
(2017) 02 KL CK 0007
In the High Court Of Kerala
Case No : OP (FC).No. 189 of 2015 (R)

Hanifa Kalangattu

APPELLANT

Vs

Shaista Khan

RESPONDENT

Date of Decision : 02-02-2017

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13(b), Section 44A
Family Courts Act, 1984 — Section 18

Citation : (2017) 2 KerLJ 556 : (2017) 2 KLT 100

Hon'ble Judges : Mr. A.M. Shaffique and Mr. K.Ramakrishnan, JJ.

Bench : Division Bench

Advocate : Sri. C.S. Dias, Sri. N.K. Subramanian and Smt. B. Bindu, Advocates, for the Petitioners; Sri. G. Sreekumar (Chelur) and Sri. K.R. Arun Krishnan, Advocates, for the Respondents

Final Decision : Dismissed

Judgement

A.M. Shaffique, J.—This original petition has been filed challenging the order dated 7.4.2015 in EP.No.57/2011. The execution petition was filed by the respondent herein for executing a foreign judgment. Exts.P4 to P7 are the orders passed by the Superior Court of Justice at Ontario, Canada. When the execution petition was filed, the petitioner had raised certain objections including the maintainability of execution petition. However without considering the same, the Family Court, Thrissur proceeded to consider whether the foreign judgment is executable and formed an opinion that the judgment debtor had transferred certain funds while the decree was in force with an intention to defeat the payment of the amount due to the decree holder and accordingly directed arrest warrant to be issued against the judgment debtor.

2. The main contention urged by the petitioner is that the documents produced by the respondent herein does not amount to a foreign judgment which can be executed before a Court in India. The primary contention raised is that the parties are foreign nationals and the direction by the Canada Court can only be

executed at Canada and not in India. Secondly it is contended that it is an ex parte order which is not decided on merits and cannot be executed before this Court in terms of Section 13(b) of the Code of Civil Procedure. It is also contended that the Family Courts have no jurisdiction to execute such an order, only a District Court having civil jurisdiction can execute, if at all it is executable. The Family Courts are formed under the Family Courts Act and its jurisdiction is confined under Section 18 of the Act which did not include execution of foreign judgments. Further it is contended that, as per Section 44 A of the Code of Civil Procedure a decree of foreign court can be executed only if certified copy of decree of any of the Superior Court of any reciprocating territory has been filed before the District Court. There is no material to indicate that Canada is a reciprocating territory which would enable the said foreign judgment to be enforced and executed by this Court.

3. The learned counsel appearing for the petitioner also placed reliance on the judgment of this Court in *Lakshmi Priya Seshan v. Shankar Guhadas* (2013 (4) KLT 362) and the Apex Court judgment in *International Woollen Mills v. Standard Wool (U.K.) Ltd.* (2001 (5) SCC 265) to contend for the position that an ex parte foreign judgment passed without discussion of any oral or documentary evidence, is not the judgment as provided under Section 13(b) of the Code of Civil Procedure, therefore cannot be executed by the District Court.

Section 13 (b) reads as under:

13. When foreign judgment not conclusive:- A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except:-

(a) xxxx xxxx

(b) where it has not been given on the merits of the case.

A perusal of Exts.P5 to P7 would show that it is an ex parte order and therefore even assuming it is a foreign judgment, since it is passed ex parte and therefore Section 13(b) applies to the fact situation and therefore such a decree is not executable in India. Even otherwise as per Section 44 A of the Code of Civil Procedure what is to be produced before the District Court for execution is the certified copy of the decree of any of the Superior Court in any reciprocating territory. Section 44 A reads as under:

44-A. Execution of decrees passed by Courts in reciprocating territory:- (1) Where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in [India] as if it had been passed by the District Court.

(2) Together with certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this

section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of Section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of the District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree fails within any of the exceptions specified in Cls.(a) to (f) of Section 13.

Explanation 1: - "Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating, territory for the purposes of this section; and "superior Courts" with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 2: - "Decree" with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.]

No materials are produced either before the Family Court or before this Court to indicate that Canada is a reciprocating territory as far as Government of India is concerned. In the absence of any such material, there is a clear bar of jurisdiction for entertaining the execution petition which has been totally ignored by the Court below.

4. Further as rightly contended by the learned counsel for the petitioner an execution petition could not have been filed before the Family Court. The Family Court's jurisdiction is confined to Section 18 of the Act, which reads as under:

"18. Execution of decrees and orders:-(1)A decree or an order [other than an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)] passed by a Family Court shall have the same force and effect as a decree or order of a civil court and shall be executed in the same manner as is prescribed by the Code of Civil Procedure, 1908 (5 of 1908) for the execution of decrees and orders.

(2) An order passed by a Family Court under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) shall be executed in the manner prescribed for the execution of such order by that Code.

(3) A decree or order may be executed either by the Family Court which passed it or by the other Family Court or ordinary civil court to which it is sent for execution.

5. The orders issued by the Foreign Court is not by a Family Court. Even otherwise Exts.P5 to P7 if at all executable can only be termed as a judgment of a foreign Court and foreign Court judgment has to be executed only before the District Court. The Family Court has been given special jurisdiction in terms of

the Family Court's Act and the District Court as specified in Section 44 A is the ordinary District Court having civil jurisdiction. In that view of the matter also we are of the view that the Family Court did not have any jurisdiction to entertain the execution petition.

6. On an over all appreciation of the factual aspects and the contentions urged on either side, we are of the view that the execution petition was not maintainable before the Family Court and therefore it has to be held that the impugned order is without jurisdiction.

7. Accordingly, this original petition is allowed and Exts.P13 order is hereby set aside.