
(1988) 03 KL CK 0035
In the High Court Of Kerala
Case No : C.R.P. No. 89 of 1988

Kuruvila Thomas and Co. and Another APPELLANT
Vs
State Bank of Travancore RESPONDENT

Date of Decision : 17-03-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 3, Order 34 Rule 4

Citation : (1991) 70 CompCas 797

Hon'ble Judges : K.T. Thomas, J

Bench : Single Bench

Advocate : C.S. Ananthakrishna Iyer and N. Subramoniam, for the Appellant; M. Pathros Mathai and Elizabeth Mathai Idiculla, for the Respondent

Final Decision : Dismissed

Judgement

K.T. Thomas, J.—During execution proceedings, the judgment-debtors challenged the validity of the decree, but the execution court repelled the challenge as per the order under attack in this revision. The decree is for sale of the mortgaged properties for realisation of the decree debt. The main contention is that since the decree was not passed in accordance with Order 34, Rule 4 of the CPC (for short "the Code") the decree is not a valid decree and is hence unexecutable. The other contention is that, if at all the decree is valid, it can only be treated as a preliminary decree as envisaged in the said rule and hence the decree holder has to wait till a final decree is passed by the trial court.

2. The State Bank of Travancore filed a suit for recovery of a certain sum of money by sale of the immovable properties mortgaged with the bank. The defendants in the suit had deposited the title deeds relating to the decree schedule properties with the bank and thus an equitable mortgage had been created. A decree has been passed in the suit on November 30. 1983, allowing the bank to realise the amount by bringing the properties to sale. Order 34, Rule 4 of the Code provides that "in a suit for sale, if the plaintiff succeeds, the court shall pass a preliminary decree to the effect mentioned in Clauses (a), (b) and (c)

(i) of Sub-rule (1) of Rule 2 and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold". The clauses in Rule 2(i), referred to above, deal with passing of directions regarding the mode of payment of the money in court Rule 5 contains conditions for passing the final decree. Sub-rule (3) of Rule 5 says that where payment has not been made, the court shall "on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold".

3. In rejecting the said contention, the court below relied on the decision in *Mathew v. Bank of Cochin* [1982] KLT 591. Learned counsel for the judgment-debtors contended that the ratio in the said decision might apply in cases governed by Order 34 of the Code which stood before the CPC (Amendment) Act, 1976 (some rules in Order 34 were amended by the High Court of Kerala in 1973). Viswanatha Iyer J. has held in the said decision that (headnote) : "In 1973, Order XXXIV, Civil Procedure Code, as it was amended by the Kerala High Court, permitted a single decree for sale without first passing a preliminary decree and then a final decree". The argument raised in the said case was that the amendment is invalid for the reason that the Legislature was not competent to delegate the power to make amendments to the High Court, but the said argument was rejected by the learned judge. Under Order 34, Rule 3, as amended by the Kerala High Court in 1973, a decree could be passed in a suit for sale directing that in default of the defendant paying the amount, the mortgaged property be sold and the proceeds of the sale be applied in payment of the amount due to the plaintiff. According to learned counsel, the said amendment made by the Kerala High Court ceased to have force with the passing of the CPC (Amendment) Act. (Act 104 of 1976, which will be referred to as the Amendment Act).

4. Section 97(1) of the Amendment Act says that any amendment made or any provision inserted in the principal Act by a State Legislature or a High Court before commencement of the Act, except in so far as such an amendment or provision is consistent with the provisions of the principal Act, shall stand repealed. On the strength of the aforesaid section, learned counsel contended that Rule 4 in Order 34 (as amended by the Amendment Act) has superseded the 1973 amendment made by the Kerala High Court. On the other hand, learned counsel for the decree-holder contended that the amendment made by the Kerala High Court in 1973 continues to be in force notwithstanding the Amendment Act, since the earlier provisions are not inconsistent with Rule 4 in Order 34 of the Amendment Act, Learned counsel in support of the said contention cited the Full Bench decision in *Chand Kaur Vs. Jang Singh and Others*,

5. I do not think it necessary to consider the question whether it is Rule 4 in Order 34 of the Code as altered by the Amendment Act, or Rule 3 in Order 34 as it stood after the amendments made by the Kerala High Court which is now in

force in Kerala. The challenge now made by the judgment-debtors can be disposed of on the simple premise that it is not open to the judgment-debtors to question the validity of a decree in execution proceedings. There can be no doubt that the civil court which passed the decree had inherent jurisdiction to dispose of the suit. If the defendants have a case that the decree passed is not in strict conformity with the provisions of the Code, the only remedy open to such defendants is to challenge the decree in appeal. The decision in *Mathew v. Bank of Cochin* [1982] KLT 591 supports this view also, although in the former part of the decision, the learned single judge has dealt with the question of application of the amendments made by the Kerala High Court. His Lordship made the following observations also (headnote) :

"Even assuming the amendment is invalid, the failure of the trial court to pass a preliminary decree and a final decree does not make the decree passed a nullity. There is no want of inherent jurisdiction in the court to pass such a decree. If the petitioner was aggrieved, he should have taken the decree in appeal and got it vacated. He cannot contend in execution that the decree is a nullity".

6. I think the position is now well-settled that it is impermissible for judgment-debtors to challenge the validity of a decree except on the ground that the court which passed the decree lacked inherent jurisdiction to entertain the suit or other action concerned. A judgment passed on wrong conclusions, or a decree based on erroneous findings, or an order issued without complying with procedural requirements would not render the decree or order wholly void and without jurisdiction and the remedy of the aggrieved party then is to challenge the decree in appeal or revision, but not to challenge it in execution proceedings. It is not the execution court's function to examine whether the trial court has complied with the legal formalities before passing the judgment or decree. In *Seth Hiralal Patni Vs. Sri Kali Nath*, the Supreme Court held that (headnote) :

"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 would 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". In *Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others*, the Supreme Court has gone a step further by holding that (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". Those decisions are the best authorities for the conclusion herein made.

7. As the legal position is now clear, the court below was well justified in repelling the contention of the judgment-debtors that since the decree was not passed in accordance with the procedure prescribed in Order 34, Rule 4 of the Code, it is invalid and is hence inexecutable. Equally erroneous is the contention that the execution court should have treated the decree only as a preliminary decree. The execution court, by interpreting the decree, cannot make a different decree for the parties under the guise of interpretation. As early as 1951, the Supreme Court has said so in *V. Ramaswami Ayyangar and Others Vs. T.N.V. Kailasa Thevar*, . The following observations are pertinent in this context (headnote) : "The duty of an executing court is to give effect to the terms of the decree. It has no power to go beyond its terms. Though it has power to interpret the decree, it cannot make a new decree for the parties under the guise of interpretation".

8. Since there is no ground to interfere with the impugned order, I dismiss this civil revision petition.

9. Issue carbon copy on usual terms.