
(2001) 06 KL CK 0037
In the High Court Of Kerala
Case No : C.R.P. No. 540 of 2001

Francis

APPELLANT

Vs

St. Thomas Church

RESPONDENT

Date of Decision : 15-06-2001

Acts Referred:

Constitution of India, 1950 — Article 13(1)

Kerala Buildings (Lease and Rent Control) Act, 1965 — Section 13(1), 2, 25, 250

Citation : (2001) 3 ILR (Ker) 64

Hon'ble Judges : K.A. Mohamed Shafi, J

Bench : Single Bench

Advocate : K. Jagadishchandran Nair, for the Appellant; P.K. Aboobacker, for the Respondent

Final Decision : Allowed

Judgement

K.A. Mohamed Shafi, J.—The judgment debtor in E.P. 351/99 in O.S. 768/96 on the file of the Munsiff's Court, Paravur has filed this revision petition challenging the order in the E.P. dated 27.1.2001 ordering delivery of possession of the plaint schedule property, overruling the contention raised by him that the decree is not executable.

2. In the above suit filed for eviction of the revision petitioner from the plaint schedule property owned by the respondent-Church, a compromise decree for eviction was passed in favour of the respondent-plaintiff, directing the revision petitioner to surrender vacant possession of the plaint schedule property on or before 31.12.1998, failing which allowing the plaintiff to recover possession by instituting execution proceedings. As the petitioner did not surrender possession as directed in the decree, the respondent filed the E.P. The revision petitioner entered appearance before the Court and contended that the decree is not executable and therefore, the E.P. is not maintainable. He contended that the notification issued by the Government of Kerala whereby the minority institutions were exempted from the operation of the Kerala Buildings (Lease & Rent Control)

Act basing which the above suit was filed, is struck down by this Court as ultra vires of the Constitution, by judgment dated 22.11.1999. Therefore, the decree has become void and the execution petition is not maintainable. According to him, the decree holder can seek eviction by instituting separate suit or proceedings under due process of law. The lower court overruled the contentions raised by the judgment debtor and directed delivery of possession of the property.

3. It is not in dispute that the above suit is filed by the respondent against the petitioner for eviction on the basis of the exemption granted by the Government of Kerala from the operation of the Kerala Buildings (Lease & Rent Control) Act to the buildings owned by the minorities institutions. That notification is struck down by a Division Bench of this Court in the decision in Krishna Pillai v. Infant Jesus Church 2000 (1) KLT 197 holding that the notification is unconstitutional and ultra vires of S. 25 of the Kerala Act 2/1965.

4. The above decree under execution is passed before the above judgment was delivered by the Division Bench of this Court. Therefore, the respondent has contended that the judgment passed by this Court quashing the notification has only prospective operation and it will not affect the judgments and decree passed by the courts before the pronouncement of the judgment by the Division Bench.

5. In the decision in Mani Subrat Jain Vs. Raja Ram Vohra, the Supreme Court has observed as follows:

"We fee no difficulty in holding that the text , reinforced by the context, especially S. 13, convincing includes ex-tenants against whom decrees for eviction might have been passed, whether on compromise or otherwise. The effect of the compromise decree, in counsel's submission, is that the tenancy has been terminated. Nobody has a case that the appellant is not continuously in possession. The conclusion is inevitable that he remains a tenant and enjoys immunity under S. 13(1). The execution proceedings must, therefore, fail because the statutory road block cannot be removed".

6. In that case a compromise decree was passed in a suit filed by the landlord for eviction of the tenant. The landlord sought to evict the tenant from the property in execution of the decree before the East Punjab Urban Rent Restriction Act 3/49 came into force. The Supreme Court has held that under Ss. 2(i) and 13(1) of the Act tenant includes quondam tenant continuing in possession and therefore, he is entitled to immunity from eviction under S. 13(1). Therefore it is clear that even if a decree for eviction is passed on compromise between the parties or otherwise, that decree can be executed only in terms of the law prevalent on the decree is sought to be executed.

7. In the decision in Deep Chand Vs. The State of Uttar Pradesh and Others, the Supreme Court has observed as follows:

"Whether a post-Constitution law of the other kind, namely, which infringes a fundamental right guaranteed to all persons, irrespective of whether they are

citizens or not, and which, therefore, can have no operation at all when it is enacted, is to be regarded as a still born law as if it had been enacted at all and, therefore, not subject to the doctrine of eclipse is a matter which may be open to discussion".

xxx xxx xxx xxx "This principle has no application to post-Constitution laws infringing the fundamental rights as they would be ad initio void in toto or to the extent of their contravention of the fundamental rights".

8. In the decision in Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, the Supreme Court has observed as follows:

"Therefore, where there is a question of a post-Constitution law, there is a prohibition against the State from taking away or abridging fundamental rights and there is a further provision that if the prohibition is contravened the law shall be void to the extent of the contravention. In view of this clear provision, it must be held that unlike a law covered by Art. 13(1) which was valid when made, the law made in contravention of the prohibition contained in Art. 13(2) is a still-born law either wholly or partially depending upon the extent of the contravention. Such a law is dead from the beginning and there can be no question of its revival under the doctrine of eclipse."

9. In the decision in The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another, the Supreme Court has observed as follows:

"The same scheme permeates both the sub-articles, namely, to make the law void in Art. 13(1) to the extent of the inconsistency with the fundamental rights, and in Art. 13(2) to the extent of the contravention of those rights. In other words, the voidness is not in rem but to the extent only of inconsistency or contravention, as the case may be of the rights conferred under Part III. Therefore, when Arts. 13(2) uses the expression "void" it can only mean, void as against persons whose fundamental rights are taken away or abridged by a law. The law might be "still-born" so far as the persons, entities or denominations whose fundamental rights are taken away or abridged, but there is no reason why the law should be void or "still-born" as against those who have no fundamental rights."

10. Therefore, it is clear that once the law is declared as unconstitutional as violative of Art. 13(2) of the Constitution, from the very inception, it is void and it cannot be contended that the law stood to be good till the date of declaration by the competent court as ultra vires of the Constitution. Therefore, the respondent cannot execute the decree in this case on the ground that it was passed before the judgment was passed by this Court declaring the notification as ultra vires of the Constitution.

11. The revision petitioner has contended that even though the plaint schedule building is situated in a rent control area, the respondent could file suit for eviction only on the basis of the notification issued by the Government taking

away the building in question from the purview of the Rent Control Act. Therefore, the respondent can evict the petitioner only as contemplated under the provisions of the Kerala Act 2/65. The question whether the respondent can evict the petitioner only as provided under the provisions of the Kerala Act 2/65 and whether the provisions of Kerala Act 2/65 will apply to the building in question, are not matters germane for disposal of the above C.R.P. Therefore, I am not considering the question whether the provisions of the Rent Control Act 2/65 are applicable to the plaint schedule building or not.

12. The contention of the respondent that since the decree in this case is passed with the consent of the petitioner as compromise decree, the petitioner cannot challenge the same, is not sustainable.

13. In the decision in State of Punjab (Now Haryana) and Others Vs. Amar Singh and Another, as well as in the decision in Mani Subrat Jain Vs. Raja Ram Vohra, already referred to above, the Supreme Court has that compromise decrees contrary to statutory provisions are not executable.

14. The counsel for the respondent submitted that the decree passed in this case is not challenged by the petitioner-defendant in appeal and therefore, the same has become final. Therefore, the petitioner cannot contend that the decree is not executable. In support of this contention the counsel for the respondent relied upon the decision of a single Judge of the Delhi High Court in Om Parkash Vs. Kanshi Nath Sham Lal and Others, .

15. The facts and circumstances of the case obtaining in the case that came up for consideration before the Delhi High Court in the above decision and the facts and circumstances of the case in the above C.R.P. are entirely different. The observations made by the Delhi High Court in the reported case have absolutely no bearing to the facts and circumstances of this case. Therefore, the above decision of the Delhi High Court is of no help to the respondent.

16. In view of the position of law as laid down by the Supreme Court as noted above, it is clear that the respondent is not entitled to execute the decree passed in the above suit against the petitioner and therefore, the lower court has committed an error of jurisdiction in allowing the E.P. and ordering delivery of the property in favour of the respondent overruling the objections raised by the petitioner. Therefore the impugned order cannot be sustained.

Hence the C.R.P. is allowed. The impugned order is set aside and the E.P. filed by the respondent is dismissed as the decree is not executable.