
(2012) 07 KL CK 0332

In the High Court Of Kerala

Case No : Writ Petition (C) No. 12275 of 2012

Kuriachan Chacko

APPELLANT

Vs

State of Kerala and others

RESPONDENT

Date of Decision : 26-07-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 102, 105A, 105A(e), 105B, 105B(2)
Registration Act, 1908 — Section 89, 89(5)

Citation : (2012) 3 ILR (Ker) 631 : (2012) 3 KLJ 620 : (2012) 3 KLT 600

Hon'ble Judges : T.R. Ramachandran Nair, J

Bench : Single Bench

Advocate : M.K. Damodaran, Sri O.V. Maniprasad and Sri Saju J. Panicker, for the Appellant; Joseph George, (Government Pleader) and Smt. T.D. Rajalakshmi, for the Respondent

Final Decision : Allowed

Judgement

Mr. Justice T.R. Ramachandran Nair

1. The writ petition is filed by the petitioner challenging the alleged unauthorised endorsement of attachment made against the property of the petitioner, in the encumbrance certificate. The question raised is whether the Sub Registrar is competent to make an endorsement regarding attachment of immovable property on the basis of a request made by an investigating officer, who is conducting an investigation into certain crimes, involving the owner of the property. The necessary facts for the disposal of the case, are the following: The petitioner is the Managing Partner of a registered partnership firm "LIS". The firm purchased 10 cents of property included in Survey No. 380/2 of Ernakulam Village, as per Ext. P-1 registered assignment deed. The petitioner obtained Ext. P-2 encumbrance certificate for the purpose of obtaining a loan from a bank. An attachment has been shown in the encumbrance certificate and when enquiries were made, the petitioner was supplied with the copy of a letter issued by the third respondent Assistant Commissioner of Police, Narcotic Cell, addressed to

the Sub Registrar. It is mainly submitted that Ext. P-3 cannot be treated as an order of attachment by a lawful authority.

2. Heard learned Senior Counsel for the petitioner Shri M.K. Damodaran and Shri O.V. Maniprasad for the petitioner, Smt. T.D. Rajalakshmi, learned counsel appearing for the impleaded additional fourth respondent and learned Government Pleader, Shri Joseph George.

3. The impleading petition is filed by the additional fourth respondent stating that in the partnership firm he has invested an amount of Rs. 15.5 lakhs and the maturity amount has not been disbursed so far.

4. Learned Senior Counsel for the petitioner mainly contended that the Sub Registrar is not empowered by any provisions of the Code of Criminal Procedure, 1973 to pass an order of attachment and to show the same in the encumbrance certificate. It is submitted that an order of attachment can be passed only by a competent court which is absent here. It is further pointed out that the provisions under the Crl. P.C., especially Section 102 and Chapter VIIA will not apply as far as the present situation is concerned. Learned Senior Counsel relied upon a Full Bench decision of the Bombay High Court in Sudhir Vasant Karnataki v. The State of Maharashtra Criminal Writ Petition No. 3198/2009 and that of the Apex Court in State of Madhya Pradesh Vs. Balram Mihani and Others, .

5. The stand taken by the Sub Registrar, in the statement filed before this Court, is that Ext. P-3 communication was issued by the third respondent to prevent further alienation of the property. The Police has registered two crimes against the petitioner, viz. Crime Nos. 672/2006 of Central Police Station, Ernakulam and 133/2006 of Museum Police Station, Thiruvananthapuram. It is further stated that the investigation revealed that the accused firm run by the petitioner, after receipt of hefty amount to the tune of Rs. 447.63 crores in the year 2005 from the public, invested the money in real estate business. It is stated that from the records obtained from Mattanchery Sub Registrar Office, it is revealed that the accused has purchased land worth Rs. 3.5 crores in 2005 and sold out the same to the Kerala Cricket Association for Rs. 25.5 crores, in the year 2010. It is also submitted that the petitioner has purchased properties in his name and in the name of his relatives by committing fraud and criminal misappropriation with the ill gotten money obtained from the subscribers. So, the investigation revealed that these properties were not only the sale proceeds of crime but also the material evidence of the crime, though converted to be immovable properties. Finally, in para 7 it is stated that the entries are made in the records in good faith and intention to support the request of the third respondent as it has been considered to protect the interest of the Government. Therefore, the plea raised is that Crime Nos. 672/2006 and 133/2006 have been registered against the firm.

6. The entries in Ext. P-2 encumbrance certificate refer to the letter dated 26-7-2011 describing it as an attachment/prohibitory order. In the third column meant for giving details and nature of the document, the entry made is the

following: "attachment/prohibitory order .

7. Before going into the merits of the controversy, it is also worthwhile to mention about the contents of Ext. P-3 letter. Therein, a request is made to the Sub Registrar to examine the details of encumbrance attached to the letter; ascertain whether the items of properties shown are still remaining in the name of the person whose details are furnished in column No. 6; whether the properties have been transferred and if so, the details of the property, if any, transferred, with the relevant dates and to furnish a report on the same. The further request made is to take urgent steps to prevent alienation of properties which have not been transferred so far since the investigation is going on in the cases referred to therein and to take steps for attachment of those properties, so as to prevent alienation. The two criminal cases referred to are Crime Nos. 672/2006 of Central Police Station, Emakulam and 133/2006 of Museum Police Station, Thiruvananthapuram.

8. Therefore, it is clear, going by the averments in the statement filed by the second respondent and the entries made in Ext. P-2, that the said letter has been treated as an order of attachment (or a request to attach) so as to make necessary endorsements in the relevant records and in the encumbrance certificate showing that there is an attachment against the said item of the property.

9. An examination of the relevant provisions of the Code of Criminal Procedure is required, to understand its scope and content. Section 102 of the Cr. P.C. as amended, reads as follows:

102. Power of Police Officer to seize certain property.--(1) Any Police Officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such Police Officer, if subordinate to the officer in-charge of a police station, shall forthwith report the seizure to that Officer.

(3) Every Police Officer acting under sub-section (1), shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same:

Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five

hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of Sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale.

It gives power to the Police Officer to seize certain property and going by sub-section (1), any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Evidently, going by the stand of the respondents herein,--even though it is not made clear whether the action is u/s 102,--only if the second limb is attracted, the same can be justified. Sub-section (3) is also important to understand the scope of subsection (1). It enables the police officer to give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same. The provision will come to the aid in cases where the property seized is such that it cannot be conveniently transported to the Court, or where there is difficulty in securing proper accommodation for the custody of such property or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation. The proviso therein applies in cases where the property seized is subject to speedy and natural decay. A specific provision for attachment is not there in Section 102 and what is provided is the power of the Police Officer to seize certain property. The provision for attachment is contained only in relation to Sections 82 and 83 of the Code. Section 82 provides for proclamation for person absconding and Section 83 relates to attachment of property of person absconding. Going by sub-section (1) therein, power is conferred on the Court issuing a proclamation u/s 82 to order attachment of any property movable or immovable, or both, belonging to the proclaimed person. The same can be ordered for reasons to be recorded in writing and at any time, after the issuance of the proclamation and the proviso confers power to pass such orders at the time of issuance of the proclamation if circumstances therein are satisfied. Sub-sections (3) to (6) contain detailed provisions as regards the procedure to order attachment and other ancillary matters. Section 84 deals with the procedure for disposing of claims and objections to attachment. Section 85 deals with release, sale and restoration of attached property and Section 86 provides for appeal from order rejecting application for restoration of attached property.

10. One thing to be noticed herein is that the attachment can only be ordered by the Court by passing a separate order for that purpose. The next important provisions are contained in Chapter VII A of the Code. Chapter VII A is under the heading "Reciprocal arrangements for assistance in certain matters and procedure for attachment and forfeiture of property". Section 105A contains various definitions. Actually, the said provisions cannot apply to a fact situation like this, in the light of the declaration of law made by the Apex Court in *State of Madhya Pradesh Vs. Balram Mihani and Others*, wherein it was held that the said provisions are applicable only to offences which have international

ramifications. Therein, the facts show that the Station House Officer filed an application before the concerned criminal court for attachment and forfeiture of properties by describing that the properties were derived from or used in commission of offences and were acquired from the criminal activities. Practically, similar allegations have been made herein also. The trial court passed an order which was challenged before the High Court of Madhya Pradesh and the High Court quashed the proceedings, holding that the provisions of Chapter VII A are not applicable to local offences. After considering various aspects, the Apex Court, in paragraphs 16 and 17, held as follows:

16. We have even taken into consideration the speech of the then Home Minister Shri S.B. Chavan which leaves no doubt that this Chapter is not meant for the local offences. When we see the applications as also the order passed by the trial court, it is clear that it is only and only in respect of the local offences like gambling and the offences under IPC which are local. Even the properties are not shown to be connected with crimes mentioned in the Statement of Objects and Reasons of the amending Act. In fact, no connection is established also between crimes mentioned and the properties. Such properties are clearly not included in Section 105C. Though the language of Section 105C(1) is extremely general, its being placed in Chapter VII A cannot be lost sight of. Again there is a clear-cut reference in sub-section (2) thereof to the contracting State, the definition of which is to be found in Section 105A(e). It is, therefore, clear that the property envisaged in Section 105C(1) cannot be an ordinary property earned out of ordinary offences committed in India.

17. Where the language is extremely general and not clear, the contextual background has to be taken into consideration for arriving at clear interpretation. Some assistance was tried to be taken from the language of Section 105B(2) which starts with the words "notwithstanding anything contained in this Code". However, when the sub-section is read in entirety, it is clear that it makes reference to a person who is in "contracting State". Therefore, even that reference will not bring in any provision within the scope of general law. We again cannot ignore the express language of Sections 105B and 105C which starts with the words "where a court in India". If this Chapter was meant for the general offences and the properties earned out of those general offences in India, then such a phraseology would not have been used by the legislature.

Therefore, there cannot be any iota of doubt that Chapter VII A will not apply as far as ordinary property earned out of ordinary offences committed in India. Therefore, the provision left to be considered is Section 102 alone, as Sections 83 and 84 cannot have any application here.

11. A Full Bench of the Bombay High Court in *Sudhir Vasant Karnataki v. The State of Maharashtra* CrI. W.P. No. 3198/2009 has considered similar points and by a majority took the view that the expression "any property" used in subsection (1) of Section 102 does not include immovable property and a police officer cannot take control over any immovable property which may be found in

circumstances which may create suspicion of commission of any offence. The relevant findings contained in paragraphs 76 and 77, are extracted below:

76....But we would repeat that it is difficult to conceive that an immovable property could be found in circumstances creating suspicion of commission of offence to warrant its seizure. The situation at a place of offence may provide evidence of commission of crime, such as finding incriminating articles, dead body, blood stained clothes, weapons, etc. This has to be distinguished from finding the immovable property itself as creating suspicion of commission of crime. Therefore, on question (a) we hold that the expression "any property" used in Section 102 of the Code cannot be given widest possible interpretation to include immovable property as well, since it is difficult to conceive that any immovable property could ever be found in circumstances which may create suspicion of commission of any offence.

77. As regards question (b), since it is not conceivable that any immovable property could ever be found under the circumstances which could create suspicion of commission of any offence, except the cases in which the immovable property is itself acquired from the proceeds of a crime such as in cases of disproportionate assets under the Prevention of Corruption Act, 1987 or 1988, and which can be sufficiently and adequately dealt with by the police officer during investigation by its attachment under the Criminal Law (Amendment) Act (supra), there could be no question of police officer being in a position to take control of such immovable property....

12. The meaning of the word "property" in Section 102 had come up for consideration before the Apex Court in *State of Maharashtra Vs. Tapas D. Neogy*, in relation to the bank account of accused or his relation. The question was considered whether in relation to bank account, the power u/s 102 could be invoked. In para 12 it was held as follows:

We are, therefore, persuaded to take the view that the bank account of the accused or any of his relations is "property" within the meaning of Section 102 of the Criminal Procedure Code and a police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence for which the police officer is investigating into.

In fact, the said dictum also will not help to advance the case of the respondents herein, since we are concerned with the immovable property of the accused.

13. Section 102, by no stretch of imagination, can apply in a situation like this. Even though the words "any property" are there in Section 102, it is clear from a reading of sub-sections (1) to (3) together, that what is involved is not the seizure of immovable property. As already noticed, Section 83 contains a provision for attachment of immovable property and the power is conferred on the court itself. u/s 102, the power of seizure is on the police officer and it has never envisaged a situation like the one herein, where a police officer can direct

attachment of immovable property. Therefore, in the absence of a specific conferment of power on the Police Officer, the steps for attachment made by the Sub Registrar herein, relying upon the request made by the Police Officer, cannot hold good. The said letter, even going by the wordings therein, cannot amount to an order of attachment also. Therefore, merely because there is a power for the Police Officer to conduct investigation and collect details of properties of the accused or others involved in that process, it can never be treated as an order of attachment for enabling the Sub Registrar to put an endorsement in the registers. Apart from the same, herein no seizure was made of any property by the Police Officers concerned, and Section 102 will not therefore be attracted herein.

14. I shall also refer to the provisions of the Registration Act and Rules in this context. Sections 89 of the Act is the relevant one which reads as follows:

89. Copies of certain orders, certificates and instruments to be sent to registering officers and filed.-- (1) ***

(2) Every Court granting a certificate of sale of immovable property under the Code of Civil Procedure, 1908 (5 of 1908), shall send a copy of such certificate to the registering officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in such certificate is situate, and such officer shall file the copy in his Book No. 1.

(3) ***

(4) Every Revenue Officer granting a certificate of sale to the purchaser of immovable property sold by public auction shall send a copy of the certificate to the Registering Officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in the certificate is situate, and such officer shall file the copy in his Book No. 1.

(5) Every Court passing--

(a) any decree or order creating, declaring, transferring, limiting or extinguishing any right, title or interest to or in immovable property in favour of or of any person, or

(b) an order for the attachment of immovable property or for the release of any immovable property from attachment, shall send a copy of such decree or order together with a memorandum describing the property, as far as may be practicable in the manner required by Section 21, to the Registering Officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in such decree or order is situate, and such officer shall file the copy and memorandum in his Book No. 1.

(6) Every officer issuing a written demand before the attachment of the immovable property of a defaulter under the Revenue Recovery Act for the time being in force--

(a) send a copy of such written demand together with a memorandum describing the property, as far as may be practicable in the manner required by Section 21; and

(b) where such written demand is withdrawn or attachment of the property is lifted or the property is sold and the sale is confirmed, send a memorandum including that fact and describing the property, as far as may be practicable in the manner required by Section 21.

Section 89(2) relates to sale certificate of immovable property and the requirement is to send it to the Registering Officer by the Court concerned. Section 89(4) concerns a sale certificate issued to the purchaser by a Revenue Officer, after the property is sold in public auction. The requirement is to send a copy of the certificate to the Registering Officer, for proper filing. Section 89(5) relates to orders passed by the Court and sub-section 5(b) relates to order for the attachment of immovable property or for the release of any immovable property from attachment. Going by the said provision, the said order/decreed shall be sent with a memorandum, to the Registering Officer who will have to file the same in his Book No. 1. Sub-section (6) relates to issuance of written demand by any officer before the attachment of immovable property for default under Revenue Recovery Act.

15. Therefore, as far as an order of attachment is concerned, Section 89(5) specifically mentions about such an order issued by a Court. Rule 171 of the Rules may be relevant in this context which reads as follows:

171. A certificate of encumbrance shall contain a complete list of all acts and encumbrances affecting the property in question.

Rules 168 and 170 concern the procedure for issuing Encumbrance Certificate on the application of the parties concerned.

16. The meaning of the words "attachment" and "encumbrance" as contained in P. Ramanatha Aiyar's "The Law Laxicon" are the following;

Attachment.--The word attachment has been defined as "taking into the custody of the law the person or property of one already before the court, or of one whom it is sought to bring before it; a writ issued at the institution or during the progress of an action, commanding the sheriff or other proper officer to attach the property, rights, credits, or effects of the defendant to satisfy the demand of the plaintiff.

Encumbrance.--Burden on property; impediment; mortgage or other claim on property.

Grant of lands rent free or the grant of the landlord's zarait land to a tenant for the purpose of cultivation does amount to an encumbrance of the estate. Apart from mere dealings such as mortgages which create a charge upon the land, there are other dealings which amount to an encumbrance. Anything which

interferes with the unrestricted rights of the proprietors as they then existed would be an encumbrance upon the land, even the granting of a lease of zarait lands, that is to say the lands which, the landlord is entitled to hold in direct possession and to cultivate for his own purposes. A lease of such lands granted to an occupier in circumstances which would give him a right of occupancy over the land, would amount to an encumbrance.

The meaning of the two expressions as explained above will throw much light to understand the scope of an "attachment" and "encumbrance". It will also indicate that to be an encumbrance there should be something which interferes with the unrestricted rights of the proprietors and an encumbrance usually should follow an order of attachment by a competent court in a situation like this.

17. A Division Bench of this Court in *Business India Builders & Developers Ltd. v. Union Bank of India* 2007 (2) KLT 237 has analysed the meaning of the term "encumbrance" in para 6 and explained it thus:

Encumbrance which can be carved out of ownership, generally are securities, leases, servitudes, trusts, etc. It generally a burden or charge upon the property.

Hence, it can be seen that as far as the present context in this case is concerned, by no stretch of imagination it can be held that the request in Ext. P-3 by the Police Officer will create an encumbrance over the item concerned.

18. It is evident from Section 89 of the Registration Act that the Sub Registrar on his own, is not empowered either to pass an order of attachment or to put an endorsement in the Books or Registers concerned. He has to place/file the copies of the orders in Book No. 1, going by the provisions of sub-sections (2), (4), (5) and (6) and based on which endorsement can be made. Therefore, the Act does not provide for exercise of any power suo motu by the Sub Registrar to make an entry in the relevant register and to carry out the same while issuing the Encumbrance Certificate. As already noticed, Section 102 and Chapter VII A of the Code of Criminal Procedure will not apply here.

19. In fact, learned Government Pleader asserted that the Sub Registrar has acted in the light of the request made in Ext. P-3 and it was only a bona fide action. Learned counsel for the additional fourth respondent also submitted that the claims of persons like him, are to be looked into by the various authorities. But such compulsions cannot result in an action like the one herein taken by the Sub Registrar, where there no is specific conferment of power to do so and he cannot act in the absence of an order passed by a competent court. The action of the second respondent, therefore, in treating Ext. P-3 as an attachment order and making an endorsement thereafter in the concerned register and in issuing the encumbrance certificate showing the encumbrance again, therefore cannot hold good and the same is unauthorised and illegal. In that view of the matter, the writ petition is allowed. There will be a direction to the second respondent to remove the endorsement of attachment made against the property of the petitioner covered by Ext. P-1 document, from the register showing the

encumbrances of the properties in the Sub Registrar's Office, Ernakulam. It is made clear that this judgment will not stand in the way of the additional fourth respondent or any other parties interested, in getting any valid orders of attachment of any of the immovable properties of the petitioner including the one covered by Ext. P-1. No costs.