receiver on the party array after obtaining sanction of the court that appointed the receiver to establish his present right to possession. But then it cannot be said that the remedies are alternative and inconsistent, it will not be right to say that when once the stranger has chosen the summary remedy by filing an application under Order 40, rule 1(2), Civil Procedure Code, and when he has been unsuccessful in that application it is no longer open to him to file a fresh suit to establish his rights in the property. The enquiry that is contemplated in the earlier proceedings is only a summary remedy and the court's jurisdiction to consider the matter in a separate suit is not in any way ousted."

12. It cannot be said that the two remedies available to the bank are mutually exclusive. It cannot also be said that the respondent had altered his position on the strength of any representation by the bank by conduct or otherwise. We are, therefore, clearly of the view that the doctrine of estoppel by election does not apply to the present case.

13. Even if the doctrine is held to apply it cannot be said that the civil court had no jurisdiction to pass the decree sought to be executed. It is only in cases of inherent want of jurisdiction that the execution court can refuse to execute the decree. The Supreme Court in *Seth Hiralal Patni Vs. Sri Kali Nath*, , stated at page 200 :

" The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it."

14. In *Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others*, it is

stated at page 1476 :

"A court executing a decree cannot go behind the decree between the parties or their representatives ; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when a decree is made by a court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record : where the objection as to the jurisdiction of the court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. "

15. In *Sunder Dass Vs. Ram Prakash*, , it is stated at page 1204 :

" Now, the law is well-settled that an executing court cannot go behind the decree nor can it question its legality or correctness. But there is one exception to this general rule and that is that where the decree sought to be executed is a nullity for lack of inherent jurisdiction in the court passing it, its invalidity can be set up in an execution proceeding. Where there is lack of inherent jurisdiction, it goes to the root of the competence of the court to try the case and a decree which is a nullity is void and can be declared to be void by any court in which it is presented. Its nullity can be set up whenever and wherever it is sought to be enforced or relied upon and even at the stage of execution or even in collateral proceedings. The executing court can, therefore, entertain an objection that the decree is a nullity and can refuse to execute the decree. By doing so, the executing court would not incur the reproach that it is going behind the decree, because the decree being null and void, there would really be no decree at all, vide *Kiran Singh and Others Vs. Chaman Paswan and Others*, and *Seth Hiralal Patni Vs. Sri Kali Nath*, It is, therefore, obvious that in the present case, it was competent to the executing court to examine whether the decree for eviction was a nullity on the ground that the civil court had no inherent jurisdiction to entertain the suit in which the decree for eviction was passed. If the decree for eviction was a nullity, the executing court could declare it to be such and decline to execute it against the respondent."

16. It is only in such cases where the court lacks inherent jurisdiction that the executing court can decline to execute the decree.

17. The plea of estoppel by election even if available is one which the judgment-

debtor might and ought to have raised at the trial of the suit. Once the suit has ended in a decree, it is not open to the judgment-debtor to raise an objection at the execution stage that the decree ought not have been passed as the suit is barred by estoppel. The Privy Council in AIR 1936 258 (Privy Council) has held that, unless a plea of res judicata is raised, the court is competent to go into the question on merits and the decree passed will not be lacking in jurisdiction.

18. In *Ittavira Mathai Vs. Varkey Varkey and Another*, , it is held that a decree passed in a suit, entertained by ignoring the bar of limitation u/s 3 of the Limitation Act, is nevertheless a valid decree, and cannot be ignored as one passed without jurisdiction. In *Craies on Statute Law, Seventh Edition*, it is stated at page 269 :

" Where a statute deprives a person of a legal remedy, but does not deny him a cause of action (e.g., the Statute of Frauds and its replacements or a Statute of Limitation), courts of justice, whether under the specific rules of procedure or under their general course of practice, treat the right of the defendant to bar the remedy as waived if he does not plead the statute which bars it. " It is evident", said Alderson B., "that a party who has a benefit given him by statute may waive it if he thinks fit ". "

19. It is thus clear that so long as the cause of action is not extinguished, there is no question of any inherent lack of jurisdiction. We are, therefore, of the view that *Aniyan and Others Vs. Federal Bank Ltd.*, , is not correctly decided.

20. For the aforesaid reasons, we set aside the order of the court below and restore E. P. No. 278 of 1988 to be proceeded with in accordance with law. The civil revision petition is allowed. The parties will suffer their respective costs.