
(1986) 02 KL CK 0018
In the High Court Of Kerala
Case No : M.F.A. No. 386 of 1980

Rahima Beevi

APPELLANT

Vs

Kerala Financial Corporation

RESPONDENT

Date of Decision : 26-02-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(2), 60
State Financial Corporations Act, 1951 — Section 31, 32, 32(6), 32(8)

Citation : AIR 1987 Ker 126 : (1987) 1 ILR (Ker) 152

Hon'ble Judges : U.L. Bhat, J;K.T. Thomas, J

Bench : Division Bench

Advocate : S. Sankara Subban, for the Appellant; Mathews P. Mathew, Philip Mathew, K.P. Vijayan, V.B. Jinnah and V.J. James, for the Respondent

Final Decision : Dismissed

Judgement

Thomas, J.—The Kerala Financial Corporation (for short "the Corporation") has filed an application before the Additional District Judge, Mavelikkara for an order of sale of certain items of properties in realisation of a sum of about 2 1/2 lakhs of rupees due from the appellant and another person. The properties include 43 cents of land and the building thereon which have been mortgaged, by the appellant with the Corporation as security for the loan granted to an industrial concern. These mortgaged properties are attached by the lower Court as per an order passed on I.A. No. 468 of 1979. The main application was resisted by the appellant on many grounds of which the relevant one is that the mortgaged properties are not liable to be attached and sold in realisation of the loan amount. The basis for the said contention is that, according to the appellant, she is an agriculturist as envisaged in Section 60 of the CPC (for short "the Code"). All the contentions of the appellant were repelled by the learned District Judge and he ordered the properties to be sold for recovery of the amount due with interest. The claim of the appellant that she is an agriculturist did not find favour with the learned District Judge. This appeal is against the aforesaid order.

2. The contention of the learned Counsel for the appellant is that the Court below has erred in holding that the appellant is not an agriculturist. But the main point which requires to be considered in this appeal is, whether, even assuming that she is an agriculturist, the mortgaged properties are not liable to be sold in proceedings initiated under the State Financial Corporations Act, 1951 (for short "the Act"). According to the appellant's counsel, an agriculturist is entitled to the protection of the proviso to Section 60 of the Code which provides that "houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist" shall not be liable to attachment or sale.

3. Section 60 of the Code is included in Part II of the Code dealing with the provisions for execution. The main title given above a fasciculus of sections starting with Section 60 is "attachment". The commencing words of Section 60 are as follows :

"The following property is liable to attachment and sale in execution of a decree".

The proviso to the said section says that (only the relevant portions are quoted) :

"Provided that the following particulars shall not be liable to such attachment or sale, namely : --

(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist....."

The contention is that even though in the initial portion of the section the words "attachment and sale" are used conjunctively, the proviso has used them disjunctively and hence even in cases where the Court proceeds to sell the properties without an attachment, as in a mortgage decree, the interdict contained in the proviso would apply. When the main section enables the Court to proceed against certain properties in execution of a decree by attaching them it is to be understood that Section 60 covers only those cases where a sale is preceded by attachment of the properties. Of course there can be instances where the attachment is not followed by a sale. That appears to be the reason why the words "attachment or sale" have been used in the proviso disjunctively. But it is important to note that the term "such" precedes both the said words. That term "such" qualifies both the words (attachment or sale) which means that the prohibition contained in proviso should apply to attachment and also to sale preceded by an attachment.

4. A Division Bench of this Court in Kochumariam Vs. Kishema Vilasam Co., had considered the proviso to Section 60 of the Code. There it was held that:

"Proviso (c) to Section 60(1) cannot apply to execution sale, which requires no attachment for its validity. The sale under a mortgage decree, strictly speaking, is not a sale in execution of the decree; it is a sale as provided in the document of mortgage and what takes place after the decree is a satisfaction of the decree

falling within Section 47 of the Code. There is no public policy as such involved in this question. The defendants must be held to have waived their rights of protection under the proviso the moment they executed the mortgage agreeing thereby to the sale of the property in execution of a decree which has eventually to be passed in the suit to be filed by the mortgagee. It follows that the proviso cannot apply to mortgage decrees where there is no need for attachment."

According to the learned Counsel for the appellant, the ratio of the said decision has been rendered ineffective by the inclusion of a Sub-section (1A), in Section 60 of the Code by the Amendment of the Code in 1976. The sub-section reads thus :

"(1A) Notwithstanding anything contained in any other law for the time being in force, an agreement by which a person agrees to waive the benefit of any exemption under this section shall be void."

The contention is that even a mortgage cannot now be used as a shield to escape from the interdict contained in the said proviso because any agreement waiving that benefit is treated as void by law. An alternate argument adopted by the learned Counsel is that since the properties have been attached in this case and now a sale of the properties is prayed for, the prohibition contained in the proviso to Section 60 would apply despite the observations in Kochumariam Vs. Kishema Vilasam Co., .

5. But the section contains yet another requirement which makes all the difference. If Section 60 of the Code is to apply, then the attachment or sale should be "in execution of a decree". Therefore, the crucial question in this case is whether the order, allowing the Corporation to sell the properties is a decree as envisaged in Section 60 of the Code.

6. The order was passed u/s 31 of the Act. It empowers the Corporation to apply to the District Judge for an order, inter alia, for the sale of the properties mortgaged. Section 32(1) of the Act contains a direction that if the application is for an order for sale of the properties mortgaged the District Judge/shall pass an ad interim order attaching the security.

7. In ascertaining whether the order contemplated in Section 31(1) of the Act will amount to "a decree", a reference to certain other sections of the Act also is necessary. Section 3 of the Act empowers the State Government to establish a Financial Corporation for the State which shall be a body corporate having perpetual succession and a common seal. Section 9 confers on the Board of Directors the power of general superintendence and management. Section 10 deals with the constitution of the Board of Directors. Section 24 enjoins on the Board of Directors to act on business principles, due regard being had to the interests of industry, commerce and the general public while discharging its functions, and Section 25 deals with the type of business which the Corporation is allowed to transact. It contains, among other things, the power to grant loans or advances to industrial concerns repayable within a period not exceeding 20

years. Section 29 deals with the power of the Corporation to resort to certain remedies when an industrial concern commits default in repayment of any loan. That power includes the right to take over the management or possession or both of the industrial concern. Then S- 31 provides that the Corporation may apply to the District Judge for an order for one or more of the reliefs enumerated in the section, which includes a relief for the sale of the property mortgaged. As per Section 32, when the application is for the relief of sale of the; properties mortgaged the District Judge shall pass an ad interim order attaching the security.

8. Section 2(2) of the Code defines a "decree". Decree is the formal expression of an adjudication conclusively determining the rights of the parties with regard to all or any of the matters in controversy in the suit No provision in the Act envisages the filing of a suit or the adjudication of the dispute regarding the amount claimed by the Corporation. Sections 29 - 32 of the Act deal with a special procedure for realisation of the amount due to the Corporation. When an application is filed u/s 31(1) of the Act; and if the relief sought for is sale of property, the District Judge has no option except to pass an ad interim order attaching the security. There is no provision in the Act which enables the Court to direct the defaulter to pay the amount due. No money decree is contemplated in the Act. The order envisaged in Section 31 is, thus, not a decree as contemplated in Section 2(2) of the Code.

9. It is next contended that since the District Judge has to investigate the claim of the Corporation in accordance with the provisions contained in the Code, as provided in Section 32(6) of the Act, the prohibition contained in the proviso to Section 60 of the Code does come into play. In support of the contention the learned counsel has referred to Sub-section (8) of Section 32 of the Act also. The sub-section provides that an order of attachment or sale of property u/s 32 "shall be carried into effect as far as practicable in the manner provided in the Code for the attachment or sale of property in execution of a decree, as if the Financial Corporation were the decree-holder". Sub-section (6) of Section 32 of the Act confers power on the District Judge to deal with the application. It reads thus :

"(6). If cause is shown, the District Judge shall proceed to investigate the claim of the Financial Corporation in accordance with the provisions contained in the Code of Civil Procedure, 1908, in so far as such provisions may be applied thereto."

A scrutiny of the two sub-sections referred to above will indicate that what is provided therein is only the procedure to be followed and those sub-sections do not make the order u/s 31(1) a decree. Expressions such as "proceed to investigate in accordance with the provisions in the Code" ordinarily contemplate only the manner in which the procedure is to be conducted in such investigation and nothing else. Sub-section (8) creates a fiction that while carrying into effect an order of attachment or sale of property the Corporation may be treated as a decree-holder, that too for the limited purpose of carrying into effect the order.

That Sub-section (8) is quoted here :

"(8) An order of attachment or sale of property under this section shall be carried into effect as far as practicable in the manner provided in the Code of Civil Procedure, 1908 for the attachment or sale of property in execution of a decree, as if the Financial Corporation were the decree-holder."

It is important to note that the sub-section is framed in such a way as to indicate that the provisions in the Code (for attachment or sale etc.) are not intended to be applied implicitly. The words "as far as practicable" would effectively convey the idea that the application of the said provisions of the Code is not intended to be without limitation. In other words the Act enables the Court to use the provisions of the Code as an aid to carry out the order of attachment or sale in an effective manner. Therefore, the said sub-sections provide for the procedure to be followed while carrying into effect the order of attachment or sale. Those sub-sections, thus cannot be understood as converting an order u/s 31(1) of the Act into a decree as defined in the Code.

10. In Gujarat State Financial Corporation Vs. Natson Manufacturing Co. Pvt. Ltd. and Others, the question raised was about the court-fee payable on an application u/s 31(1) of the Act, whether it is a fixed court-fee as governed by Article 1(c) of Schedule II of the Bombay Court-fees Act or the ad valorem fee at the rate shown in Article 7 of Schedule I of that Act. In that context the Supreme Court has observed :

".....It would be inappropriate to say that on an analogy an application u/s 31(1) is something akin to a suit by a mortgagee to recover mortgage money by sale of mortgaged property. At any rate, in an application u/s 31(1) the Corporation does not and cannot pray for a decree for its outstanding dues. It can make an application for one of the three reliefs, none of which, if granted, results in a money decree or a decree for recovery of outstanding loan or advanced

11. The Punjab and Haryana High Court had, in M/s. Rajdhani Enterprises v. Haryana Financial Corporation (1970) 72 PLR 491 occasion to consider whether an order passed u/s 31(1) is a decree. The context is that an order under that section was passed ex parte and an application to set aside the same was dismissed against which a regular appeal was filed. While dealing with the maintainability of such an appeal, R. S Sarkaria, J. (as he then was) has stated as follows :

"It will be clear from a study of Sub-section (6) that the District Judge has to apply the provisions of the CPC only in so far as the investigation of the claim of the Financial Corporation is concerned. Once the investigation is completed in accordance with the Code of Civil Procedure, the order of adjudication thereon is to follow under any of the clauses of Sub-section (7) of Section 32 of the Act. That is to say, even if the investigation made by the District Judge in accordance with the provisions of the Code of Civil Procedure, culminates in an ex parte

adjudication on merits, the order will still be an order under the aforesaid Sub-section (7). It will not be a "decree" as defined in Section 2 of the Code, because (i) it is not an adjudication given in a suit, but in special proceedings commenced by an application under the Act; and (ii) it is an adjudication for which an appeal lies u/s 32(9) of the Act, as an appeal from an order."

12. The above observations lend support to the view taken by us that the order contemplated in Section 31(1) of the Act is not a decree. If it is not a decree, then Section 60 of the Code has no application, except for the procedure as discussed above. It follows therefore that Sub-section (1A) of Section 60 of the Code also has no application in this case. The District Judge is within his powers to proceed with the application for sale of the properties, unaffected by anything contained in the proviso to Section 60 of the Code. We accordingly confirm the impugned order and dismiss the appeal. No costs.